Maine Law Review

Volume 59
Number 2 *Symposium: Closing in on Open Science: Trends in Intellectual Property & Scientific Research*

Article 10

June 2007

Defining "Disability" Under the Maine Human Rights Act After Whitney v. Wal-Mart Stores, Inc.

Michael J. Anderson
University of Maine School of Law

DEFINING "DISABILITY" UNDER THE MAINE HUMAN RIGHTS ACT AFTER *WHITNEY V. WAL-MART STORES, INC.*

Michael Anderson

DEFINING "DISABILITY" UNDER THE MAINE HUMAN RIGHTS ACT AFTER *WHITNEY V. WAL-MART STORES, INC.*

Michael Anderson[*]

I. INTRODUCTION

In *Whitney v. Wal-Mart Stores, Inc.*,[1] the Maine Supreme Judicial Court, sitting as the Law Court, was asked to determine whether the Maine Human Rights Act[2] (MHRA) requires plaintiffs alleging disability discrimination to show that their condition substantially limits one or more major life activities.[3] In determining that the MHRA does not require such a showing, the court effectively established that the MHRA was intended to protect a much broader range of medical conditions than its federal counterparts, the Rehabilitation Act of 1973[4] (Rehabilitation Act) and the Americans with Disabilities Act of 1990[5] (ADA).[6] In so doing, the *Whitney* court invalidated a regulation adopted by the Maine Human Rights Commission that had been in place for nearly twenty years.[7] The primary reasoning articulated by the majority in reaching this decision was that the statutory definition of disability within the MHRA is unambiguous and, by its own terms, includes no qualification of substantiality.[8] Two dissents found ambiguity within the statute and called for deference to the Commission's regulation.[9]

This Note considers the history of the MHRA and its construction in both state and federal courts since its promulgation. It looks to the adoption of the Maine Human Rights Commission regulation as a valid and reasonable interpretation of the MRHA and briefly explores the rationale underlying that interpretation. Additionally, it examines the rules of statutory construction practiced by Maine courts and identifies the appropriate deference granted to administrative regulations during the course of such construction. This Note concludes that the Law Court erred when it neglected to recognize the ambiguity within the MHRA's definition of "disability," and thus failed to give the proper deference to the Commission's interpretation of the statute. Furthermore, this Note argues that, by declaring the regulation void on account of the overwhelming clarity of the statute, the *Whitney* court stripped employers, practitioners, and courts of any true guidance on what constitutes a disability under

---

* J.D. Candidate, 2008, University of Maine School of Law.

1. 2006 ME 37, 895 A.2d 309.

2. ME. REV. STAT. ANN. tit. 5 §§ 4551-4634 (West 2005).

3. *Whitney*, 2006 ME 37, ¶ 1, 895 A.2d 309 at 310.

4. 29 U.S.C. §§ 701-797 (2000).

5. 42 U.S.C. §§ 12101-12213 (2000).

6. *Whitney*, 2006 ME 37, ¶ 31, 895 A.2d at 316.

7. *Id.* ¶ 33, 895 A.2d at 316 (invalidating Me. Human Rights Comm'n 11 CMR 94 348 003-2 § 3.02(C)(1) (1999)).

8. *Id.* ¶ 28, 895 A.2d at 316.

9. *Id.* ¶¶ 41, 49, 895 A.2d at 318, 319.

Maine law, invalidating years of precedent in the process. Finally, this Note recommends that the Maine Legislature address this lack of guidance by clarifying the statutory definition of disability under the MHRA.

II. THE MAINE HUMAN RIGHTS ACT

A. Statutory History

The MHRA was enacted in 1971 "to prevent discrimination in employment, housing or access to public accommodations on account of race, color, religion, ancestry or national origin."[10] In its original form, the MHRA did not protect against discrimination on the basis of physical or mental disability. In 1973, Congress passed the Rehabilitation Act,[11] which made it unlawful for any federally funded program to discriminate against any "otherwise qualified handicapped individual."[12] That same year, "physical handicap" was added as an impermissible basis for discrimination under the MHRA.[13] In 1975, the Maine Legislature added "mental handicap" to the MHRA[14] and included a definition of "physical or mental handicap."[15] While the Rehabilitation Act defined a "handicapped individual" as a person who "has a physical or mental impairment which substantially limits one or more . . . major life activities,"[16] the MHRA definition stated that:

> "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 also includes 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, vocational rehabilitation or related services.[17]

The original drafting of the MHRA definition included a non-exclusive list of examples of "physical or mental handicap," stating that the term "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."[18] The drafting committee struck this language, however, explaining that "[i]t . . . felt unnecessary to spell out some of the conditions and not all of them."[19]

---

10. P.L. 1971, ch. 501, § 1 (amended 1973).

11. An Act to Replace the Vocational Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973).

12. *Id.* § 504.

13. P.L. 1973, ch. 705, § 1 (amended 1975). No definition of "physical handicap" was included within the MHRA at this time. *Id.*

14. P.L. 1975, ch. 358, § 1 (amended 1991).

15. *Id.* § 2.

16. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(A), 88 Stat. 1617 (1974) (codified as amended at 29 U.S.C. § 705(20)(B) (2000)).

17. P.L. 1975, ch. 358, § 2 (amended 1991).

18. L.D. 1791, § 2 (107th Legis. 1975).

19. Comm. Amendment A to L.D. 1791, No. H-351 (107th Legis. 1975).

In 1990, Congress passed the ADA,[20] which prohibits, *inter alia*, certain private employers[21] from discriminating on the basis of disability with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[22] The ADA definition of disability is virtually identical to that of the Rehabilitation Act, specifically indicating that a disability means "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[23] Despite the ADA's definition of "disability," the Maine Legislature did not incorporate it into the MHRA. In fact, the MHRA definition of "physical or mental handicap" was amended only once, in 1991,[24] not to make substantive changes to the provision itself but rather to replace the word "handicap" with "disability."[25]

The importance of identifying the scope of the MHRA's definition of "physical or mental disability" becomes clear in light of the procedure required for proving a claim under the statute. The MHRA establishes that an individual seeking relief for unlawful discrimination must prove by a fair preponderance of the evidence that the alleged unlawful discrimination occurred.[26] In *Maine Human Rights Commission v. City of Auburn*,[27] the Law Court adopted the three-step, burden-shifting analysis set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*[28] as a means of evaluating employment discrimination claims at the summary judgment stage.[29] Under the *McDonnell Douglas* framework, as applied by the court, a plaintiff employee asserting disability discrimination must initially make out a *prima facie* case by proving that "first, she suffers from a [physical or mental] disability; second, she is otherwise qualified, with or without reasonable accommodations, and is able to perform the essential functions of the job; and third, she was adversely treated by the employer based in whole or in part on her disability."[30] The burden then shifts to the employer to articulate a legitimate, non-discriminatory basis for the adverse action.[31] If such a basis is shown, the burden shifts back to the employee to show that the claimed legitimate reason is mere pretext.[32]

---

20. An Act to Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Disability, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2000)).

