SUPREME JUDICIAL COURT OF MAINE
SITTING AS THE LAW COURT

DOCKET NO. FED-05-172

REVIEW OF QUESTIONS OF LAW
CERTIFIED BY U.S. DISTRICT COURT

STANLEY WHITNEY,

Appellant

v.

WAL-MART STORES,

Appellee

BRIEF OF AMICUS CURIAE

Maine State Chamber of Commerce, Chamber of Commerce of the United States of America, New England Legal Foundation, National Federation of Independent Businesses, Maine Pulp & Paper Association, Maine Bankers Association, Maine Innkeepers Association, Maine Restaurant Association, Maine Motor Transport Association, and Maine Oil Dealers Association

James R. Erwin, Bar No: 1856
Katharine I. Rand, Bar No: 9629
Pierce Atwood LLP
One Monument Square
Portland, Maine 04101
207-791-1100

Philip J. Moss, Bar No: 3404
Eric J. Uhl, Bar No: 7244
Moon, Moss & Shapiro, P.A.
Ten Free Street, P.O. Box 7250
Portland, Maine 04112
207-775-6001

Counsel for Amicus Curiae
Maine State Chamber of Commerce, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

CONSENT TO FILING OF BRIEF OF AMICUS CURIAE

Pursuant to Rule 9(e)(1) of the Maine Rules of Appellate Procedure, this Brief of Amicus Curiae is filed with the written consent of both parties to this case. The written consents are attached. (Addendum at 1, 2)

STATEMENT OF INTEREST

The Maine State Chamber of Commerce is a trade association representing approximately 5,000 businesses in the State of Maine. The Chamber of Commerce of the United States of America is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. An important function of both the Maine State and United States Chambers of Commerce (collectively, "Chambers") is to represent the interests of their members in court on employment law issues of local and national concern to the business community.

The New England Legal Foundation ("NELF") is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF is supported by contributions from more than 130 corporations, law firms, foundations, and individuals. NELF's mission is to promote balanced economic growth for New England, protect the free enterprise system, and defend economic rights.

The National Federation of Independent Businesses ("NFIB") is the largest advocacy organization representing small and independent businesses in Washington, D.C., and all 50 state capitals. NFIB's purpose is to impact public policy at the state and federal level and be a key business resource for small and independent business in America.

The Maine Pulp & Paper Association, Maine Bankers Association, Maine Innkeepers Association, Maine Restaurant Association, Maine Motor Transport Association and Maine Oil Dealers Association, (collectively, "the trade organizations") are industry trade organizations representing the interests of Maine's pulp and paper, banking, trust, financial service, hospitality, food-service, transportation, and heating industries in the state of Maine. These organizations exist to advocate for their respective industries, to facilitate communication amongst their memberships, and to provide educational, training and regulatory services to their members.

All of the *amici* have members that are employers subject to both the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4553 et seq., and of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq. Accordingly, the *amici* have a direct interest in the scope and application of the state and federal fair employment statutes. More specifically, they have a direct interest in the issue presented in this case; *i.e.*, whether the MHRA's disability discrimination provision protects only individuals who are substantially limited in one or more major life activities.

The *amici* are interested in protecting and improving the economic health of State of Maine. If this Court holds that the MHRA requires no showing of substantial limitation of a major life activity, it will upset settled law upon which Maine employers have long relied. Maine businesses will be faced with the prospect of virtually every employee and job applicant being covered by the MHRA's disability discrimination provisions. They will also be left to master two legal standards if their obligations under the ADA and the MHRA diverge. Finally, it is likely that Maine businesses will be forced to defend more lawsuits since the class of individuals protected from discrimination will grow to include nearly every member of the population at one time or another. None of these results bodes well for Maine business.

The *amici* seek to assist the Court by highlighting both the strong basis for upholding the validity of Maine Human Rights Commission Employment Regulation 3.02(C)(1) and the impact this Court's decision in this case may have beyond the immediate concerns of the parties to the case. Thus, in addition to explaining why Appellee's position is legally correct, this Brief endeavors to bring to the Court's attention the policy and practical considerations that should inform its response to the questions certified by the United States District Court for the District of Maine.

ISSUES PRESENTED

The United States District Court for the District of Maine has certified the following two questions to this Court for review pursuant to 4 M.R.S.A. § 57 and Rule 25 of the Maine Rules of Appellate Procedure:

(1) Does the Maine Human Rights Act definition of "physical or mental disability" found at 5 M.R.S.A. § 4553(7-A) require a showing of a substantial limitation on a major life activity as does its federal analogue, 42 U.S.C. § 12102(2)(A)?

(2) Is Section 3.02(C) of the regulations adopted by the Maine Human Rights Commission, defining a "physical or mental impairment," invalid because it requires a showing of a substantial limitation on a major life activity?

STANDARD OF REVIEW

The Court is called upon to offer its instructions concerning these questions of state law and no standard of review is applicable.

SUMMARY OF ARGUMENT

The purpose of the Maine Human Rights Act ("MHRA"), like all anti-discrimination statutes, is to protect disadvantaged classes of individuals who historically have been subject to disparate treatment and stereotyping. To that end, the MHRA's and federal Americans with Disabilities Act's protections for disabled individuals have been interpreted consistently to protect only those individuals with substantial impairments. Appellant urges this Court to abandon nearly twenty years of settled law and to hold that the MHRA is much broader, covering individuals with minor impairments and without regard to the effect that such impairments have on individuals' major life activities. Appellant's construction cannot stand for a number of reasons.

First, if the definition of "physical or mental disability" is as broad as Appellant argues, then it covers every member of the population at one time or another. This result would undermine the Act's historical purpose of protecting only the truly disadvantaged.

Second, applying ordinary canons of statutory construction, the Court must conclude that the definition of "physical or mental disability" includes at least a threshold requirement that the impairment be "substantial."

Third, pursuant to an express grant of authority from the Legislature, the Maine Human Rights Commission adopted Rule 3.02(C)(1), which provides a context-specific, elaborative definition of disability that both provides predictability for employers and employees and obviates the need for Maine trial courts to construct a definition of disability on a case-by-case basis.

Fourth, Rule 3.02(C)(1) is entitled to deference because it was adopted by an agency with special expertise, broadly supported, was and does not contradict the statutory language.

Fifth, the Legislature has acquiesced in the interpretation embodied in Rule 3.02(C)(1) since it has failed to take any action to repudiate the rule since its enactment nearly twenty years ago. Moreover, like the Maine Human Rights Commission rules that this Court has relied upon in the past, Rule 3.02(C)(1) is in accord with federal precedent.

