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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SUSAN GRILL and MICAELA GRILL,

11 Plaintiffs,

12 v.

13 COSTCO WHOLESALE CORPORATION,
a domestic corporation, and DOES 1-100,

14 Defendants.

No. C03-2450Z

ORDER

15
16 **BACKGROUND**

17 The defendant, Costco Wholesale Corporation (“Costco”), has brought this motion for
18 partial summary judgment with respect to its counterclaim and count VI of the plaintiffs’
19 complaint. Def’s Mot. for Summ. J., docket no. 22. Costco’s counterclaim seeks a
20 declaratory judgment that its written policy concerning the admittance of service animals into
21 its warehouse stores does not violate either Title III of the Americans with Disabilities Act
22 (“ADA”) or the Washington Law Against Discrimination (“WLAD”). Def’s Counterclaim,
23 docket no. 10. Count VI of the plaintiffs’ complaint contends that the written policy violates
24 these laws and seeks a declaratory judgment to that effect. Pl’s Compl., docket no. 1. Thus,
25 the sole issue for the purpose of this motion for partial summary judgment is whether the
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1 written policy of the defendant, Costco, concerning the admittance of service animals into its
2 warehouse stores violates Title III of the ADA or the WLAD.¹

3 Plaintiff Susan Grill alleges that she is a disabled individual who uses a service animal
4 to assist her. Pl's Compl., docket no. 1, ¶ 3.1. Costco is a private membership club which
5 sells goods through its warehouse stores located throughout the United States. Raines Decl.,
6 docket no. 24, ¶ 4. Susan Grill has been a Costco member since December 2000. Pl's
7 Compl., docket no. 1, ¶ 3.2. For several reasons, Costco does not generally permit its
8 members to bring animals into its warehouses. Raines Decl., docket no. 24, ¶ 6. However,
9 in an effort to comply with the requirements of the ADA and the WLAD, Costco has created
10 a written policy to allow service animals in its warehouse stores. Id. at ¶ 4.

11 The written policy adopted by Costco provides that an animal will be admitted into its
12 store if it determines that the particular animal is a service animal². Raines Decl., docket no.
13 24, Ex. A. Under the policy, the animal will be admitted if one of two separate criterion are
14 met. Id. First, an animal will be admitted if it is visually identifiable as a service animal by
15 the presence of an apparel item, apparatus or other visual evidence that the animal is a
16 service animal. Id. Second, if the animal is without visual evidence that it is a service

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19 ¹ This motion does not deal with the issue of whether Costco employees applied the policy as
20 written when the plaintiffs entered Costco's warehouses. The only question is whether the
21 policy as written complies with the ADA and WLAD.

22 ² A service animal is defined under the federal regulations as:

23 [A]ny guide dog, signal dog, or other animal individually trained to do work or
24 perform tasks for the benefit of an individual with a disability, including, but not
25 limited to, guiding individuals with impaired vision, alerting individuals with impaired
26 hearing to intruders or sounds, providing minimal protection or rescue work, pulling a
wheelchair, or fetching dropped items.

28 C.F.R. § 36.104. Washington defines a service animal as "an animal that is trained for the
purpose of assisting or accommodating a person's sensory, mental, or physical disability."
WAC 162-26-040.

1 animal, the “member or guest must be prepared to reasonably establish that the animal does,
2 in fact, perform a function or task that the member or guest cannot otherwise perform.” Id.
3 In such a situation, the Costco personnel are to “inquire of the animal’s owner what tasks or
4 functions the animal performs that its owner cannot otherwise perform.” Id. If the owner is
5 unwilling to provide this information the animal will not be allowed to enter the Costco
6 warehouse. Id.

7 **DISCUSSION**

8 **I. Standard of Review**

9 Summary judgment is appropriate where there is no genuine issue of material fact and
10 the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The
11 moving party bears the initial burden of demonstrating the absence of a genuine issue of
12 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party
13 has met this burden, the opposing party must show that there is a genuine issue of fact for
14 trial. Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The
15 opposing party must present significant and probative evidence to support its claim or
16 defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir.
17 1991). For purposes of the motion, reasonable doubts as the existence of material facts are
18 resolved against the moving party and inferences are drawn in the light most favorable to the
19 opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

20 **II. Americans With Disabilities Act Claim**

21 The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive
22 national mandate for the elimination of discrimination against individuals with disabilities."
23 42 U.S.C. § 12101(b)(1). Congress found that "individuals with disabilities continually
24 encounter various forms of discrimination, including outright intentional exclusion, the
25 discriminatory effects of architectural, transportation, and communication barriers,
26 overprotective rules and policies, [and] failure to make modifications to existing facilities