21. The employment provisions generally apply to employers with fifteen or more employees. 42 U.S.C. § 12111(5)(A) (2000).

22. 42 U.S.C. § 12112(a) (2000).

23. 42 U.S.C. § 12102(2)(A) (2000).

24. P.L. 1991, ch. 99, § 2.

25. *See* L.D. 191, Statement of Fact (115th Legis. 1991) ("This bill does not change the substance of the Maine Human Rights Act, but changes the terminology from handicap to disability."). This amendment also replaced the semicolon after the word "illness," eliminated the word "also" and twice replaced the word "which" with "that." *Id.* § 2.

26. ME. REV. STAT. ANN. tit. 5 § 4631 (West 2005).

27. 408 A.2d 1253 (Me. 1979).

28. 411 U.S. 792 (1973).

29. *City of Auburn*, 408 A.2d at 1261-62.

30. Doyle v. Dep't of Human Servs., 2003 ME 61, ¶ 14, 824 A.2d 48, 54.

31. *City of Auburn*, 408 A.2d at 1262. For a discussion of affirmative defenses prescribed by the MHRA, see *infra* note 45 and accompanying text.

32. *City of Auburn*, 408 A.2d at 1262.

Thus, as an initial matter, a plaintiff alleging disability discrimination under the MHRA must first demonstrate that he or she has a "physical or mental disability." Although such a showing is only one of several hurdles a plaintiff must overcome in bringing a successful claim, its importance cannot be overstated. In this context, the consequences of determining the scope of the statutory definition become clear: the broader the reading, the more citizens statutorily defined as "disabled," and thus the greater the likelihood of a claimant moving beyond summary judgment.

B. The Maine Human Rights Commission's Interpretation of "Disability"

Upon enacting the MHRA, the Legislature also established the Maine Human Rights Commission, which was given "the duty of investigating all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity."[33] Among the powers and duties granted by the Legislature to the Commission is the power to "adopt, amend and rescind rules and regulations to effectuate this Act" and to do "everything reasonably necessary to perform its duties under this Act."[34] Pursuant to this duty, the Commission adopted the Employment Regulations of the Maine Human Rights Commission,[35] which were intended to "inform employers, labor organizations, employment agencies, and other interested parties of the Commission's interpretation of the Maine Human Rights Act."[36] Included within these regulations was the agency's definition of "physical or mental disability":

> 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.[37]

This regulation effectively adopted the definition of physical and mental disability utilized by both the Rehabilitation Act and the ADA.[38] An internal memorandum of the Commission indicates that this language was proposed and adopted in response to the overly broad language of the MHRA.[39] In a written statement prepared following

---

33. P.L. 1971, ch. 501, § 1 (codified as amended at ME. REV. STAT. ANN. tit. 5 §§ 4551-4634 (West 2005)).

34. ME. REV. STAT. ANN. tit. 5 § 4566(7), (12) (West 2005). The Commission also has the duty of investigating claims of discrimination made by either "public agencies" or "private persons," hold hearings and take testimony, issue subpoenas, create "local or statewide advisory agencies," report to the Legislature and Governor at least once a year describing their activities and to make recommendations "for further legislation or executive action." *Id.* § 4566.

35. Me. Human Rights Comm'n 11 CMR 94 348.

36. *Id.* § 3.01(A).

37. *Id.* § 3.02(C)(1).

38. *See* 29 U.S.C. § 705(20)(B) (2000) (Rehabilitation Act); 42 U.S.C. § 12102(2)(a) (2000) (ADA). *See also supra* notes 16-23 and accompanying text.

39. Memorandum of John E. Carnes, Counsel, Maine Human Rights Commission (Sept. 19, 1984). The memo indicates that "[d]uring the past couple of years, Human Rights Commissioners, staff members, and several legislators have expressed concern that the statutory reference to 'any disability . . . caused by bodily injury, accident, disease . . . or illness,' is so broad and general that it could be interpreted to include conditions which are not serious and of only temporary duration." *Id.* at 2.

a public hearing on the regulation, the Commission indicated that the definition was an "effort to clarify its interpretation of the phrase 'physical or mental handicap' as referring to serious impairments of more than temporary duration."[40]

C. Judicial Interpretation of "Disability"

Prior to the *Whitney* decision, the Law Court had considered the scope of the MHRA definition of "disability" several times, either directly or indirectly. In *Maine Human Rights Commission v. Canadian Pacific Ltd.*,[41] the court considered the appeal of a decision by the Superior Court dismissing certain railroad employees' complaints of unlawful disability discrimination under the MHRA.[42] One employee had been fired based on the employer's concern that his asymptomatic heart murmur could lead to a risk of sudden heart failure.[43] The defendant employer did not argue that the employee's condition failed to meet the statutory definition of "physical or mental handicap" under the MHRA,[44] but rather relied on several affirmative defenses that, if successful, would have rendered the termination non-discriminatory.[45] As a result, the court did not expressly consider on appeal whether or not the asymptomatic condition constituted a physical handicap under the statute.[46] In rejecting the employer's affirmative defenses, however, the court stated that, as a result of the employee's "diagnosed handicap," his termination was discriminatory under the MHRA.[47]

Three years later, in *Rozanski v. A-P-A Transport, Inc.*,[48] a defendant trucking company appealed a ruling from the Superior Court that two of its former employees were "handicapped" under the MHRA.[49] Both employees had been fired after physical examinations, taken as a condition of their employment, revealed latent lower back defects.[50] The court held that the employees' defects "fit within the express terms of [the MHRA's definition of physical or mental disability] since the asymptomatic condition of each of the men constitutes a 'malformation' of the spine" and concluded that their "latent back conditions, which were the sole ground for their termination, are

---

40. Comments and Responses to Comments on Proposed Rule Defining "Physical or Mental Handicap," Maine Human Rights Commission (Mar. 8, 1985).