Finally, there are several public policy considerations that strongly support upholding Rule 3.02(C)(1)'s interpretation of disability. If virtually every employee is, at one time or another, "disabled" under the MHRA, the effect will be increased litigation and nearly every case will turn on whether the employer's motive was pretext for discrimination. In addition, Appellant's construction would place Maine at odds with both federal law and with the anti-discrimination laws of forty-three other states.

The class of individuals protected against disability discrimination under the Maine Human Rights Act consists of those with substantial impairments of more than a temporary duration. The Court should therefore answer the two certified questions in the affirmative and leave settled law undisturbed.

ARGUMENT

I. THE CONSTRUCTION URGED BY WHITNEY WOULD DIVORCE THE MAINE HUMAN RIGHTS ACT FROM BOTH ITS HISTORY AND WELL-ESTABLISHED PRECEDENT.

A. The Purpose of the Maine Human Rights Act is to Protect Classes of Individuals Historically Disadvantaged by Invidious Discrimination.

Whitney urges upon the Court a construction of the MHRA's definition of "physical or mental disability" that is utterly divorced from the Act's historical purpose. The MHRA was designed to address discrimination against classes of persons historically subjected to stereotyping and disparate treatment, including in the employment context, where such treatment was based on factors unrelated to their ability to perform a particular job. Prior to the enactment of the MHRA in 1971, Governor Kenneth M. Curtis created a Task Force on Human Rights to investigate and propose solutions to the problem of discrimination in Maine. The Task Force's report to the Governor confirms that its focus was upon traditionally marginalized groups or classes of people, rather than on unfair treatment of individuals generally. Report of the Governor's Task Force on Human Rights at 11-12 (1968).[1] This focus mirrors that of Congress when it passed the Americans with Disabilities Act ("ADA"), the MHRA's federal counterpart respecting the disabled. "[A]s a group, [the disabled] occupy inferior status in our society, and are extremely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). When Congress enacted the ADA in 1990, it found that "'some 43,000,000 Americans have one or more physical or mental disabilities.' If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or

[1] The Report specifically notes that "[i]t would be unfair to our State to suggest that it is in some way worse, in its attitude toward *minority and disadvantaged groups*, than the rest of the country. But honesty compels us to conclude that it is not distinctly better; that is, there are deeply ingrained attitudes of prejudice against these *groups*." *Id.* (Emphasis supplied.) *See also* Katharine I. Rand, *Taking Care of Business and Protecting Maine's Employees:*

particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher." *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).

As laws enacted to prohibit *discrimination*, both of these statutes seek to protect only members of that class of individuals recognized as being disadvantaged as compared to the population at large. In other words, the statutes identify protected *classes* as to which there is a recognized history of discriminatory treatment. It has never been their purpose to protect every individual with the kinds of minor and/or temporary infirmities or disfigurements, common colds, sprained ankles and broken bones the entire population ultimately experiences. Yet Whitney's construction would encompass essentially a class of everyone, which is no class at all. This broad a group is simply not the historical victims of discrimination either the Maine Legislature or Congress was seeking to protect. The group needing protection— both in 1975 when the Legislature added the "physically handicapped" to the list of groups protected under the MHRA and today—consists of individuals with substantial impairments of more than a temporary nature. By seeking an unreasonably expansive interpretation of the MHRA's definition of "physical or mental disability," Whitney disregards altogether the historical fact of discrimination against an identifiable class: those with impairments substantial enough to set them apart from the population in general and subject them to damaging stereotypes and disparate treatment.

B. The MHRA Has Been Interpreted Consistently with the ADA for Nearly Twenty Years.

Whitney's construction also divorces the MHRA from well-established precedent. For nearly twenty years, the Act's provisions protecting "handicapped"—or, since 1991,

---

Supervisor Liability for Employment Discrimination under the Maine Human Rights Act, 55 Me. Law Rev. 428,

"disabled"—individuals have been interpreted consistently with the ADA.[2] *E.g., Kvorjak v. Maine*, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (noting that the standards applicable to the ADA and the MHRA "have been viewed as essentially the same"); *Winston v. Maine Technical College Sys.*, 631 A.2d 70 (Me. 1993) (citing Rule 3.02(C)(1) and noting that the MHRA generally tracks federal anti-discrimination law)**.**

This Court has made clear that it does not "disturb a settled point of law unless 'the prevailing precedent lacks vitality and the capacity to serve the interests of justice. . . .'" *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 25, 774 A.2d 366, 373 (quoting *Bourgeois v. Great N. Nekoosa Corp*., 1999 ME 10, ¶ 5, 722 A.2d 369, 371). For all of the reasons set forth elsewhere in this Brief, the prevailing precedent, as reflected in Rule 3.02(C)(1), serves the policy behind the MHRA's protection of disabled individuals and therefore serves the interests of justice. Moreover, there is clearly a benefit to having one set of rules, not two, governing the obligations of businesses and the rights of truly disabled workers. The construction urged by Whitney would upset this settled area of anti-discrimination law, upon which employers have long relied.

II. UNDER ORDINARY CANONS OF STATUTORY CONSTRUCTION, THE MAINE HUMAN RIGHTS ACT'S DEFINITION OF DISABILITY INCLUDES AT LEAST A REQUIREMENT OF SUBSTANTIALITY

The MHRA defines "physical or mental disability" as follows:

442-445 (2003) (citing the Task Force's Report and discussing the legislative history of the MHRA generally).

[2] Whitney relies heavily on the 1986 case *Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335, 340 (Me. 1986), where this Court concluded that the plaintiff's asymptomatic spinal condition was a malformation and so qualified as a handicap under the MHRA. Although Rule 3.02(C)(1) was adopted approximately one year before the Court heard oral argument in *Rozanski*, yet the Court did not discuss the Rule at all in its opinion. Clearly, the Court would have addressed Rule 3.02(C)(1) had one of the parties raised it. The Court's silence confirms that the Rule simply was not before the Court. Since *Rozanski*, the Court has recognized that the Rule "supplements" the statutory definition of disability and has repeatedly noted that the MHRA is generally interpreted consistently with the ADA. *E.g., Winston v. Maine Technical College Sys.*, 631 A.2d 70 (Me. 1993). In light of the supervening developments in the law, *Rozanski* appears to no longer be viable.

> [A]ny disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, and includes the physical or mental condition of a person that constitutes a substantial disability as determined by a physician or, in the case of a mental disability, by a psychiatrist or psychologist, as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services.