1 and practices....” 42 U.S.C. § 12101(a)(5). Under the ADA, “[n]o individual shall be
2 discriminated against on the basis of disability in the full and equal enjoyment of the goods,
3 services facilities, privileges, advantages, or accommodations of any place of public
4 accommodation.” 42 U.S.C. § 12186(a). The statute defines discrimination as:

5 (ii) a failure to make reasonable modifications in policies, practices, or procedures,
6 when such modifications are necessary to afford such goods, services, facilities,
7 privileges, advantages, or accommodations to individuals with disabilities, unless the
entity can demonstrate that making such modifications would fundamentally alter the
nature of such goods, services, facilities, privileges, advantages, or accommodations.

8 Id. at § 12182(2)(A)(emphasis added).

9
10 Additionally, pursuant to the authority delegated to it by Congress, the Department of
Justice has issued regulations which require “[a] public accommodation shall make
11 reasonable modifications in policies...when the modifications are necessary to afford goods,
12 services, facilities, privileges, advantages, or accommodations to individuals with
13 disabilities....” 28 C.F.R. § 36.302(a)(2003). With respect to service animals, the
14 Department of Justice has determined that “a public accommodation shall modify policies,
15 practices or procedures to permit the use of a service animal by an individual with a
16 disability.” Id. at § 36.302(c)(1).

17
18 In this case, the parties do not dispute whether the “visual evidence” inquiry in the
19 Costco policy complies with the ADA. However, the center of the dispute is whether the
20 “task or function” inquiry is prohibited by the Act. Costco argues that their policy of asking
21 the “task or function” question prior to admittance does not violate the ADA because it
22 complies with a Department of Justice interpretation of the ADA and, second, the policy
23 complies with a Department of Transportation interpretation of the Air Carrier Access Act,
24 which is arguably analogous to the ADA.

1 **A. Department of Justice Interpretations**

2 Costco argues that their “task or function” inquiry complies with the ADA, as a matter
3 of law, because the Department of Justice has already determined that this is a legitimate
4 inquiry by a business owner. The Department of Justice issued an interpretation directed at
5 businesses regarding service animals which provides that:

6 Business may ask if an animal is a service animal or ask what tasks the animal has
7 been trained to perform, but cannot require special ID cards for the animal or ask
8 about the person’s disability.

9 Valente Decl, docket no. 23, Ex. A (“Business Brief”)(emphasis added). Because the
10 Department of Justice is the “agency directed by Congress to issue implementing regulations,
11 see 42 U.S.C. § 12186(b), to render technical assistance, § 12206(c), and to enforce Title III
12 in court, § 12188(b), the Department’s views are entitled to deference.” Bragdon v. Abbott,
13 524 U.S. 624, 646 (1998).

14 Plaintiffs respond by arguing that the ADA Business Brief is contradicted by a 1996
15 Department of Justice document entitled “Commonly Asked Questions About Service
16 Animals in Places of Business.” Glogowski Decl., Ex. A. The document explains to
17 businesses that “[i]f you are not certain that an animal is a service animal, you may ask the
18 person who has the animal if it is a service animal required because of a disability.” Id. at 4.
19 However, the document does not mention that the business may also ask what tasks the
20 animal has been trained to perform, unlike the ADA Business Brief from April 2002. Id.
21 Plaintiffs argue that by implication the Business Brief is in “irreconcilable conflict” with the
22 “Commonly Asked Questions” document, and thus must be disregarded.

23 Costco correctly argues that the plaintiffs’ argument is misguided. Both documents
24 are plainly permissive. The Business Brief provides that Costco “may ask if an animal is a
25 service animal or what tasks the animal has been trained to perform....” Valente Decl., Ex.
26 A. Additionally, the “Commonly Asked Questions” document provides that Costco “may

1 ask the person who has the animal if it is a service animal required because of a disability.”
2 Glogowski Decl., Ex. A, at 4. The latter does not foreclose the possibility that Costco may
3 still ask the “task or function” inquiry as provided in the Business Brief issued in April 2002.

4 Finally, the plaintiffs argue that the Business Brief should be disregarded because it is
5 internally inconsistent. They argue that the Brief is inconsistent because in the same
6 sentence that the document provides that a business may “ask what tasks the animal has been
7 trained to perform,” the business may not “require special ID cards for the animal or ask
8 about the person’s disability.” Valente Decl., Ex. A. The plaintiffs assert that “the task
9 based inquiry indirectly requires disclosure of a person’s disability, particularly ‘invisible’
10 ones.” Pl’s Resp., at 9.