41. 458 A.2d 1225 (Me. 1983).

42. *Id.* at 1227.

43. *Id.* at 1229.

44. This case was decided prior to the amendment to the MHRA changing the applicable language from "handicap" to "disability." *See supra* note 25 and accompanying text.

45. *Canadian Pacific Ltd.*, 458 A.2d at 1227. Specifically, the employer relied on two statutorily defined exceptions to demonstrate that the discrimination was not unlawful. *Id.* at 1230. The first such exception, know as the "BFOQ" defense, allows such discrimination when based on a "bona fide occupational qualification." *Id.* (quoting ME. REV. STAT. ANN. tit. 5 § 4572(1) (West 2005)). The second affirmative defense, the "safety" defense, is applicable when an employee's disability renders him unable to perform his or her duties "in a manner which would not endanger the health or safety of others." *Id.* (quoting ME. REV. STAT. ANN. tit. 5 § 4573(4) (West 2005)).

46. The court mentioned only briefly the requirement of establishing a *prima facie* case of discrimination and proceeded directly to the employer's affirmative defenses. *Id.* The statutory definition of "mental or physical handicap" is not discussed in the opinion.

47. *Id.* at 1235.

48. 512 A.2d 335 (Me. 1986).

49. *Id.* at 338.

50. *Id.*

physical handicaps that entitle them to the protection of the [MHRA]."[51] *Rozanski* was decided one year following the promulgation of the Commission's definition of "physical or mental handicap," but did not address the regulation in its decision and did not speak directly to the validity of the "substantially limits" requirement.[52]

Finally, in *Winston v. Maine Technical College System*,[53] the court held that a sexual behavior disorder was not a protected disability under the MHRA.[54] The plaintiff in *Winston* was an instructor at a community college who was dismissed for violating the school's sexual harassment policy by kissing one of his students.[55] Following the termination, the instructor filed suit under the MHRA, claiming that he was fired based on his "mental handicap of sexual addiction."[56] Two experts diagnosed the instructor's sexual addiction as a permanent disorder under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and stated that the condition led to the termination.[57] A third expert testified that the DSM was not applicable to sexual behavior but, in any event, the instructor's behavior was controllable and not compulsive.[58] The Superior Court granted summary judgment to the school on all claims, holding that the claimed disability did not bring the instructor under the protection of the MHRA.[59]

The Law Court affirmed in a unanimous decision, and in addressing whether a "sexual control impulse disorder" constituted a legal disability under the MHRA, Chief Justice Wathen wrote that "[t]he provisions of the MHRA regarding mental disability are very similar to those contained in the [Rehabilitation] Act."[60] The court cited both the MHRA definition of "physical and mental disability" and the corresponding regulation, noting that the Commission had "supplemented" the statutory definition.[61] Based on the similarities between the federal and state statutory schemes, the court stated that "because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA"[62] but found that "a review of federal case laws concerning conditions that constitute a disability provides minimal guidance in determining when it is appropriate to impose categorical limits on the definition of a disabled individual."[63] Citing to specific language within the Rehabilitation Act, the Chief Justice concluded that "[b]ecause the

---

51. *Id.* at 340. At the time of the *Rozanski* decision, the MHRA included within its definition of "physical or mental handicap" any "disability, infirmity, *malformation*, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness." ME. REV. STAT. ANN. tit. 5 § 4553(7-A) (1979) (emphasis added). The term "handicap" was later amended to read "disability." P.L. 1991, ch. 99, § 2.

52. *See generally Rozanski*, 512 A.2d 335.

53. 631 A.2d 70 (Me. 1993).

54. *Id.* at 72.

55. *Id.*

56. *Id.* at 73.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 74.

61. *Id.*

62. *Id.* at 74-75 (citing Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1261 (Me. 1979)).

63. *Id.* at 75.

MHRA was modeled after the [Rehabilitation] Act, and the Act was not intended to protect individuals with sexual behavior disorders, we conclude that plaintiff's condition is not protected under the MHRA as a matter of law."[64]

The Law Court in *Winston* not only recognized the Commission's regulation as a valid supplement to the MHRA,[65] but it reinforced the propriety of looking to federal precedent when interpreting the Act, specifically regarding the scope of the term "disability."[66] Such reasoning has informed the decisions of the overwhelming majority of federal and state courts confronted with interpreting the MHRA.[67] These courts have, as in *Winston*, looked beyond the wording of the MHRA in analyzing claims brought under the statute and found guidance in both federal law and the regulations promulgated by the Commission.

D. Rules of Statutory Construction

When interpreting statutory language, Maine courts utilize a two-step process. The threshold inquiry is a fundamental tenet of statutory construction known as the

---

64. *Id.*

65. *See id.* at 74. In addition to quoting the Commission's definition of "physical or mental handicap," the court also noted, *inter alia*, that the regulations included "emotional illness" within the definition of "mental impairment," and "working" within the definition of "major life activities." *Id.*

66. *See id.* at 74-75.