5 M.R.S.A. § 4553 (7-A). As Appellant points out unlike the ADA, the Act does not refer to major life activities. The definition does, however, use the term "substantial," indicating that the Legislature intended to subject physical and mental conditions to a threshold of substantiality before deeming them disabilities under the Act. Several ordinary canons of statutory construction dictate that the definition be read to require that impairments be "substantial" in order to come within the protection of the MHRA.

First, although it is well settled that, in construing a statute, the Court attempts to effectuate Legislature's intent by first looking to the statute's plain meaning, *e.g. Medical Mut. Ins. Co. of Maine v. Bureau of Ins.*, 2005 ME 12, ¶ 5, 866 A.2d 117, the Court is bound to avoid "statutory constructions that create absurd, illogical, or inconsistent results."[3] *E.g. Darling's v. Ford Motor Co.*, 2003 ME 21, ¶ 7, 825 A.2d 344, 346. At the outset, the Court is confronted with a statutory definition of disability that is circular: "'Physical or mental disability' means any disability . . ." 26 M.R.S.A. § 4553(7-A). The definition of disability in the MHRA goes on to include "any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness . . . ." With the help of Webster's New World® Dictionary, 4th Ed., the definition of "physical or mental disability" becomes something like this:

[3] The gist of Whitney's argument is that the statutory definition does not, on its face, require that disabled individuals be substantially limited in any major life activity. Appellant's Brief at 4. For all of the reasons set forth in text, however, that reading of the statutory language is both absurd and redundant. The so-called "plain meaning rule" therefore fails here.

> any illness, injury or physical handicap [*disability*], physical weakness, feebleness or defect [*infirmity*], faulty, irregular, or abnormal formation or structure of a body or part [*malformation*], blemish, defect or deformity [*disfigurement*], imperfection or weakness, fault, flaw or blemish that existed at birth [*congenital defect*] or state of mind [*mental condition*] caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, …

See 26 M.R.S.A. § 4553(7-B). It is not an exaggeration to state that, without any threshold requirement of substantiality, this definition would include every member of the general population at one time or another, and many only slightly impacted individuals for their lifetimes. *See Providence Journal Company v. Mason*, 359 A.2d 682 (R.I. 1976) (rejecting plaintiff's argument that the Rhode Island Fair Employment Practices Act covers "any physical disability caused by injury, no matter how slight."). However, as discussed in Part I above, the anti-discrimination laws were not enacted to protect the general population. Rather, they were enacted to protect groups of people who had historically born the brunt of prejudice and stereotyping and been socially and economically marginalized because of their *substantial* physical or mental impairments. *See* 42 U.S.C. §§ 12101(a)(6) & (a)(7) (describing the disabled as a "discrete and insular minority," "extremely disadvantaged socially, vocationally, economically, and educationally.") Without any threshold requirement of substantiality in the definition of disability, virtually every member of the population will qualify as disabled and be entitled to the protection of the Act, an absurd result given the Act's purpose in protecting a minority group consisting of the socially and economically marginalized.

A second "axiom of statutory interpretation [provides] that words must be given meaning and are not to be treated as meaningless and superfluous. . . . [N]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *E.g. Handyman Equipment Rental Co., Inc. v. City of Portland*, 724 A.2d 605, 607-608 (Me. 1999) (internal quotation omitted). This principle is applicable because if "substantial"

is not read to modify each of the terms contained in the first clause of the definition, then the second clause of the definition becomes entirely superfluous. Disability claimants who can demonstrate that they meet the statutory definition of disabled by showing only that they have an "infirmity" caused by "illness" or a "disfigurement" caused by "accident" would have no reason to seek out a physician's declaration that they have a "substantial disability." If the Legislature had intended the general terms "disability, infirmity, malformation, disfigurement, congenital defect [and] mental condition" to be interpreted in an unrestricted sense, it would have had no need to mention conditions which are determined to be a "substantial disability" by a physician. *See Providence Journal Company v. Mason*, 359 A.2d 682 (R.I. 1976). As Magistrate Judge Kravchuk noted in her Recommended Decision, "if 'physical or mental disability' truly means any disability or infirmity without some limitation, then the 'and includes' clause is reduced to a redundancy." Recommended Decision on Motion for Summary Judgment and Motion in Limine at n.5.

Third, under the rule of statutory construction known as *ejusdem generis*, general terms followed by specific terms should be construed to embrace only concepts similar to the specific. *E.g. Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983). The MHRA's definition of "physical or mental disability" can be broken into two clauses as follows:

> 'Physical or mental disability' means any **[1]** disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, environmental conditions or illness, **[2]** and includes the physical or mental condition of a person that constitutes a substantial disability as determined by a physician . . . .

5 M.R.S.A. § 4553 (7-A). Since the modifier "substantial" narrows the class of conditions that constitute a physical or mental disability, *ejusdem generis* requires that the term "substantial" be read to modify each of the terms listed in the first clause of the definition.

Three principles of statutory construction, along with the Act's historical purpose in protecting specific disadvantaged groups, support reading a threshold requirement of substantiality into the definition of "physical or mental disability." Applying "substantial" in this way is necessary to save the definition from an absurdly broad and redundant reading. However, the definition still lacks the specificity necessary for a fully limned, practical interpretation. The Commission's Rule 3.02(C)(1) fills this gap.

III. MHRC RULE 3.02(C)(1) IS A REASONABLE AND HELPFUL GLOSS ON THE STATUTORY DEFINITION

The Legislature expressly granted the Maine Human Rights Commission authority to "adopt, amend and rescind rules and regulations to effectuate [the MHRA]." 5 M.R.S.A. § 4566(7). Adopted by the Maine Human Rights Commission ("MHRC" or "Commission") in 1985, Rule 3.02(C)(1) provides as follows:

> An applicant or employee who has a 'physical or mental disability' means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment.

In adopting Rule 3.02(C)(1), the Commission provided needed guidance to employers, employees, and potential litigants with respect to how the MHRA's definition of disability should be interpreted. The rule assists in the application of both the MHRA and other statutes by (1) adopting a context-specific, consensus-based interpretation with a clear historical basis that provides predictability for employers and employees; (2) eliminating confusion as to what "substantial" actually means both in the context of the MHRA itself and in the manner in which it interacts with other statutes; and (3) obviating the need for Maine trial courts, and ultimately this Court, to develop the meaning of "disability," including in particular "substantial" in that context, on a case by case basis. By providing a context-specific, elaborative definition of

disability, Rule 3.02(C)(1) provides a reasonable and helpful interpretive gloss on the statutory definition.

