NO. 44713-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DALE WEEMS,

Appellant,

v.

STATE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

AMICUS CURIAE BRIEF OF DISABILITY RIGHTS WASHINGTON IN SUPPORT OF APPELLANT

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I. INTERESTS AND IDENTITY OF AMICUS CURIAE

Amicus Disability Rights Washington (DRW) is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. *See* Motion to Appear as Amicus Curiae and Declaration of Mark Stroh ¶ 2 [hereinafter Stroh Decl.] in support thereof. DRW has a Congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training. Stroh Decl. ¶ 2.

DRW has extensive experience representing the interests of people with a variety of disabilities. DRW fields hundreds of calls annually from individuals with legal problems related to their disabilities, such as issues related to requesting accommodations in all types of court proceedings, including administrative hearings. *Id.* at ¶ 5. DRW has represented individuals to help them get disability accommodations in court proceedings. *Id.*

DRW participated in the committee of the Access to Justice Board that drafted GR 33, our state's court rule governing requests for disability accommodations. *Id.* at ¶ 7. DRW also worked closely with others on the subsequent revision of the rule. *Id.* DRW was one of the principal authors

of *Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts*, which provides guidance to attorneys and courts on how to make courts accessible. *Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts* (2011), *online at* http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/A%20Guide%20for%20Washington%20Courts%20updated%202011.ashx (last visited Feb. 28, 2014). Stroh Decl. ¶ 7. DRW has been a presenter in numerous Continuing Legal Education seminars on GR 33, including seminars for prosecutors, defense counsel, judges, the Attorney General, and other attorneys. *Id.*

Specifically related to administrative proceedings, DRW assisted with the development of a Model Rule for Administrative Hearings and the guide titled, *Ensuring Equal Access for People with Disabilities: A Guide for Administrative Proceedings* (2011), *online at* http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/ATJBLC/~/media/73292065DB15413D865E7AB3426806F4.ashx (last visited Feb. 28, 2014). Stroh Decl. ¶ 8. DRW continues to work for

the implementation of a rule governing disability accommodation in fair hearings. *Id.*

Over the past couple of years, DRW has had concerns about the lack of a process to accommodate people with disabilities in Board of Industrial Insurance Appeals (BIIA) proceedings. *See* Stroh Decl. ¶ 9, Exhibit A. Based on information we received from individuals, DRW reached out to the BIIA in September 2012 regarding DRW's concerns with the BIIA's failure to accommodate people with disabilities, specifically its apparent blanket refusal to appoint attorneys as accommodations. *See* Stroh Decl. ¶ 9. BIIA responded and stated a process for accommodations was available and specifically stated that it must follow GR 33. Stroh Decl. Exhibit A. BIIA denied that it refused to appoint attorneys as accommodations. *Id.* DRW is interested in Mr. Weems' case because his situation appears to contradict the recent assurances the BIIA gave to DRW. DRW is also very concerned about the discriminatory undertones of the administrative hearing record and the Respondents' briefs in this case.

II. STATEMENT OF THE CASE

Amicus Disability Rights Washington joins generally in Appellant's Statement of the Case.

III. ARGUMENT

DRW agrees with Appellant's contention that under Title II of the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD) [1], public entities like the Board of Industrial Insurance Appeals (BIIA) must conduct an individualized inquiry to determine whether a disability-related accommodation or modification is reasonable under the circumstances. *See* Brief of Appellant [hereinafter BOA] at 15-28; Appellant's Reply Brief at 7; *Duvall v. Kitsap*, 260 F.3d 1124, 1137-38 (9th Cir. 2001) (stating, in a case where an individual requested an accommodation from a court for his hearing impairment, the ADA imposes an obligation to investigate whether a requested accommodation is reasonable and a duty to gather sufficient information from the individual with the disability and qualified experts as needed to determine what accommodations are necessary). This individualized process is required because people with disabilities are unique human beings who need varying accommodations. Judges must rely on evidence, not common sense, to fashion appropriate accommodations for people with mental disabilities like Mr. Weems.