67. *See, e.g.* Bilodeau v. Mega Industries, 50 F. Supp. 2d 27 (D. Me. 1999). In *Bilodeau*, the court rejected a plaintiff's contention that the MHRA provided broader coverage than the ADA. *Id.* at 32 n.2. Noting that "[n]o other court considering claims under both the ADA and the MHRA has conducted the analysis of whether an individual is disabled separately," the court pointed to the fact that the Law Court recognized the Commission's regulation in *Winston* and subsequently applied the same analysis to both the ADA and MHRA claims in terms of what constituted a disability. *Id. See also* Dudley v. Hannaford Bros. Co., 333 F.3d 299, 312 (1st Cir. 2003) ("It is settled law that the MHRA should be construed and applied along the same contours as the ADA."); Kvorjak v. Maine, 259 F.3d 48, 50 n.1 (1st Cir. 2001) (utilizing identical standards in analyzing a claim brought under the ADA, Rehabilitation Act and the MHRA); Pouliot v. Town of Fairfield, 226 F. Supp. 2d 233, 244 (D. Me. 2002) (holding that because the same analysis applies to both ADA and MHRA, a failure by a plaintiff to show a substantial limitation on a major life activity precluded employment discrimination claims under both statutes); Soileau v. Guilford of Me., Inc., 928 F. Supp. 37, 45 (D. Me. 1996) ("In analyzing the ADA and MHRA, the Court need not continuously distinguish between the two statutes as to their scope and general intent because Maine courts consistently look to federal law in interpreting state anti-discriminatory statutes."); Me. Human Rights Comm'n v. City of Auburn, 408 A.2d at 1261 ("In enacting the Human Rights Act, Maine was legislating against the background of prior federal antidiscrimination statutes . . . and a developing body of case law construing and applying those statutes. . . . [T]he Maine legislature — by adopting provisions that generally track the federal antidiscrimination statutes — intended the courts to look to the federal case law to 'provide significant guidance in the construction of our statute.'" (quoting Me. Human Rights Comm'n v. Local 1361, 383 A.2d 369, 375 (Me. 1978))); Doyle v. Me. Dep't of Human Servs., No. Civ.A. CV-00-239, 2002 WL 1978907, at *4-*6 (Me. Super. Ct., July 10, 2002) (Marden, J.) (finding that plaintiff with substantial portion of her colon removed and who was forced to use a pouch to eliminate waste clearly suffered from a physical impairment but was not "disabled" under the MHRA because she did not meet the requirement of a substantial limitation of a major life activity as set forth in the Commission's regulations); Murphy v. C.N. Brown, Co., No. CV-01-5, 2002 WL 748892, at *2 (Me. Super. Ct., Mar. 22, 2002) (Mead, J.) (recognizing regulatory requirement of substantiality and questioning whether plaintiff's hearing impairment met that standard). *But see* Norton v. Lakeside Family Practice, P.A., 382 F. Supp. 2d 202, 205 n.2 (D. Me. 2005) (noting that the MHRA "has a broader definition of 'physical or mental disability'" than the Rehabilitation Act).

"plain meaning" rule: if the meaning of the language is plain, the court must interpret the statute to mean exactly what it says.[68] As a matter of policy, "when the language chosen by the Legislature is clear and without ambiguity, it is not the role of the court to look behind those clear words in order to ascertain what the court may conclude was the Legislature's intent."[69] Such a finding of statutory clarity ends the inquiry.[70] In searching for a plain meaning, "[t]he statutory scheme from which the language arises must be interpreted to achieve a harmonious outcome" and the court "will not construe statutory language to effect absurd, illogical, or inconsistent results."[71]

If the statutory language is ambiguous, however, the court will "look beyond it to the legislative history or other external indicia of legislative intent."[72] Ambiguous language is defined as language that is "reasonably susceptible of different interpretations."[73] In looking beyond the language of the statute, Maine courts have granted significant deference to an agency's interpretation of a statute that it administers when that interpretation "is both reasonable and within the agency's own expertise."[74] Indeed, the Law Court, in specifically addressing the Maine Human Rights Commission regulations, indicated that "[a]dministrative interpretations by our Commission . . . are entitled to great deference, especially where that interpretation involves a reasonably 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion.'"[75]

III. THE *WHITNEY* DECISION

A. Factual Background

Stanley Whitney was hired by Wal-Mart in 1998 at one of its store locations in Florida.[76] In 2001, Whitney accepted a salaried position in North Windham, Maine, as tire-lube express department manager, where he worked an average of six days and over seventy hours per week.[77] Soon thereafter, Whitney was diagnosed with high blood pressure and possible heart disease, for which he was granted a two-month leave

---

68. *See* Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 18, 745 A.2d 387, 392.

69. *Id.*

70. Botting v. Dep't of Behavioral & Developmental Servs., 2003 ME 152, ¶ 10, 838 A.2d 1168, 1171 ("If the plain meaning of the statute is clear, we need investigate no further.").

71. Coker v. City of Lewiston, 1998 ME 93, ¶ 7, 710 A.2d 909, 910.

72. Irving Pulp & Paper, Ltd. v. State Tax Assessor, 2005 ME 96, ¶ 8, 879 A.2d 15, 18.

73. Competitive Energy Servs. v. Pub. Util. Comm'n, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046 (quoting Portland Valve, Inc. v. Rockwood Sys. Corp., 460 A.2d 1383, 1387 (Me. 1983)).

74. *Botting*, 2003 ME 152, ¶ 9, 838 A.2d at 1171. *See also Competitive Energy*, 2003 ME 12, ¶ 15, 818 A.2d at 1046 (holding that agency interpretations of ambiguous statutes are "reviewed only to 'determine whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record.'" (quoting Guilford Transp. Indus. v. Pub. Util. Comm'n, 2000 ME 31, ¶ 6, 746 A.2d 910, 912)); Conservation Land Found. v. Dep't of Envtl. Prot., 2003 ME 62, ¶ 23, 823 A.2d 551, 559 ("[I]f the Legislature's intent is not expressed unambiguously and the interpretation of the statutory scheme involves issues that are within the scope of the agency's expertise, then the agency's interpretation must be given special deference.").

75. Me. Human Rights Comm'n v. Local 1361, 383 A.2d 369, 378 (Me. 1978) (quoting Norwegian Nitrogen Prods. v. United States, 288 U.S. 294, 315 (1933)) (citations omitted).

76. Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, ¶ 2, 895 A.2d 309, 310.

77. *Id.*

of absence so that further tests could be performed.[78] Whitney returned to work with a note from his physician's assistant indicating that he should not, as a result of his condition, be allowed to work more than eight hours per day and forty hours per week with two consecutive days off, a request he later amended to nine hours per day with two consecutive days off and no more than forty-five hours per week.[79]

Whitney's supervisors informed him that the minimum hours expected of his position as tire-lube manager were forty-eight to fifty-two hours per week, and that if he could not meet those requirements he would have to transfer to another non-salaried department manager position that would accommodate his requested reduction in hours.[80] After applying unsuccessfully for several of these positions, Whitney accepted a job as a non-salaried department manager in a Wal-Mart store in Scarborough, Maine.[81]

B. Procedural Background

In January of 2004, Whitney filed a complaint in Superior Court alleging disability discrimination by Wal-Mart in violation of the MHRA.[82] He sought injunctive relief in the form of reinstatement as tire-lube express manager at the North Windham location as well as damages.[83] Wal-Mart, asserting diversity of citizenship, removed the case to the United States District Court for the District of Maine.[84]

Wal-Mart moved for summary judgment on the grounds that Whitney's heart condition did not meet the statutory definition of a disability.[85] A federal magistrate judge issued a recommended decision that the motion be granted as to all counts.[86] The magistrate based her decision on the disability claim on the fact that the MHRA, like the ADA, required a showing of a "substantial limitation in a major life activity" in order to prove that the claimant was disabled under the terms of the statute.[87] The

---

78. *Id.* ¶ 3, 895 A.2d at 310-11. According to the affidavit of the cardiologist who was treating Mr. Whitney at the time, these tests revealed "the presence of coronary heart disease." Affidavit of Joseph N. Wight, Jr., M.D. at 1, Whitney v. Wal-Mart Stores, Inc., 370 F. Supp. 2d 323 (D. Me. 2005) (No. Civ. 04-38-P-H).