First, as Congress (through the Rehabilitation Act and ADA), the MHRC (through Rule 3.02(C)(1)) and over forty other states have recognized,[4] "substantial" has a specific meaning informed by practical experience and broad consensus in the context of physical or mental disability. Rule 3.02(C)(1) merely recognizes what the vast majority of jurisdictions consider to be the appropriate contours of the group to be protected by Maine's own version of a disability discrimination law.

Second, Rule 3.02(C)(1) helps eliminate confusion, and potentially illogical results, with how the MHRA and related statutes are to be applied. Even with a substantiality requirement, but without the benefit of the Rule's interpretive guidance, individuals with serious but temporary conditions, no matter how short the duration, are within the MHRA's protection. Indeed, an indisposition of one day necessitating no medical treatment would constitute a disability even though it would not even constitute a "serious health condition" under the Family Medical Leave Act ("FMLA") or its Maine counterpart. *See* 29 U.S.C. § 2611 (defining "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital . . . or continuing treatment by a health care provider); 26 M.R.S.A. § 843(6) (mirroring federal definition).

Moreover, without the interpretative gloss provided by Rule 3.02(C)(1), an employer's obligations to disabled employees under the MHRA and its obligations to employees with "serious health conditions" under the FMLA will be difficult to reconcile. For example, under

[4] See Section VI(B) below for a discussion of how the other states address the definition of disability.

the FMLA (state and federal), an employee with the common cold or flu who does not receive inpatient care or treatment from a health care provider does not have a "serious health condition" and is therefore not entitled to leave for that condition. However, even with a requirement of substantiality, the MHRA's definition of "physical or mental disability" is broad enough to cover an employee with a fleeting, albeit severe, cold or flu who does not seek medical treatment. Since the disability discrimination laws have been interpreted, in certain circumstances, to require an employer to accommodate an employee's "disability" with a leave of absence, *e.g.*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), an employer's freedom under the FMLA to terminate a chronically absent who happens to have a common cold would appear to be illusory. Unless Rule 3.02(C)(1) informs the statutory definition of disability, employees will be arguably entitled to leave as a reasonable accommodation for illnesses and/or infirmities that can be deemed "severe" or "significant," no matter how temporary and no matter their effect on employees' daily lives. This result creates a lower threshold under the MHRA than under the FMLA, rendering the latter superfluous.

Third, left with the concept of "substantial" impairment, but nothing more, employers, employees, the Commission, and ultimately the courts are left to grapple with which impairments are protected by the MHRA, and which are not, on a case-by-case basis. While it seems probable that Maine courts would, if required to do so without Rule 3.02(C)(1), interpret the MHRA the same way, the Rule offers needed predictability for those potentially affected by the law, including specifically from *amicis'* perspective employers who must endeavor to provide reasonable accommodations to disabled individuals and who face liability even without proof of intent to discriminate if they are mistaken as to whom the duty to accommodate runs.

In short, the interpretive value of Rule 3.02(C)(1) is significant practically, legally, and economically.

IV. RULE 3.02(C)(1) IS ENTITLED TO DEFERENCE

As noted above, the Legislature expressly granted the Maine Human Rights Commission rule-making authority.[5] Pursuant to that grant of authority, the MHRC adopted "interpretive administrative regulations" to "inform employers, labor organizations, employment agencies, and other interested parties of the Commission's interpretation of the Maine Human Rights Act." Maine Human Rights Commission, 94 348 CMR 3.01 et seq. Rule 3.02(C)(1) represents the Commission's interpretation of the Maine Human Rights Act's definition of "physical or mental disability" and provides that "[a]n applicant or employee who has a 'physical or mental disability' means any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment."

This Court has held that "[a]dministrative interpretations by [the Maine Human Rights Commission] . . . are entitled to great deference."[6] *Maine Human Rights Commission v. Local 1361, United Paperworkers International Union AFL-CIO et al.*, 383 A.2d 369, 378-79 (Me. 1978). "[D]eference is due the interpretation of a statute by the agency charged with its

[5] Appellant baldly asserts that the Commission was not "empowered" to interpret the definition of "physical or mental disability," but does not even acknowledge, let alone address, the Legislature's express grant of rule-making authority to the Commission. Appellant's Brief at 12.

[6] Appellant suggests that the Commission's regulations are due less deference because the Commission chose to label them "interpretive." Appellant Brief at n.14. This Court has not embraced the distinction drawn by federal courts between informal and formal rules. *See also Central Maine Power Co. v. Public Utilities Com'n*, 458 A.2d 739, 740 (Me. 1983). Even if it had , under the body of federal case law distinguishing between informal or "interpretive" rules and formal or "legislative" rules, it is not the label attached to the rule, but rather the procedure through which the rule is enacted, that dictates the level of deference afforded the rule. *E.g. Mead Corp. v. United States*, 533 U.S. 218 (2001). Rules enacted formally, through notice-and-comment rulemaking, are entitled to the most deference. *Id. See also* Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 Journal of College and Univ. Law 1, 10-18 (2002). Thus, if the analysis employed by the federal courts applies, Rule 3.02(C)(1), which was adopted following a notice-and-comment period, would be entitled to *heightened* deference.

administration," unless the regulation "contravene[s] the provisions of controlling law." *Central Maine Power Co. v. Public Utilities Com'n*, 458 A.2d 739, 741 (Me. 1983). *See also Botting v. Dept. of Behavioral and Developmental Servs.*, 2003 ME 152, ¶ 9, 838 A.2d 1168, 1171 ("Unless the meaning of a statute is clear or within our own expertise, we will defer to an agency's interpretation of a statute it administers when the agency's interpretation is both reasonable and within the agency's own expertise."); *Competitive Energy Services LLC v. Pub. Util. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046 ("An agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a different result."). For reasons more fully set forth below, the MHRC's interpretation of 5 M.R.S.A. § 4553 (7-a) advances the legislature's intent and is therefore entitled to deference. *Id.*

A. Rule 3.02(C)(1) Is Squarely Within the MHRC's Expertise

This Court has repeatedly noted that it affords greater deference to an interpretation that is within the agency's expertise. *E.g. Botting v. Dept. of Behavioral and Developmental Servs.*, 2003 ME 152, ¶ 9, 838 A.2d 1168, 1171; *Competitive Energy Services LLC v. Pub. Util. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046. As the state agency charged with enforcing the MHRA and investigating and resolving complaints of unlawful discrimination, the MHRC is uniquely and ideally situated to interpret the statutory definition of "physical or mental disability." The Commissioners are experts as to the law's purpose and meaning and are in touch with the approaches adopted by other jurisdictions. Accordingly, this Court has afforded "great deference" to "[a]dministrative interpretations by our Commission." *Maine Human Rights Commission v. Local 1361, United Paperworkers International Union AFL-CIO et al.*,

383 A.2d 369, 378-79 (Me. 1978). Rule 3.02(C)(1) is entitled to heightened deference because is within the MHRC's expertise.