[1] The ADA is codified at 42 U.S.C. § 12101 *et seq.* WLAD is codified at RCW 49.60 *et seq.*

This brief intends to place Appellant's arguments in the larger context of the disability rights movement. First, DRW argues that the ADA and WLAD were passed to combat discrimination against people with disabilities, which includes discrimination in state judicial processes. Next, DRW defines "sanism" and argues that prejudice against people with mental disabilities still pervades aspects of Washington's administrative processes by giving examples of discrimination against Mr. Weems in the administrative hearing record and Respondents' briefs. Finally, DRW outlines how BIIA's actions in Mr. Weems' case appear to contradict its September 2012 assurances to DRW that it has a process to accommodate people with disabilities.

A. THE ADA AND WLAD WERE PASSED TO COMBAT RAMPANT DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES, INCLUDING DISCRIMINATION IN STATE JUDICIAL PROCESSES

In passing the Americans with Disabilities Act of 1990 (ADA), Congress found that

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society….

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329 (1990). Upon signing the ADA, President George H.W. Bush described the legislation as taking a "sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp." "Remarks of President George Bush at the Signing of the Americans with Disabilities Act," *available at* http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html (last visited Feb. 28, 2014). President Bush proclaimed that the passage of the ADA was another showing that Americans will not tolerate discrimination, and that the "shameful wall of exclusion" would finally come tumbling down. *Id.*

Since 1973, before the passage of the ADA, the Washington Law Against Discrimination (WLAD) has recognized the right of Washingtonians with disabilities to be free from discrimination and to the right of "full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement." Laws of 1973, 1st Ex. Sess., ch. 214, § 1; RCW 49.60.030. In passing the WLAD, the Washington Legislature found that discrimination against people with disabilities, among other protected classes, "threatens not only the rights and proper privileges of its

inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. The Supreme Court of Washington further specified that people with disabilities are entitled to equal access to courts under the ADA and WLAD when it adopted General Rule 33, the court rule that outlines a process for accommodating people with disabilities in court proceedings. *See* GR 33.

By passing the ADA and WLAD, federal and State lawmakers recognized that people with disabilities had been the subjects of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee v. Lane*, 541 U.S. 509, 524, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). State entities have had a long history of depriving people with disabilities basic liberties like the ability to vote, marry, or serve as jurors. *See id.* at 524. States have also treated individuals with disabilities unconstitutionally through unjustified commitment, abuse and neglect in state mental health hospitals, and irrational discrimination in zoning decisions. *See id.* at 524-25 (citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972); *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)).

In *Tennessee v. Lane,* the United States Supreme Court noted that many of its decisions demonstrated a pattern of unconstitutional treatment of people with disabilities by states in the administration of justice. *Lane,* 541 U.S. at 525. *Lane* held that under ADA Title II, a State's duty to accommodate people with disabilities is consistent with the well-established due process principle that a State must afford to all individuals a meaningful opportunity to be heard in its courts. *Id.* at 533-34. Mr. Weems' case must be examined in this context of historical discrimination against people with disabilities in court processes.

B. A REVIEW OF APPELLANT'S CASE DEMONSTRATES THAT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES, OTHERWISE KNOWN AS SANISM, STILL PERVADES ASPECTS OF WASHINGTON'S JUDICIAL PROCESSES

One of the forms of discrimination that laws like the ADA and the WLAD were meant to protect against is known as "sanism," a concept that New York Law School Professor Michael Perlin has written about

extensively.[2] Sanism is an irrational prejudice against people who have been labeled as having a mental disability, similar to other irrational prejudices like racism, sexism, homophobia, and ethnic bigotry.[3] *See* Perlin, *"Things Have Changed," supra* note 1, at 536. Sanism is based predominantly upon stereotypes, myths, superstitions, and a lack of individualization of people with mental disabilities; it is generally invisible and largely socially acceptable. *Id.*

Perlin contends that sanism infects our court systems when judges make decisions based on discriminatory myths and assumptions, not evidence:

> The entire legal system makes assumptions about persons with mental disabilities--who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their