79. *Whitney*, 2006 ME 37, ¶ 3, 895 A.2d at 311.

80. *Id.* ¶ 4, 895 A.2d at 311.

81. *Id.* Prior to accepting the job in Scarborough, Whitney had informed his supervisors through his attorney that he felt he had been "forced out of his job as TLE Manager in violation of laws forbidding discrimination against persons with disabilities." *Whitney*, 370 F. Supp. 2d at 326. In addition, he had asked, in a letter to a supervisor, to remain in his position under the reduced hours, asserting that "TLE managers can, with few exceptions, complete their job duties in 40-45 hours per week." *Id.*

82. *Whitney*, 2006 ME 37, ¶ 5, 895 A.2d at 311. Whitney also alleged age discrimination and breach of his employment contract. *Id.* Those claims were not implicated by the questions certified to the Law Court and are not relevant to the subject matter of this Note.

83. *Id.*

84. *Id.*

85. *Id.* ¶ 6, 895 A.2d at 311.

86. Whitney v. Wal-Mart Stores, Inc., No. Civ. 04-38-P-H, 2004 WL 2792297, at *1 (D. Me. Dec. 3, 2004).

87. *Id.* at *6. The Magistrate, while conceding that the MHRA had a "curious jurisprudential history," asserted that "if there is anything consistent about its application in this court, and in the courts of Maine, it is that the MHRA will be construed consistently with the ADA," compelling an analysis of Whitney's claim under the MHRA "in a manner consistent with how that claim would be analyzed under the ADA." *Id.* at *8.

Magistrate concluded that while Whitney had established that he had a "physical impairment" that limited him to forty-five hours of work a week, such a restriction "[did] not amount to a substantial limitation."[88] Rather than accepting the recommended decision, the district court certified two questions for interpretation by the Law Court.[89] These questions, as stated by the district court, were:

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?[90]

C. Arguments on the Certified Question

Whitney made several arguments that his heart condition was indeed a disability under the MHRA and that the Commission's regulation was void. First, he asserted that although both federal and state courts had looked to the ADA as a means of interpreting the MHRA, such an endeavor is only appropriate "when the language of the Maine and federal statutes being construed is identical or virtually so."[91] Whitney argued that, unlike the ADA, the MHRA contained no requirement of a substantial limitation on a major life activity, and thus "reliance on judicial quotations endorsing parallel construction of the statutes is therefore completely misplaced."[92]

In addition, Whitney called attention to both the *Rozanski* and *Canadian Pacific* decisions, arguing that the Law Court had in both cases considered the scope of the definition of disability under the MHRA and had reached results inconsistent with the ADA.[93] He asserted that because these previous interpretations of the MHRA by the court departed from the ADA on the definition of disability, the statute clearly did not require a showing that the disability "substantially limits one or more of such person's major life activities."[94] Specifically, Whitney argued that in both cases the plaintiffs had asymptomatic conditions of which they were unaware and were thus obviously "not limited in performing a major life activity."[95]

Whitney also pointed to two significant occasions when the Maine Legislature passed on an opportunity to adopt a more stringent definition of disability that would parallel federal law.[96] In the first instance, the Legislature amended the MHRA to include a definition for "physical or mental handicap"[97] choosing not to include the

88. *Id.* at *8.

89. Whitney v. Wal-Mart Stores, Inc., 370 F. Supp. 2d 323, 327 (D. Me. 2005).

90. *Id.*

91. Brief for Plaintiff at 4, Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, 895 A.2d 309 (No. Fed. 05-172) (citing Me. Human Rights Comm'n v. Local 1361, 383 A.2d 369, 375 (Me. 1978) ("[D]ecisions by federal courts interpreting the federal statutory *equivalents* of the Maine Act provide significant guidance in the construction of our statute.") (emphasis added)).

92. *Id.* at 4.

93. *Id.* at 4-5.

94. *Id.* at 7.

95. *Id.* at 5-6, 6 n.5.

96. *Id.* at 6-7.

97. P.L. 1975, ch. 358, § 1.

"substantially limits" language adopted by the Rehabilitation Act.[98] Similarly, Whitney pointed to the 1991 amendment to the definition of "physical disability"[99] where, again, the Legislature failed to adopt the "substantially limits" requirement that had since been implemented in the ADA.[100] He asserted that, based on these instances, "it would represent an encroachment on the powers of the legislature for this court to read into the statute restrictive language which the legislature itself has repeatedly declined to enact."[101]

Finally, Whitney argued that the regulation adopted by the Commission,[102] which incorporated the federal substantiality requirement, was void.[103] He asserted that deference granted to administrative agencies is lessened when the agency in question is merely offering an interpretation of a statute as opposed to exercising rule making authority as prescribed by the legislature.[104] Whitney further contended that the Commission was not empowered to "interpret" the MHRA by adopting restrictive regulations that directly contradict the clear wording of the statute.[105]

In response, Wal-Mart argued that the MHRA definition of "physical or mental disability" did in fact require a showing of a substantial limitation on a major life activity, consistent with federal law.[106] First, Wal-Mart asserted that because the MHRA's definition of "physical or mental disability" includes "the physical . . . condition of a person that constitutes a *substantial* disability as determined by a physician," a requirement of substantiality must be applied to the entire definition.[107] Wal-Mart argued that any other reading would create a situation in which those employees who sought a determination from a physician would need to prove that their disabilities were substantial while all others would not.[108] Wal-Mart asserted that such a result was illogical and, at the very least, that this "apparent inconsistency creates an ambiguity within the statute."[109] Based on that ambiguity, Wal-Mart concluded that deference to the Commission's interpretation of the statue was proper "as long as the agency's construction is reasonable."[110]

Turning to the regulation itself, Wal-Mart noted that the Commission had the statutory authority to implement the MHRA,[111] and, in adopting the more restrictive

---

98. *See supra* notes 10-16 and accompanying text.