B. In Enacting Rule 3.02(C)(1), the MHRC Sought to Alleviate Widely Shared Concerns Over the Vagueness of the Statutory Definition

In the years leading up to the adoption of Rule 3.02(C)(1), "Human Rights Commissioners, staff members, and several legislators . . . expressed concern that the statutory reference to 'any disability . . . caused by bodily injury, accident, disease . . . or illness,' [was] so broad and so general that it could be interpreted to include conditions which are not serious and of only temporary duration, *e.g.*, a sprained ankle, a cut finger or a cold." Memorandum from John E. Carnes, Commission Counsel, to the Commission (September 19, 1984) (Addendum at 3, 4) Commission Counsel Carnes[7] recommended that, "in light of the concerns expressed by a number of legislators during the past legislative session, it would be appropriate for the Commission to state clearly that it interprets the phrase 'physical and mental handicap' to refer to conditions which are serious and more than temporary." *Id.* at 4.

Commission Counsel Carnes noted that there was a strong argument that "even without a change in the statute or the issuance of a regulation, rules of statutory construction would dictate that the general reference to 'any disability' is limited by the subsequent reference to 'substantial handicap as determined by a physician' and to 'health or sensory impairment which requires special education, vocational rehabilitation or related services.'" *Id.* Carnes also pointed out that the rule's language was "sufficiently broad to include all conditions the legislature could have reasonably intended to cover." *Id.* at 6. Given that the statutory definition already used the term

[7] Appellant relies heavily on another memorandum prepared by Attorney Carnes in 2003 recommending that the Commission to repeal Rule 3.02(C)(1). Ironically, this later memorandum is relevant, if at all, because the Commission *rejected* Attorney Carnes' recommendation that it repeal Rule 3.02(C)(1) in 2003 and thus his 2003. The 1984 memorandum is relevant because the Commission adopted his recommendation and enacted Rule 3.02(C)(1).

"substantial," Commission Counsel noted that the Legislature could not possibly have intended the definition of "physical or mental handicap" to reach as broadly as urged by Whitney and *amici* supporting his position and accordingly recommended, and the Commission adopted, the rule clarifying that the term "handicap" "is intended to protect any person who has a physical or mental impairment which substantially limits one or more of such person's major life activities." *Id.* at 3, 5-6.

While considering the proposed rule, the Commission received comments from many individuals and organizations. Every one of them was "supportive of the Commission's effort to clarify its interpretation of the phrase 'physical or mental handicap' as referring to serious impairments of more than temporary duration." Comments and Responses to Comments on Proposed Rule Defining "Physical or Mental Handicap," March 8, 1985 (Addendum at 8.) Thus, in 1985 there was a clear consensus that the MHRA's definition of "physical or mental disability" needed clarification. Since the Legislature has not amended that definition to date, Rule 3.02(C)(1) is no less necessary today.[8]

C. The Regulation Does Not Contradict the Statutory Language.

For multiple reasons noted above, "substantial" is inherent in the statutory definition of "physical or mental disability." The Rule's requirement that individuals be *substantially* limited

[8] Moreover, as discussed below in Section V, the Legislature has not changed the definition of "physical or mental disability" in the 20 years since Rule 3.02(C)(1) was adopted, indicating that it agrees with the interpretation reflected in the rule.

therefore finds express support in the statute. Although the term "major life activities" does not appear in the statute, it too is inherent in the statutory definition, specifically in the term "handicap," which the Legislature subsequently replaced with the term "disability."

When first amended to protect individuals with disabilities from employment discrimination, the MHRA used the term "handicapped" throughout. The Legislature amended the Act in 1991 and substituted the term "disability" for "handicapped." L.D. 191 (115th Legis. 1991) (Addendum at 9-22.) In so doing, the Legislature expressly noted that it intended to change only the terminology, and not the substance, of the Act. *Id.* at 19, Statement of Fact.

The term "handicapped" means more than just illness, infirmity, or disfigurement. "Handicap" connotes a condition that interferes with normal day-to-day functioning in some way. *See Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Washington State Human Rights Commission,* 557 P.2d 307, 310 (Wash. 1976) ("A person with a handicap does not enjoy, in some manner, the full and normal use of his sensory, mental, or physical faculties."); *State of Minnesota, Dept. of Human Rights v. Hibbing Taconite Co.*, 482 N.W.2d 504, 509 (Minn. 1992) (J. Davies, concurring) ("While the low back anomalies in this case might be considered 'physical conditions,' they do not fall within the plain meaning of the term 'handicap.' . . . At this point, the claimants are generally asymptomatic, and cannot be considered . . . restricted in normal achievement."). The dictionary definition is "a disadvantage that makes achievement unusually difficult." Webster's Third New International Dictionary (1998). Thus, inherent in the terms "handicap" and "disability"—which the Legislature declared mean the same thing—is the concept that a person is significantly disadvantaged vis-à-vis the general population.

The connection between "handicap" and limitations on major life activities is also supported by the Act's legislative history. In 1975 the Legislature amended the definition of

"physical handicap" to include "mental handicap" and ultimately adopted the definition that appears in the Act today. L.D. 1791 (107th Legis. 1975). The original bill adding "mental handicap" and rewriting the definition of "physical or mental handicap" was, however, different from the one actually adopted. Originally, the bill read as follows:

> 'Physical or mental handicap' means any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness; *and shall include, but is not limited to: epilepsy seizure disorders; any degree of paralysis; cerebral palsy, autism; mental retardation; amputation; lack of physical function or coordination; impairment of sight, hearing or speech; or physical reliance on a seeing eye dog, wheelchair or other remedial appliance or device*; and also includes[9] the physical or mental condition of a person which constitutes a substantial handicap as determined by a physician or, in the case of mental handicap, by a psychiatrist or psychologist, as well as any other health or sensory impairment which requires special education, vocation rehabilitation or related services.