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[2] *See, e.g.*, Michael L. Perlin, "*Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems,* 25 Ga. St. U. L. Rev 607 (2009); Michael L. Perlin, *"Things Have Changed:" Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. Sch. L. Rev. 535 (2003) [hereinafter Perlin, *"Things Have Changed"*]; Michael L. Perlin, *"Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. Contemp. Legal Issues 3 (1999) [hereinafter Perlin, *"Half-Wracked Prejudice Leaped Forth"*]; Michael L. Perlin, *On "Sanism,"* 46 SMU L. Rev. 373 (1992). Although Perlin has written extensively on sanism, he attributes the term to Dr. Morton Birnbaum. Perlin, *"Half-Wracked Prejudice Leaped Forth,"* at 4 n.15 (citing Morton Birnbaum, *The Right to Treatment: Some Comments on its Development,* in Medical, Moral and Legal Issues in Health Care 97, 106-07 (Frank J. Ayd ed., 1974)).

[3] DRW realizes that these "isms" are generally uncomfortable topics to discuss, but they are realities of American society. DRW is not alleging that all examples of potential "sanism" described in this brief were intentional. Rather, as is explained below, sanism is often an unconscious form of discrimination. *See* Perlin, *"Things Have Changed,"* supra note 1, at 536.

> conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we may become mentally disabled.

Perlin, *"Half-Wracked Prejudice Leaped Forth," supra* note 1, at 17. He calls this decision-making based on assumptions and discriminatory myths the use of "ordinary common sense," where people unconsciously discriminate in response to events in both everyday life and the legal process. Perlin, *"Things Have Changed," supra* note 1, at 536.

Examples of sanist myths and assumptions about people with mental disabilities can help illustrate this concept of "ordinary common sense." For instance, a popular myth is that mental disabilities can be easily identified by laypeople and that they match up closely to popular media depictions. Perlin, *On "Sanism,"* 46 SMU L. Rev. at 395. Another assumption is that people with mental disabilities simply do not try hard enough. *Id.* at 396. A very common myth is that most individuals with mental illness are dangerous and frightening. *Id.* at 394.

Perlin contends that when courts rely on "ordinary common sense" instead of evidence, they subvert statutory and case law standards. *See* Perlin, *"Half-Wracked Prejudice Leaped Forth," supra* note 1, at 18 (noting that courts use assumptions to rubber stamp involuntary commitment and competency findings instead of following statutory

procedures). Instead of relying on stereotypes and myths, Perlin argues that making accommodations for people with mental disabilities should be based on some sort of data or assessment:

> After all, if we agree that mentally disabled individuals can be treated differently (because of their mental disability, or because of behavioral characteristics that flow from that disability), it would appear logical that this difference in legal treatment is--or should be-- founded on some sort of empirical data base that confirms both the existence and the causal role of such difference. Yet, we tend to ignore, subordinate, or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views.

Id. at 17. Perlin's contention that sanism pervades our court systems is reflected in this case in Mr. Weems' interactions with the Industrial Appeals Judge (IAJ) and in Respondents' briefs, as explained below.

1. The IAJ's decision to not accommodate Mr. Weems was based on "ordinary common sense" assumptions, not evidence

In this case, when Mr. and Mrs. Weems asked the IAJ for an attorney at his June 3, 2008 BIIA hearing, the IAJ's response is a prime example of "ordinary common sense" thinking based on assumption, not evidence. BOA 17-18 (citing ARTR 6/3/08 at 28-29). Mrs. Weems stated that she did not think Mr. Weems could represent himself at the hearing because of his mental capacity. BOA 17. The IAJ stated that Mr. Weems

"seems responsive and seems very able to answer questions. He seems to understand what's going on." *Id.* The IAJ did not inquire further.

While this one exchange may seem innocuous at first, this interaction in context of the multitude of Mr. Weems' hearings is problematic. When Mr. Weems appealed to superior court and asked for disability accommodations under GR 33, he was appointed an attorney two times. BOA 6 (citing AR 66), 13 (citing CR 17). Under GR 33, individuals who want accommodations generally submit an application with a description of the accommodation sought and a statement about the disability necessitating the accommodation. *See* GR 33(b)(3). The court may require the individual to provide additional information about the disability to help determine the appropriate accommodation. *Id.* This process allows the superior court's decision on an accommodation to be based on actual evidence of a need for a disability accommodation, not assumptions. In this case, on the superior court's first remand, the court specifically found that Mr. Weems' disability affected his ability represent himself, yet the IAJ did not look into this. BOA 7 (citing AR 66). Therefore, the IAJ's "ordinary common sense" assumptions about Mr. Weems' ability to represent himself were likely incorrect because twice he was granted an attorney as an accommodation through a process designed to be based on evidence of disability.