99. P.L. 1991, ch. 99, § 2.

100. *See supra* notes 20-25 and accompanying text.

101. Brief for Plaintiff, *supra* note 91, at 7.

102. Me. Human Rights Comm'n 11 CMR 94 348 003-2 § 3.02(C)(1) (1999).

103. Brief for Plaintiff, *supra* note 91, at 12-14.

104. *Id.* at 12 n.14 (citing U.S. v. Mead Corp., 533 U.S. 213, 232 (2001)). The regulations expressly indicate that they are "the Commission's interpretation of the Maine Human Rights Act." Me. Human Rights Comm'n 11 CMR 94 348 003-1 § 3.01(A) (1999).

105. Brief for Plaintiff, *supra* note 91, at 12 (citing Joyce v. Webber, 157 Me. 234, 238, 170 A.2d 705, 708 (1957)).

106. Brief for Defendant, Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, 895 A.2d 309 (No. Fed. 05-172).

107. *Id.* at 10-11 (citing ME. REV. STAT. ANN. § 4553(7-A) (2002) (emphasis added)).

108. *Id.* at 11.

109. *Id.*

110. *Id.* at 15-16 (quoting Conservation Law Found., Inc. v. Dep't of Envtl. Protection, 2003 ME 62, ¶ 23, 823 A.2d 551, 559).

111. *Id.* at 16 (citing ME. REV. STAT. ANN. tit. 5 § 4566 (West 2005)).

definition of disability, was simply attempting to reflect legislative intent that the statute provide relief to "those individuals affected by substantial physical infirmities as opposed to those experiencing temporary or insignificant impairments."[112] Wal-Mart further asserted that failure by the Legislature to amend or clarify the statute at any time following the enactment of the regulation represented acquiescence rather than rejection of the Commission's definition.[113] Finally, Wal-Mart argued that the regulation was a reasonable interpretation of the statute in light of the "practical impact" of the construction set forth by the plaintiff.[114] Specifically, Wal-Mart contended that under such a reading, "the vast majority of individuals would belong to the protected class" and that the MHRA "was not designed to afford protection to every individual who might experience some level of mental or physical infirmity."[115]

D. The Decision of the Law Court

A majority of the Law Court rejected Wal-Mart's assertion that the MHRA required a showing of a "substantial limitation on a major life activity," thereby invalidating the Commission regulation.[116] The majority stated that the two relevant amendments to the MHRA definition of "physical or mental impairment" without incorporation of the federal standard were "strongly probative of legislative rejection, not adoption, of the restrictive language."[117] In dismissing Wal-Mart's argument of legislative acquiescence, the court held that "[n]othing in the legislative history, or anywhere else, supports that view."[118] The majority stated that its decision in *Rozanski* instructed "that 'latent' conditions are protected under the [MHRA] definition," a holding that "necessarily rejects the 'substantially limits' qualification to the definition of disability."[119]

In addition, the majority found that no ambiguity existed within the MHRA definition of disability.[120] Asserting that "[i]f, and only if, a statute is ambiguous do we look to extrinsic sources like agency interpretation or legislative history to assist in interpreting ambiguous terms,"[121] the court held that "[a]n agency cannot, by regulation, create an ambiguity in interpretation of a statute that does not otherwise exist."[122] Furthermore, the majority rejected Wal-Mart's argument that the words "substantial disability" in that statute applied to the entire definition, instead finding that a plain reading of the statute revealed "three categories of covered

---

112. *Id.* at 18.

113. *Id.* at 21.

114. *Id.* at 23.

115. *Id.*

116. Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, ¶ 33, 895 A.2d 309, 316.

117. *Id.* ¶ 15, 895 A.2d at 313.

118. *Id.* ¶ 17, 895 A.2d at 313.

119. *Id.* ¶ 21, 895 A.2d at 314. The court explained that because the *Rozanski* interpretation of the MHRA governed when the Legislature amended the definition of disability in 1991, failure to amend the statute at that time to include the restrictive "substantially limits" language could not result in acquiescence of the agency regulation. *Id.*

120. *Id.* ¶ 26, 895 A.2d at 315.

121. *Id.* ¶ 22, 895 A.2d at 315 (citing Competitive Energy Servs., LLC v. Pub. Utils. Comm'n, 2003 ME 12, ¶15, 818 A.2d 1039, 1046).

122. *Id.* ¶ 23, 895 A.2d at 315.

conditions."[123] Recognizing that "it is possible for an individual to have a condition that meets all three categories," the majority clarified that, under its holding in *Rozanski*, "meeting all of them is not a prerequisite for coverage."[124]

Three justices in two dissents attacked the majority holding that the statutory definition of "disability" was unambiguous.[125] First, Justice Clifford endorsed Wal-Mart's reading of the definition, stating that "[i]f that language of the statute describing 'substantial disability' is not part of the required definition of physical disability, then the 'substantial disability' phrase of the statute is rendered without meaning."[126] Given this ambiguity within the definition, Justice Clifford asserted that the court must look beyond its plain language, beginning with the Commission's regulation.[127] In doing so, he stated that the court must review the agency's interpretation for reasonableness, and uphold it "unless the statute plainly compels a contrary result."[128] Justice Clifford asserted that the interpretation was reasonable, particularly in light of the broad reading given the statute by the majority, which "renders [it] virtually unlimited in scope, and makes it applicable to even the most minor of disabilities."[129] He found it unlikely that the Legislature "intended that the statute make our courts accessible on the grounds of disability discrimination when alleged ailments are so very minor or trivial."[130] Accepting Wal-Mart's theory of legislative acquiescence, Justice Clifford found that "it is more likely that the Legislature recognized that [the regulation] . . . contained clear substantial limitation language and that there was no need to incorporate the same language into [the MHRA] itself."[131]

Justice Levy, in a separate dissent, remarked that the statute was far from "a model of legislative clarity."[132] He was particularly concerned with the categorical interpretation given the definition by the majority, stating that "[t]here is no historical

---

123. *Id.* ¶ 24, 895 A.2d at 315. The court elaborated:

> Under the first category, a person is covered if he or she has "any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness." The second category is "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 . . . ." The third category is "any other health or sensory impairment that requires special education, vocational rehabilitation or related services."