L.D. 1791 (107th Legis. 1975) (emphasis added). The italicized language was stricken from the bill before it was passed because the Legislature "felt [it] unnecessary to spell out some of the conditions and not all of them." House Amend. A to L.D. 1791, No. H-351 (107th Legis. 1975). Notably, each of the conditions the Legislature listed in the original bill implicates some functional limitation on a major life activity not faced by the general population. Absent from the list are illnesses such as the common cold or cosmetic disfigurements such as scars or the everyday stresses of living and working, all of which would rise to the level of "disabilities" under Appellant's construction. The list reveals whom the Legislature intended to protect:

[9] The statute was later amended, deleting the semicolon between "device" and "and also includes," and deleting the term "also." L.D. 191 (115th Legis. 1991). The Legislature made clear, however, that it intended no substantive change. L.D. 191, Statement of Fact (115th Legis. 1991). To the extent that the semi-colon and word "also" suggest two separate categories, the deletion in 1991 confirms that the Legislature always intended the "physical or mental condition of a person which constitutes a substantial handicap as determined by a physician. . ." to be illustrative of a disability covered by the first clause of the definition.

individuals with substantial disabilities that significantly limit them vis-à-vis the general population. That the Legislature chose to strike the list because it was not exhaustive does not diminish the fact that it originally contemplated specific conditions which limit individuals in major life activities such as thinking (autism, mental retardation), walking (cerebral palsy, amputation, lack of physical function, reliance on a wheelchair), seeing (impairment of sight, reliance on a seeing eye dog) or hearing (impairment of hearing).

Rule 3.02(C)(1) deserves deference because it is a reasonable interpretation and not contrary to the terms of a vague and unworkable definition. Furthermore, as discussed next, the Court should defer to the interpretation reflected in the rule because the Legislature has made clear over the years that it embraces that interpretation. By passing up opportunities to re-write the definition and reject Rule 3.02(C)(1), the Legislature has indicated that it approves of the interpretation of "physical or mental disability" adopted by the Commission and the federal courts.

V. UNDER THE DOCTRINE OF LEGISLATIVE ACQUIESCENCE, THE LEGISLATURE HAS ENDORSED THE STATUTORY INTERPRETATION REFLECTED IN RULE 3.02(C)(1)

"It is a well accepted principle of statutory construction that when an administrative body has carried out a reasonable and practical interpretation of a statute and this has been called to the attention of the Legislature, the Legislature's failure to act to change the interpretation is evidence that the Legislature has acquiesced in the interpretation." *Thompson v. Shaw's Supermarkets, Inc.*, 2004 ME 63, ¶ 7, 847 A.2d 406, 409.

Appellant makes much of the fact that the Legislature did not expressly adopt the ADA's definition of "disability" when it amended the statute in 1991. However, Rule 3.02(C)(1) was promulgated in 1985 and had therefore been on the books for six years when the Legislature took

another look at the statute. In other words, the Legislature did not *need* to amend the MHRA because Rule 3.02(C)(1) already ensured consistency between the Act and the ADA. When the Legislature amended the definition of "physical or mental disability" in 1991, it took no steps to repudiate the Commission's interpretation. L.D. 191 (115th Legis. 1991). Had the Legislature seen the need, it would have rejected the MHRC's regulation when amending the definition fourteen years ago. The fact that it did not do so then, and has not done so to date despite the development of a body of federal case law interpreting the ADA and MHRA consistently, shows that the Legislature has long since embraced the interpretation reflected in the rule. Deference to the rule is therefore appropriate.

VI. RULE 3.02(C)(1) IS IN ACCORD WITH FEDERAL PRECEDENT, WHICH THIS COURT HAS REPEATEDLY EMBRACED

Affording the Commission regulations the deference they are due, this Court has repeatedly relied upon the Maine Human Rights Commission regulations for guidance in interpreting the MHRA. *E.g. Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989) (holding that lower court's reliance on Rule 3.08(D) of the MHRC Employment Regulations, imposing reasonable accommodation obligation but not requiring employer to eliminate essential functions of the job, was proper); *Winston v. Maine Tech. Coll. Sys.*, 631 A.2d 70, 74 (Me. 1993) (citing MHRC Rule 3.02(C)(1), the same provision at issue in this case); *Finnemore v. Bangor Hydro-Electric Co.*, 645 A.2d 15, 17 (Me. 1994) (relying on MHRC Rule 3.10(G)(1), providing that religious harassment constitutes religious discrimination under the MHRA). In each of the cases where the Court has deferred to or looked to the MHRC regulations for guidance, the Court has also examined analogous federal precedent.

For example, in *Plourde v. Scott Paper Co.*, 552 A.2d 1257 (Me. 1989), the Court wrestled with the proper inquiry to be made in determining whether an employer is required to

accommodate a particular disability. The MHRA was, at the time, silent regarding an employer's duty to accommodate. MHRC Rule 3.08(D)[10] provided that "It is an unlawful employment practice for an employer to fail or refuse to make reasonable accommodations to the physical or mental limitations of otherwise qualified employees or applicants for employment, unless the employer can demonstrate that a reasonable accommodation does not exist or that an accommodation would impose an undue hardship on the conduct of the employer's business." The appellant argued that the lower court's reliance on this rule was in error and that the court should instead have relied upon case law requiring the employer to alter job responsibilities in order to accommodate the hiring of a female guard at a men's prison. *Id.* at 1261. The Court rejected appellant's argument, concluding that the lower court was correct in relying upon the MHRC rule defining an employer's duty to accommodate a disabled employee. *Id.*

The *Plourde* Court noted with approval that the lower court had surveyed analogous federal case law in arriving at the proper standard. *Id.* at 1261-62. Like the MHRC rule, federal law required employers to take steps to reasonably accommodate a potential employee's disability, but did not require the employer to eliminate essential functions of the job. *Id.* Persuaded by the alignment between the MHRC regulation and federal precedent, the Court affirmed the lower court's decision to rely upon the rule. *Id.* at 1262 and n.7.

Rule 3.02(C)(1) is similarly in accord with both the ADA itself and federal precedent interpreting the ADA and the MHRA. *See, e.g., Kvorjak v. Maine*, 259 F.3d 48, 50 n.1 (1st Cir. 2001); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 14 (1st Cir. 1997). Giving weight to the congruence between federal law and Rule 3.02(C)(1), the Court should defer to the rule as it has deferred to the Commission's rules in the past.

[10] This rule has since been repealed and replaced, the incorporation of a "reasonable accommodation" standard into the MHRA making it unnecessary.

VII. STRONG PUBLIC POLICY CONSIDERATIONS WARRANT DEFERENCE TO THE MHRC RULE

Employers are committed to meeting their obligations to the truly disabled. A reasonable, predictable, and understandable definition of disability—like the one employers and employees have lived with for nearly twenty years—makes it easier for them to do so without the constant threat of expensive and often meritless litigation.