11 The Plaintiffs’ argument is unpersuasive. First, the Department of Justice has
12 determined that a business owner can ask the “task or function” question without asking for
13 the specific medical label or disability, as demonstrated by the specific language of the
14 Business Brief. Valente Decl., Ex A. Second, as argued by Costco, the “task or function”
15 question can be answered without divulging the specifics of the individuals disability, i.e. (1)
16 “the animal is trained to alert me when a medical condition is about to occur” or (2) “the
17 animal is trained to pick items up off the floor for me.” See Def’s Reply, at 3 n.3. Finally, it
18 cannot be said that Costco’s failure to change their “task or function” question is a “failure to
19 make a reasonable modification” in policies that are necessary to provide access for a
20 disabled individual. See 28 C.F.R. § 302(a)(2003). Without any authority to the contrary,
21 the Court gives deference to the Justice Department’s interpretation of its own regulations
22 and finds that the Costco policy does not violate the ADA.

23 **B. Department of Transportation Interpretations**

24 Finally, Costco argues that the Court should look to other agency interpretations of
25 analogous nondiscrimination regulations for additional guidance. Def’s Mot. for Summ. J.,
26 at 6. In support of their argument Costco points to the Department of Transportation’s recent

1 guidance concerning service animals in air transportation. See 68 Fed. Reg. 2874 (2003).
2 The DOT guidance provides that airline personnel may obtain “credible verbal assurances”
3 from the passenger to determine whether an animal is a service animal. Id. at 2875. The
4 personnel may ask specifically, “[w]hat tasks or functions does the animal perform for you.”
5 Id. However, as the plaintiffs argue, the DOT guidance is not an interpretation of the ADA
6 but is an interpretation of the Air Carrier Access Act. Id. at 2874. Costco asserts that the
7 nondiscrimination provision of the ACAA and the ADA are analogous and the DOT
8 guidance should “inform” the Court’s analysis.

9 The Court need not address this issue as the provisions of the ADA and the
10 Department of Justice interpretations are sufficient to find that the Costco policy is not
11 discriminatory as a matter of law. Costco has made a “reasonable modification” of their no
12 animals policy to allow admittance of service animals. The policy requires Costco
13 employees to first look for visual identification that an animal is a service animal. Raines
14 Decl., docket no. 24, Ex. A. If the animal is “without visual evidence” that it is a service
15 animal, the employee should inquire into what task or function the animal performs. Id.
16 This “task or function” inquiry follows nearly word for word the Department of Justice’s
17 guidance directed at businesses. Valente Decl., docket no. 23, Ex. A. The Department’s
18 interpretation of its own regulation is entitled to deference absent a contrary reading of the
19 regulation. In this case, it cannot be said that the task inquiry allowed in the DOJ Business
20 Brief is contrary to the reasonable modification requirement. For these reasons the Court
21 grants the defendant’s motion for summary judgment with respect to the ADA claim.

22 **III. Washington Law Against Discrimination**

23 In addition to moving for summary judgment on the ADA claim of discrimination,
24 Costco also moves for summary judgment on the claim of a violation of the WLAD. The
25 statute provides that “[t]he right to be free from discrimination because of ...physical
26 handicap is recognized as and declared to be a civil right.” RCW 49.60.030(1).

1 Additionally, that right shall include “[t]he right to full enjoyment of any of the
2 accommodations, advantages, facilities, or privileges of any place of public resort,
3 accommodation....” *Id.* at 49.60.030(1)(b). Finally, WLAD provides that “[i]t shall be an
4 unfair practice for any person or his agent or employee to commit an act which directly or
5 indirectly results in any distinction, restriction, or discrimination....” *Id.* at 49.60.215. The
6 plaintiffs in this case argue that the “task or function” inquiry “directly or indirectly” resulted
7 in discrimination. Pl’s Comp., docket no. 1, p. 20.

8 Washington state courts have noted that state law relating to disability discrimination
9 substantially parallels federal law, and courts should look to interpretations of federal anti-
10 discrimination laws, including the ADA, when applying the WLAD. *See Matthews v.*
11 *NCAA*, 179 F. Supp. 2d 1209, 1229 (E.D. Wash. 201); *see MacSuga v. County of Spokane*,
12 97 Wn. App. 435, 442, 983 P.2d 1167 (1999) (commenting in dicta that the WLAD and
13 ADA “have the same purpose” and state courts therefore may look to federal cases for
14 guidance); *see also Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998) (holding that
15 courts should employ the same analysis to evaluate claims under the ADA and the WLAD).