Id. (citations omitted).

124. *Id.* ¶ 25, 895 A.2d at 315.

125. Justice Clifford wrote one dissent, joined by Chief Justice Saufley and Justice Levy. *Id.* ¶¶ 34-35, 895 A.2d at 316-18. Justice Levy wrote a second dissent, joined by Chief Justice Saufley. *Id.* ¶¶ 46-49, 895 A.2d at 318-19.

126. *Id.* ¶ 36, 895 A.2d at 317 (Clifford, J., dissenting).

127. *Id.* ¶ 37, 895 A.2d at 317.

128. *Id.* ¶ 40, 895 A.2d at 317 (citing Competitive Energy Servs., LLC v. Pub. Utils. Comm'n, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046).

129. *Id.* ¶ 42, 895 A.2d at 318.

130. *Id.*

131. *Id.* ¶ 43, 895 A.2d at 318.

132. *Id.* ¶ 46, 895 A.2d at 318-19 (Levy, J., dissenting). Justice Levy further describes the definition as "a single, seventy-seven word run-on sentence that contains thirteen commas and employs the disjunctive 'or' eight times." *Id.*

evidence that the Legislature intended to create not one but three separate definitions for the term 'physical or mental disability.'"[133]

IV. CRITIQUE AND CONSEQUENCES OF *WHITNEY*

As the dissents in *Whitney* noted, the majority erred when it failed to recognize the ambiguity within the MHRA definition of "physical or mental disability." Indeed, the categorical reading given the statute by the court further highlighted rather than alleviated this ambiguity. In attempting to ascertain the "plain meaning" of the definition, the court found separate applicable categories of disabilities protected under the statute, each of seemingly distinct levels of severity. The first such category, "*any disability*, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness," when read literally, is a broad and expansive description that could arguably apply to most individuals at some point.[134] The second category, specifically "the physical or mental condition of a person that constitutes *a substantial disability*," as determined by a medical professional, imposes a much more stringent standard that almost certainly applies to a much more finite group and would automatically warrant inclusion within the first category. Such a reading renders the requirement of substantiality, a separate category according to the *Whitney* majority, completely superfluous.[135] Courts have been loath to interpret statutes as containing such extraneous language.[136]

Furthermore, a reading into the definition of distinct categories of disability would seem to promote inconsistency in the application of the Act. Thus, as Wal-Mart argued, a plaintiff who has sought a determination of his or her condition by a physician would need to meet the requirement of substantiality while others simply would need to show "any disability, infirmity, malformation disfigurement, congenital defect or mental condition."[137] Thus it would not be inconceivable, under the majority's reading, that two plaintiffs with identical conditions would encounter different results at the summary judgment stage simply because one sought a

---

133. *Id.* ¶ 48, 895 A.2d at 319.

134. *See* Brief of Amicus Curiae for Maine State Chamber of Commerce et al. at 10, Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, 895 A.2d 309 (No. Fed. 05-172) ("[W]ithout 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.").

135. Magistrate Judge Kravchuk, in recommending summary judgment be granted to Wal-Mart, echoed this very concern, indicating that "the manner in which the Legislature used the language 'and includes' generates ambiguity as to whether the Legislature perhaps intended the MHRA to pertain only to individuals with a 'substantial disability'" and "if 'physical or mental disability' truly means *any* disability or infirmity without some limitation, then the 'and includes' clause is reduced to a redundancy." Whitney v. Wal-Mart Stores, Inc., No. Civ. 04-38-P-H, 2004 WL 2792297, at *8 n.5 (D. Me. Dec. 3, 2004) (emphasis in original).

136. *See* Frustaci v. City of S. Portland, 2005 ME 101, ¶ 12, 879 A.2d 1001, 1006 ("In the construction of a statute, nothing should be treated as surplusage, if a reasonable interpretation supplying meaning and force is possible.") (quoting Finks v. Me. State Highway Comm'n, 328 A.2d 791, 799 (Me. 1974)); Home Builders Ass'n of Me., Inc., v. Town of Eliot, 2000 ME 82, ¶ 8, 750 A.2d 566, 570 ("Surplusage occurs when a construction of one provision of a statute renders another provision unnecessary or without meaning or force.").

137. *See supra* notes 107-110 and accompanying text.

physician's diagnosis while the other had not. Protection under the statute should not turn on one's choice to pursue or forgo the opinion of a medical professional. An overall requirement of substantiality throughout the statutory definition eliminates such an inconsistency and results in an even-handed application of the statute.

Based on this apparent inconsistency within the statutory text, it is at least a reasonable interpretation of the statute that the Legislature intended the requirement of substantiality to apply to the entire statute. State and federal courts,[138] as well as commentators,[139] have interpreted and analyzed the MHRA as requiring a showing of substantial limitation. These interpretations suggest that the language of the statute is, at the very least, "reasonably susceptible to different interpretations," thus meeting the Law Court's own definition of ambiguity.[140]

The *Whitney* majority, in declaring the statute clear and unambiguous and determining that the Legislature envisioned three distinct categories within the definition, not only failed to recognize the ambiguity within the MHRA, but in doing so neglected to grant the appropriate deference to the Maine Human Rights Commission as the agency authorized by statue to implement it. The Legislature authorized the Commission to "adopt, amend and rescind rules to effectuate" the MHRA.[141] Pursuant to this authority, the agency addressed the ambiguity within the definition by placing a meaningful limitation on the types of medical conditions protected under the statute. In borrowing the federal standard for disability, the Commission clarified that the MHRA was not intended to apply to insignificant or temporary ailments but rather was meant to deter unfair treatment of a class that had traditionally been discriminated against and would truly benefit from statutory protection.[142] Such an implementation meets the "reasonableness" standard utilized by Maine courts when reviewing an interpretation of a statute by an agency, like the Commission, that is authorized to administer it.[143]

The reasonableness of the regulation defining "physical or mental disability" becomes more apparent when considered in light of the entire range of powers bestowed upon the Commission by the Legislature. In addition to rulemaking authority, the agency

---

138. *See id.* For additional state and federal cases, see cases cited *supra* note 67 and accompanying text.