A. Appellant's Construction Increases the Likelihood of Litigation.

The Commission's Annual Report for Fiscal Year 2004 (July 31, 2003 – June 30, 2004), states that complaints asserting discrimination on account of disability accounted for the largest percentage of all new cases filed with the Commission in FY 2004 (306 charges alleging disability discrimination filed in FY 2004, or 29.3% of all charges filed in that period). The Annual Report also states that of 398 cases decided by the Commission in FY 2004, the Commission found reasonable grounds to believe that unlawful discrimination occurred in just 44, or 11% of them.[11]

The *prima facie* disparate treatment case requires evidence only that an employee is "disabled" and has been treated differently from a similarly situated non-disabled employee. Currently, many of the charges of disability discrimination brought against employers are dismissed in the early stages of the complaint process or litigation because the complainant is unable to demonstrate that he or she is "disabled." However, under Appellant's construction, every employee with even a slight physical or mental impairment could make out a *prima facie* case of disparate treatment with respect to any promotion, demotion, discipline or other

[11] The Commission's Annual Report may be found at http://www.state.me.us/mhrc/PUBLICATIONS/AnnualRpt04.htm.

employment action. As a result, the framework that has traditionally been used to evaluate disability discrimination claims will be useless, as nearly every case filed will turn on whether the employer's articulated motive was pretext for discrimination. Appellant's construction also raises the absurd prospect of employers combating disability disparate treatment claims by arguing that there can be no "discrimination" because nearly every other member of its workforce is also "disabled."

The result of Appellant's construction is that so many people will be considered disabled that the statute's salutary purpose of assisting the truly disadvantaged will be swamped by a tide of insubstantially impaired claimants. Again, this is a result that the Legislature did not intend when it defined "physical or mental disability" in the MHRA.

B. The MHRC's "Substantial Limitation" Requirement Aligns Maine with the Vast Majority of the Other States, Advancing the Important Goals of National Uniformity and Predictability in Employment Matters

A decision upholding the MHRC's "substantial limitation" requirement would align Maine not only with federal law but also with the vast majority of the other states. Forty-seven states and the District of Columbia have their own statutes banning disability discrimination. Of these, 43 have followed the ADA's "substantial limitation" requirement, whether by statute, regulation, or judicial interpretation.[12] Three of these states have statutes with a broad definition

[12] The following 43 jurisdictions have adopted the ADA's "substantial limitation" requirement: **Alaska** (Alaska Stat. § 18.80.300(12)); **Arizona** (Ariz. Rev. Stat. § 41-1461(2)); **Arkansas** (Ark. Code Ann. 16-123-102(3)); **Colorado** (Colo. Rev. Stat. § 24-34-301(2.5)); **Delaware** (Del. Code. Ann. tit. 19, § 722(4)); **District of Columbia** (D.C. Code Ann. § 2-1401.02(5A)); **Florida** (Fla. Stat. § 760.22(7)); **Georgia** (Ga. Code Ann. § 34-6A-2(3)); **Hawaii** (Haw. Rev. Stat. § 378-1); **Idaho** (Idaho Code § 67-5902(15)); **Indiana** (Ind. Code § 22-9-5-6(a)); **Iowa** (*Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 476-77 (Iowa 1983)) (upholding validity of "substantial limitation" regulation, Iowa Admin Code r. 161-8.26(1), promulgated under Iowa Code § 216.2(5), which defines "disability" as "the physical or mental condition of a person which constitutes a substantial disability"); **Kansas** (Kan. Stat. Ann. § 44-1002(j)); **Kentucky** (Ky. Rev. Stat. Ann. § 344.010(4)); **Louisiana** (La. Rev. Stat. Ann. § 46:2253(1)); **Maryland** (Md. Regs. Code tit. 14 § 03.02.02(B)(6)(b)) ("substantial limitation" requirement under regulation interpreting Md. Ann. Code art. 49B, § 15, which defines disability as "any physical disability, infirmity, malformation or disfigurement"); **Massachusetts** (Mass. Gen. Laws ch. 151B, § 1(17)); **Michigan** (Mich. Comp. Laws § 37.1103(d)(i)(A)); **Minnesota** (Minn. Stat. § 363A.03(Subd. 12)); **Missouri** (Mo. Rev. Stat. § 213.010(4)); **Montana** (Mont. Code Ann. § 49-2-101(19)(a)); **Nebraska** (Neb. Rev. Stat. § 48-1102(9)); **Nevada** (Nev. Rev. Stat.

of "disability" similar to Maine's and, like Maine, have set forth the "substantial limitation" requirement in an interpretive regulation."[13] The Supreme Court in one such state, Iowa, has upheld the validity of the "substantial limitation" regulation as a reasonable interpretation of the statute.[14] As with Maine's statutory definition of disability, the Iowa statute contains the term "substantial disability," which provides a clear textual basis for upholding the validity of the interpretive regulation's "substantial limitation" requirement.[15]

The majority "substantial limitation" requirement is an appropriate standard because it preserves a reasonable balance between an employee's right to non-discriminatory treatment and an employer's right to protect its economic interests. An employer should be free to make legitimate employment decisions regarding an employee who may incidentally have a minor or temporary condition, without fearing exposure to liability.

613.310(1)); **New Hampshire** (N.H. Rev. Stat. Ann. § 354-A:2(IV)); **New Mexico** (N.M. Stat. Ann. § 28-1-2(M)); **North Carolina** (N.C. Gen. Stat. § 168A-3(7a)); **North Dakota** (N.D. Cent. Code. § 14-02.4-02(5)); **Ohio** (Ohio Rev. Code Ann. § 4112.01(13)); **Oklahoma** (Okla. Stat. tit. 25, § 1301(4)); **Oregon** (Or. Rev. Stat. § 659A.100(1)(a)); **Pennsylvania** (43 Pa. Cons. Stat. Ann. § 954(p.1)); **Rhode Island** (R.I. Gen. Laws § 11-24-2.1(b)); **South Carolina** (S.C. Code Ann. § 1-13-80(N)); **South Dakota** (S.D. Codified Laws § 20-13-1(4)); **Tennessee** (Tenn. Code. Ann. § 4-21-102(9)(A)); **Texas** (Tex. Lab. § 21.002(6)); **Utah** (Utah Code Ann. § 34A-5-102(5)); **Vermont** (Vt. Stat. Ann. tit. 21, § 495d(5)); **Virginia** (Va. Code Ann. § 51.5-3); **Washington** (*Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 23 P.3d 440, 453 (2001) (requiring "substantial limitation" for reasonable accommodation claims under state's anti-discrimination statute, Wash. Rev. Code § 49.60.040, which does not define "disability"); **West Virginia** (W. Va. Code § 5-11-3(m)); **Wisconsin** (*City of La Crosse Police and Fire Comm'n v. Labor and Ind. Review Comm'n*, 139 Wis.2d 740, 407 N.W.2d 510, 518 (1987) (interpreting "substantial limitation" requirement under Wis. Stat. § 111.32(8), which defines "disability" as "an impairment which makes achievement unusually difficult"); **Wyoming** (Wy. Rules and Regulations Emp. LS Ch 10 § 3) (requiring federal "substantial limitation" standard under Wyo. Stat. Ann. § 27-9-105, which does not define "disability").