16 The plaintiffs did not address the issue of the interpretation of WLAD in their
17 response brief. Pl’s Resp., docket no. 27, p. 6-7. Instead, they argue that Costco’s policy
18 violates WLAD because it is allegedly contradicted by a Washington State Human Rights
19 Commission (“WSHRC”) document entitled “Service Animal Questions.” *Id.* at p. 6. The
20 plaintiffs also argue that the Court should defer to a WSHRC reasonable cause finding that
21 held that there was sufficient evidence to show that Costco’s policy violated WLAD. *Id.* at
22 p. 7.

23 **A. WSHRC’s “Service Animal Questions”**

24 The plaintiffs first argue that the WSHRC’s “Service Animal Questions,” which does
25 not provide for a “task or function” question precludes a business from asking such a
26 question. The WSHRC guide provides:

1 **5. How can I tell if an animal is really a service animal and not just a pet?**

2 There are no legal requirements for service animals to be specially identified. Some,
3 but not all, service animals, wear special collars and harnesses. Some, but not all, are
4 licensed or “certified” and or have identification papers. If you are not certain that an
5 animal is a service animal, you may ask the person who has the animal if it is a
6 service animal required because of a disability. A public entity cannot require any
7 proof of a person’s disability, or identification or certification of the service animal’s
8 status.

9 Glogowski Decl., docket no. 28, Ex. D.

10 Plaintiffs argue that this guide restricts a business’s questioning to “whether the
11 animal is a service animal.” Pl’s Resp., docket no. 27, p. 6. However, as Costco correctly
12 argues, the guide simply states that Costco “may ask the person who has the animal if it is a
13 service animal required because of a disability.” Glogowski Decl., docket no. 28, Ex. D
14 (emphasis added). The guide does not state that a business may not ask the “task or
15 function” question. By contrast, the guide specifically provides that “[a] public entity cannot
16 require any proof of a person’s disability, or identification or certification of the service
17 animal’s status.” *Id.* Costco’s policy does not require any such proof. Raines Decl., docket
18 no. 24, Ex. A.

19 **B. WSHRC’s Reasonable Cause Finding**

20 The final issue for the Court is the reasonable cause finding of the WSHRC that found
21 that there was sufficient evidence to show that the Costco “task or function” inquiry violated
22 WLAD. Glogowski Decl., docket no. 28, Ex. C. WSHRC held:

23 WAC 162-26-070(6) requires that [Costco] reasonably accommodate a customer’s
24 disability, which includes providing admittance into the store without inquiries
25 necessitating disclosure of the nature or scope of a customer’s disability. [Costco’s]
26 Service Animal policy violates RCW 49.60.215 by resulting in a direct restriction on
 the access of customers with disabilities accompanied by service animals, as
 compared to non-disabled customers.

1 Id. As a preliminary matter, Washington state courts review an agency's application of the
2 law to facts *de novo*. Mader v. Health Care Auth., 149 Wn.2d 458, 470, 70 P.3d 931 (2003).

3 In this case the Court disagrees with the Commission's finding that there is sufficient
4 evidence to show that Costco's "task or function" inquiry violates WLAD. Costco's policy
5 does not operate as a "direct restriction" on the access of customers with disabilities
6 accompanied by service animals. By contrast the policy first allows a service animal
7 admittance into its stores if the animal is identified as a service animal. If there is no
8 identification, the customer must only provide what task or function the animal performs to
9 gain admittance into the warehouse. Costco should be allowed some way of determining
10 which animal is in fact a service animal, and the plaintiffs cannot demonstrate that the policy
11 as written results in discrimination.

12 **CONCLUSION**
13

14 In conclusion, the Court grants Costco's motion with respect their counterclaim and
15 count IV of the plaintiffs' complaint. The ADA provides that discrimination is a failure to
16 make a reasonable modification in policies when such a modification is necessary to afford
17 the facilities to an individual with a disability. As the Department of Justice interpretations
18 indicate, it is not necessary for Costco to modify their written policy to remove their "task or
19 function" question. Finally, the Court decides the plaintiffs' state anti-discrimination claims
20 using the same analysis it uses to interpret the federal anti-discrimination claims.

21 IT IS SO ORDERED.
22

23 DATED this 22nd day of January, 2004.

24 /s/ Thomas S. Zilly

25 _____
THOMAS S. ZILLY

26 UNITED STATES DISTRICT JUDGE