2. Respondent BIIA's brief exemplifies sanist assumptions when it argues that people with mental disabilities do not need to be thoroughly and individually assessed to determine appropriate accommodations

Respondent BIIA spends a significant portion of its brief listing the "wide range of options for accommodating workers appearing before the Board who have a mental disability." Brief of Respondent BIIA at 6, 8-14. These options include encouraging attorneys to represent workers on a contingency basis, allowing for lay representation, and requiring impartial assistance from judges. *Id.* at 8-14. Without commenting on the appropriateness of these "accommodations," which are available at all times to all workers, most concerning is BIIA's assertion that when a worker with a disability asks for an accommodation, the IAJ can "immediately evaluate" the extent of the disability and exercise a wide variety of options. *Id.* at 26. This is a stark example of "ordinary common sense" thinking: that an IAJ can tell what a person with a mental disability needs as an accommodation just by briefly looking at them, without any sort of evidence to support the specific accommodation. This harkens back to the sanist myth that mental disabilities can be easily identified by laypeople. *See* Perlin, *On "Sanism,"* 46 SMU L. Rev. at 395.

BIIA does recognize that there may be "more serious cases" in which it may provide lay representation at its expense, but that this would

likely be rare "because incapacitated workers can be represented by guardians." Brief of Respondent BIIA at 26-27. This argument assumes that lay representation would mainly be required for people who are so incapacitated that they almost reach the level of needing a court-appointed guardian. Again, this does not appear to be based on any sort of empirical evidence, but rather "ordinary common sense" and assumptions.

BIIA also argues that this court should be reluctant to require it to engage in separate fact-finding hearings or appoint counsel every time a party asserts "some disability." *Id.* at 27. This statement is very broad and seems to imply that people with disabilities are faking to try to get an attorney, that if they just tried hard enough, they would be fine. *See* Perlin, *On "Sanism"* at 396 (describing the popular sanist myth that people with mental disabilities "simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint.").

Overall, BIIA lumps people with disabilities into one group and offers a set list of accommodations. BIIA seems to argue that mental disabilities are obvious and a specific inquiry into the individualized accommodations a person needs is not necessary. BIIA should adopt procedures for individualized inquiry like the state court system has done

through GR 33. BIIA's arguments reflect the sanism still present in our administrative system that the ADA and WLAD were enacted to combat.

3. Respondent L&I similarly displays a very limited understanding of how people with mental illness are unique human beings who need individualized accommodations

In its brief, Respondent Department of Labor and Industries (L&I) states that "As a general matter, a worker who has a mental disability, but who is not mentally incompetent, is capable of meaningfully participating in an appeal, and, therefore, does not require an accommodation in order to have 'meaningful access' to the Board." Brief of Respondent L&I at 24. This statement is overly simplistic and does not take into account the varying types of accommodations a person with a mental disability may need. While there should be a presumption that a person who has not been deemed incompetent is capable of participating in the court process, it does not follow that this person would never need any sort of accommodation. *See* RPC 1.14(a) (stating that when a client's capacity to make decisions is diminished the lawyer shall maintain as normal a client-lawyer relationship as possible; this could include making accommodations for a client's mental disability). For instance, a person with a mental disability may request frequent breaks or hearings at a certain time of day as accommodations but would still be able to meaningfully participate in her case. L&I's apparently argues that only

individuals who are mentally incompetent require accommodations is based on sanist assumptions and fails to comprehend that people with mental disabilities may need a whole range of accommodations based on their specific disability-related needs. *See also* Brief of Respondent L&I at 33-34 (arguing that "the appointment of counsel at public expense is only appropriate as an accommodation under the ADA…when an individual is not only disabled but *mentally incompetent* and when the case involves a fundamental liberty interest, such as a loss of physical freedom.").