Moreover, two states have not enacted their own disability anti-discrimination employment laws and are therefore subject to the ADA's "substantial limitation" requirement: **Alabama** (no state disability law); **Mississippi** (Miss. Code Ann. § 43-6-15) (no state anti-discrimination employment law for private employees).

[13] The three other states with "substantial limitation" regulations are**: Iowa** (*Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d at 476-77) (upholding validity of "substantial limitation" regulation, Iowa Admin Code r. 161-8.26(1), promulgated under Iowa Code § 216.2(5), which defines "disability" as "the physical or mental condition of a person which constitutes a substantial disability"); **Maryland** (Md. Regs. Code tit. 14 § 03.02.02(B)(6)(b)) ("substantial limitation" requirement provided in regulation interpreting Md. Ann. Code art. 49B, § 15, which defines disability as "any physical disability, infirmity, malformation or disfigurement"); and **Wyoming** (Wy. Rules and Regulations Emp. LS Ch 10 § 3) (requiring "substantial limitation" standard under Wyo. Stat. Ann. § 27-9-105, which does not define "disability").

[14] S*ommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d at 476-77.

[15] *See* Iowa Code § 216.2(5) (defining "disability" as "the physical or mental condition of a person which constitutes a substantial disability").

Conversely, a decision rejecting the "substantial limitation" requirement would relegate Maine to a minority of only five states that depart, in whole or in part, from the federal standard.[16] Such a result would contribute to an already unwelcoming business climate in Maine, where employers would be subject to a broader and less predictable definition of disability than in most other jurisdictions. Multi-state businesses in particular would be subject to different and inconsistent state laws that affect their ability to adhere to centralized and uniform company policy and make legitimate employment decisions with predictable results. The potential confusion is compounded by the fact that employees "may also telecommute or cross state lines to go to the workplace." Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case Under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation,* 53 Drake L. Rev. 359, 417 (2005). The increasingly inter-state nature of the modern employment relationship, in turn, creates uncertainty as to which state's conflicting anti-discrimination law may apply to a particular employment decision. Multi-state businesses with employees in Maine would

[16] These five jurisdictions are: **California** (Cal. Gov't. Code § 12926.1(c) (requiring "limitation" on a major life activity but not "substantial" limitation); **Connecticut** (*Christophe v. People's Bank*, 2003 WL 1993503, (Ct. Super. Feb. 20, 2003), at *4 ("[u]nlike the ADA, the Connecticut statute[,Conn. Gen. Stat. § 46a-51(15),] does not define a disability in terms of whether it substantially limits a major life activity"); **Illinois**; (*Lake Point Tower, Ltd. v. Illinois Human Rights Comm'n*, 291 Ill.App.3d 897, 684 N.E.2d 948, 953 (1997) ("[r]ecognizing that the [federal] definition of handicap was too restrictive, the legislature enacted the Human Rights Act[, 775 Ill. Comp. Stat. 5/1-103(I),] . . . [which] eliminated the reference to limitations on major life activities.")); **New Jersey** (*Failla v. City of Passaic*, 146 F.3d 149, 154 (3d. Cir. 1998) ("[i]n contrast to the ADA, [New Jersey's] definition of 'handicapped'[N.J. Stat. Ann. § 10:5-5(q)] does not incorporate the requirement that the condition result in a substantial limitation on a major life activity"); **New York** (*Reeves v. Johnson Controls World Serv., Inc.*, 140 F.3d 144, 155 (2d Cir. 1998) ("an individual can be disabled under [New York's anti-discrimination law, N.Y. Exec. Law § 292(21] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit that individual's normal activities").

therefore be exposed to the risk of liability when making employment decisions that are lawful in virtually every other jurisdiction.

Upholding Maine's "substantial limitation" regulation is therefore instrumental in furthering the economically desirable goals of national uniformity and predictability of result in employment matters. "The new nationalization and globalization of the workplace requires greater consistency and predictability on how our laws protecting the workforce are applied." Rosenberg & Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case*, 53 Drake L. Rev. at 419-20. It is inefficient and costly to burden multi-state businesses with competing legal standards that apply to routine employment decisions. "A standard approach would enable businesses to maintain a uniform policy . . . within their operating spheres, which would create predictability in regards to the handling of discrimination policies." *Id*. at 417-18. The "substantial limitation" requirement is therefore a widely embraced standard that allows businesses to make legitimate employment decisions while protecting the rights of the truly disabled.

CONCLUSION

For the foregoing reasons, the Court should hold that Rule 3.02(C)(1) of the Maine Human Rights Commission Employment Regulations is a valid interpretation of the definition of "physical or mental disability" found in 5 M.R.S.A. § 4553(7-A), to which courts applying section 4553(7-A) should defer.

Dated at Portland, Maine this 1st day of July, 2005.

James R. Erwin, Bar No: 1856
Katharine I. Rand, Bar No: 9629

Pierce Atwood LLP
One Monument Square
Portland, Maine 04101
207-791-1100

Philip J. Moss, Bar No: 3404
Eric J. Uhl, Bar No: 7244

Moon, Moss & Shapiro, P.A.
Ten Free Street, P.O. Box 7250
Portland, Maine 04112
207-775-6001

Counsel for Amicus Curiae
Maine State Chamber of Commerce, et al.

CERTIFICATE OF SERVICE

I, James R. Erwin, hereby certify that on this day I made service of two copies of the Brief of Amicus Curiae by first-class mail, postage prepaid to the following:

Curtis Webber, Esquire
Linnell, Choate & Webber, LLP
83 Pleasant Street
P.O. Box 190
Auburn, ME 04212-0190

Mark V. Franco, Esquire
Thompson & Bowie, LLP
Three Canal Plaza
P.O. Box 4630
Portland, ME 04112

_____

James R. Erwin, Bar No: 1856

Pierce Atwood LLP
One Monument Square
Portland, Maine 04101
207-791-1100

ADDENDUM