

SUBJECT: Adopt federal standards defining disability and forbidding discrimination

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Deshotel, Christian, Gattis, Giddings, Keffer, Orr, Quintanilla, S. Turner

0 nays

3 absent — Elkins, England, S. Miller

WITNESSES: For — Brian East, Advocacy, Inc.; John Griffin, Texas Diabetes Council, American Diabetes Association; Jason Smith, Texas Employment Lawyers Association; (*Registered, but did not testify*: Jay Arnold, on behalf of Kim Suiter, National Multiple Sclerosis; Yannis Banks, Texas NAACP; Veronica De La Garza, American Diabetes Association; Rona Statman, The ARC of Texas; (*On committee substitute*) Rick Levy, Texas AFL-CIO)

Against — Michael Golden, Texas Employment Law Council

BACKGROUND: Labor Code, ch 21, the Texas Commission on Human Rights Act, requires that Texans, including those with disabilities, be free from discrimination in employment. The Texas Workforce Commission Civil Rights Division (TWCCRD) investigates complaints of discrimination in employment.

In September 2008, the U.S. Congress enacted S. 3406, ADA Amendments Act of 2008 (ADAAA), which amended the Americans with Disabilities Act of 1990 in response to judicial interpretation of the original act.

DIGEST: CSHB 978 would amend Labor Code, ch. 21 to incorporate federal ADAAA changes in definitions of major life activity, impairment, and business necessity and in standards on how to evaluate the way in which impairments would affect major life activities. The bill would add conditions that are episodic or controlled through medication, such as epilepsy or diabetes, as a form of impairment subject to claims of discrimination under subchapters B and C under Labor Code Chapter 21.

Major life activity. CSHB 978 would define “major life activity” as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

Major life activities also would include operation of major bodily functions including the immune, digestive, excretory, neurological, respiratory, circulatory, endocrine, and reproductive systems, and normal cell growth and brain functions.

The bill would define “regarded as having an impairment” as being discriminated against in employment because of an actual or perceived physical or mental impairment. It would not apply to an impairment that would be considered minor or would last six months or less. Other provisions would preclude persons without disabilities to claim discrimination because they did not have disabilities.

Standards of disability. CSHB 978 would amend Labor Code, ch. 21 to require that the prohibitions against employment discrimination in subchapters B and C be construed broadly to provide maximum protection of those with disabilities.

The standard of disability also would include impairments that would limit major life activities that are episodic or in remission. The bill would require a determination of whether an impairment limited major life activities without mitigating measures such as:

- medication, medical supplies, medical equipment, medical appliances, prosthetic limbs and devices, hearing aids, cochlear implants and other implantable hearing devices, mobility devices, or oxygen therapy devices;
- devices that magnify, enhance, or otherwise augment a visual image, other than eyeglasses and contact lenses;
- use of assistive technology;
- reasonable accommodations and auxiliary aids or services; and
- learned behavioral or adaptive neurological modifications.

CSHB 978 would add definitions of auxiliary aids and services to include qualified readers or interpreters and modifications of equipment or devices.

Business necessity and good faith efforts. Other provisions would prohibit an employer from using a qualification standard, employment test, or other selection criterion based on an application's uncorrected vision unless those standards, tests, or criteria were considered a business necessity and related to the job. Also, the bill would amend Labor Code, sec. 21.128 to extend the good faith and reasonable accommodation exception based on business hardship to employees whose disability is based solely on having a limitation to a major life activity.

Other provisions. CSHB 978 would not change the standards for eligibility for benefits under federal Title 5 of Civil Rights Act of 1965 or for other state or federal disability benefit programs.

Any discrimination claim brought under CSHB 978 would apply only to any acts that happen on or after the bill would take effect on September 1, 2009. Otherwise, such claims would be reviewed under current law.

**SUPPORTERS
SAY:**

CSHB 978 would help ensure legal protection for all Texans with disabilities, including conditions such as diabetes, epilepsy, multiple sclerosis, and cancer. While the original Texas Commission on Human Rights Act and ADA provided protection for American workers with disabilities, those protections were eroded over time by several U.S. Supreme Court decisions. The ADAAA, which was passed overwhelmingly by Congress and signed into law by then-President George W. Bush, was the product of extensive bipartisan effort by stakeholders in both the disability and business communities and reflects a bipartisan consensus. The national standard should apply in Texas.

CSHB 978 would provide clarity and consistency for TWCCRD staff members who must consider both state laws and federal Equal Employment Opportunity Commission regulations when investigating and evaluating employment discrimination claims. The overwhelming majority of these cases are resolved administratively, rather than by courts. Texas fell out of compliance with the federal regulations on January 1, 2009. TWC should have a unified set of guidelines in making these determinations.

CSHB 978 would recognize the balance between prevention of discrimination against those with disabilities and the rights of businesses. The bill would include simple standards and would recognize both

business necessity and good-faith efforts on behalf of employers to comply with the regulations.

The bill would not impose additional burdens on the TWC or in the courts. Few workers bringing workplace discrimination cases deliberately forum-shop between state and federal courts. Some might make idiosyncratic decisions to select one venue over another, but these cases would be extremely rare.

Those with the additional disabilities that would be protected by CSHB 978 already are productive members of the workforce, but sometimes their medical conditions interfere with their ability to perform their jobs. They did not ask for or bring about these conditions. Other provisions in the law already prohibit alcoholics from making disability claims.

**OPPONENTS
SAY:**

CSHB 978 would create a substantial burden on Texas businesses and would increase the workload of the courts by broadening the definition of disability. The bill's definition of disability would be unworkably overbroad. It would define a disability as something that would substantially limit the operation of a person's reproductive function, even when that has no relationship to the person's job duties. The Texas Commission on Human Rights Act provides enough protection without adopting the federal standard.

The bill would further blur the distinction between a disability and poor lifestyle choices. It would also add to the confusion by prohibiting discrimination based on a "perceived disability."

NOTES:

CSHB 978 differs from the original bill in the way it would define "major life activity."