In sum, DRW agrees with Appellant that the ADA and WLAD require an individualized assessment process for determining appropriate accommodations. A judge cannot look at someone and immediately evaluate the extent of a mental disability. Administrative hearings are supposed to be more accessible to pro se parties, yet at the BIIA level there are more barriers than in superior court, where Mr. Weems was twice granted an attorney as a disability accommodation. By applying GR 33 and looking at Mr. Weems as an individual, Thurston County Superior Court showed that courts can rise above discriminatory myths and assumptions about people with mental disabilities and determine appropriate accommodations. Washington courts at all levels should

follow the superior court's lead and evaluate people with mental disabilities as individuals under the ADA and WLAD.

C. THE BIIA HAS NOT LIVED UP TO ITS ASSURANCES TO DRW THAT IT HAS A PROCESS TO ACCOMMODATE PEOPLE WITH DISABILITIES

DRW is particularly interested in this case because it has had past reasons to be concerned about BIIA's process for accommodating people with disabilities. In September 2012, DRW wrote a letter to the BIIA expressing its concerns about BIIA's failure to accommodate people with disabilities in its proceedings, specifically its apparent blanket refusal to appoint attorneys as accommodations. *See* Stroh Decl. ¶ 9. BIIA responded within days and stated a process for accommodations was available, specifically stating that it must follow GR 33. Stroh Decl. Exhibit A. It denied there was a blanket refusal of attorney appointment as an accommodation. *Id.*

In this case, the lack of an individualized inquiry into Mr. Weems' accommodations directly contradicts the BIIA's assurances to DRW. The IAJ did not discuss GR 33 as a potential avenue for Mr. Weems to request an accommodation, even after Mr. Weems had used the rule in superior court to get an appointed attorney. The BIIA states that this Court should be reluctant to engage in separate fact-finding hearings or appoint counsel every time a party asserts "some disability," but GR 33, which it purports

to follow, already lays out a process for fact-specific inquiry when an individual requests a disability-based accommodation. Brief of Respondent BIIA at 27.

BIIA says a judge can evaluate a person informally, by "immediately evaluat[ing]" the extent of the disability and exercising a wide variety of options, but assured DRW that it follows GR 33, a more formalized process. *Id.* at 26. Furthermore, BIIA told DRW there is no blanket denial of attorneys as an accommodation, yet its brief severely limits the possibility of counsel appointment, saying "…it is hard to imagine a situation where appointment of counsel at public expense might ever be required" and suggests that situation may only be for those deemed incompetent. *Id.* at 26-27.

DRW is concerned to see the arguments made by BIIA and L&I. BIIA is not following through on its assurances to DRW to comply with GR 33, the WLAD, and the ADA. BIIA should assess a claimant's individual needs for disability accommodations based on evidence, not discriminatory assumptions.

IV. CONCLUSION

The ADA and WLAD require an individualized process for assessing disability accommodations. Throughout Mr. Weems' proceedings, which have been litigated since 2007, the BIIA has based its

decision to deny Mr. Weems an attorney as an accommodation not on evidence, but on "ordinary common sense" and discriminatory assumptions, even though Mr. Weems had counsel appointed pursuant to GR 33 in superior court. As demonstrated by Mr. Weems' case, the BIIA has not followed through on its assurances to DRW that there is a process for people with disabilities to be accommodated in BIIA hearings. Washington's workers with disabilities deserve better.

Amicus Disability Rights Washington respectfully requests that this Court reverse the superior court's March 8, 2013 Order Granting Reconsideration and Vacating Order. This reversal would recognize not only the longstanding substantive accommodation requirements of the ADA and WLAD as argued by Appellant, but would stand up against the underlying sanist attitudes that pervade this case – attitudes the ADA and WLAD were intended to combat.

Respectfully submitted this 28th day of February, 2014.

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DISABILITY RIGHTS WASHINGTON

Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on February 28, 2014, a true and correct copy of the foregoing document was served upon counsel listed below by electronic mail, per prior agreement, which agreement also applies to service of any amicus curiae brief authorized by this motion:

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DATED February 28, 2014 at Seattle, Washington.

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