139. *See, e.g.*, Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 626 n.205 (2004) (describing the MHRA definition as including a requirement that a disability must be substantial); Richard A. West, *No Plaintiff Left Behind: Liability for Workplace Discrimination and Retaliation in New Jersey*, 28 SETON HALL LEGIS. J. 127, 132-33 (2003) (noting substantiality requirement in MHRA).

140. Competitive Energy Servs. v. Pub. Utils. Comm'n, 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046 (quoting Portland Valve, Inc. v. Rockwood Sys. Corp., 460 A.2d 1383, 1387 (Me. 1983)); *cf.* Lisa Eichhorn, *The* Chevron *Two-Step and the* Toyota *Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 196 (2004) (arguing that the ambiguity of the ADA's definition of "disability" is apparent from the varying conclusions that different courts and even Supreme Court Justices have reached regarding its scope).

141. ME. REV. STAT. ANN. tit. 5 § 4566(7) (West 2005).

142. While the legislative history of the MHRA is sparse, an original drafting of the statutory definition of "physical or mental disability" contained a list of conditions included within its scope, including epilepsy seizure disorders, paralysis, cerebral palsy, autism, and mental retardation. *See supra* note 18 and accompanying text. Such expressly included conditions arguably suggest that the Legislature was contemplating only substantial or seriously debilitating ailments when drafting the definition. *See also supra* Part II.B (discussing the Commission's rationale behind the regulation).

143. *See supra* note 74-75 and accompanying text.

has a general mandate to "investigat[e] all forms of invidious discrimination."[144] Once an individual has approached the Commission with a complaint of discrimination,[145] the agency must, after preliminary settlement efforts,[146] conduct "such preliminary investigation as it deems necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred."[147] If reasonable grounds exist, the Commission can elect to bring a suit against the employer.[148]

Because proof of membership in a protected class is a threshold matter for any plaintiff claiming discrimination under the MHRA,[149] interpretation of the statutory definition of disability is absolutely necessary before any reasonable grounds determination can be made. It is thus reasonable to expect that the Commission, pursuant to the rule-making power granted it by the Legislature, would interpret the statute in a way that clearly defined the scope of protections offered by the MHRA. In pursuit of that end, rather than adopting a novel and untested standard for disability, the agency implemented a definition that, at the time, had been incorporated into federal law for over ten years.[150]

Rather than recognizing the reasonableness and utility of the Commission's regulation, the *Whitney* majority rendered it invalid and put forth its own interpretation of the statute. The court concluded that the Legislature included three distinct definitions of "physical or mental disability" within the MHRA, seemingly without any textual or historical support.[151] In so doing, the court ignored its own well-established and well-practiced canons of statutory interpretation and administrative deference.

---

144. ME. REV. STAT. ANN. tit. 5 § 4566 (West 2005).

145. *See id.* § 4611. The statute provides, in pertinent part, that:

> Any person who believes that the person has been subject to unlawful discrimination, or any employee of the commission, may file a complaint under oath with the commission stating the facts concerning the alleged discrimination, provided that such complaints must be filed with the commission not more than 6 months after the alleged act of unlawful discrimination.

Id.

146. As an initial step, the Commission must "provide an opportunity for the complainant and respondent to resolve the matter by settlement agreement." *Id.* § 4612(1)(A).

147. *Id.* § 4612(1)(B).

148. *Id.* § 4612(4)(A). An individual can bring suit in Superior Court regardless of the Commission's findings. *Id.* § 4621. There is no requirement within the statute that an individual must file a grievance with the Commission before bringing suit, although not doing so typically results in a forfeit of attorney's fees and civil penal or compensatory and punitive damages. *Id.* § 4622.

149. *See* discussion *supra* Part II.B.

150. *See supra* note 16 and accompanying text.

151. Justice Levy, in dissent, stated that:

> The Court interprets this challenging statute categorically, finding within it three separate definitions of "physical or mental disability." It does so in the face of a sentence that does not contain any textual signals, such as numbers, letters, parentheses, semi-colons or other punctuation[] that one might expect to find when a legislative body seeks to establish, in one sentence, three separate definitions for a single term.

Whitney v. Wal-Mart Stores, Inc., 2006 ME 37, ¶ 47, 895 A.2d 309, 319 (Levy, J., dissenting). The dissent goes on to note that "[t]he interpretive history recounted by the Court sheds more fog than light on its subject, except, perhaps, in one respect: There is no historical evidence that the Legislature intended to create not one but three separate definitions for the term 'physical or mental disability.'" *Id.* ¶ 48, 895 A.2d at 319.

The impact of this error is substantial. By declaring the regulation void, the court left a complete dearth of administrative guidance for employers, employees, practitioners, and courts alike regarding what conditions constitute a disability under Maine law. In addition, the *Whitney* decision effectively invalidated years of common law precedent in which both the state and federal courts had interpreted the MHRA coextensively with federal law.[152] In reaching its decision, the majority ignored the vast weight of authority, including its own opinion in *Winston*, which recognized the validity of looking beyond the MHRA to both federal law and the Commission's regulations for assistance in interpreting the scope of the statute. Against this overwhelming precedent, the court offered only its decision in *Rozanski*, an opinion that did not directly consider a requirement of substantiality under the MHRA.[153]

To compound this error, the majority offered no insight into what possible limitations, if any, may fairly be read into the statute. By heralding the plain meaning of the statute while at the same time rendering federal law, common law precedent, and regulatory guidance inapplicable to its interpretation, the court left Maine with a definition of disability that is virtually unlimited in scope. In the final analysis, *Whitney* transformed the MHRA from a statute directed at disadvantaged minorities to one that arguably protects a majority of employees in the state of Maine. Such a result presents a potentially unbearable burden on employers.[154] In addressing these concerns, Justice Alexander, writing for the majority, stated that "legislative policy arguments are more appropriately left to the executive and the Legislature to resolve," and that "[i]f a legislative policy concern is valid, the appropriate body to address that concern is the Maine Legislature, it is not to seek amendment of the law by judicial action."[155]

In light of both the lack of guidance and overly broad scope of the MRHA resulting from the *Whitney* decision, the Maine Legislature should accept this invitation by the Law Court and amend the statutory language of the MHRA to provide a clear and unambiguous definition of "physical or mental disability." Indeed, because the *Whitney* majority held that the statute was unambiguous on its face, any subsequent interpretations of the MHRA by the Commission that do not fully comport with that broad reading will almost certainly be subject to invalidation.[156] As a result, legislative action seems to be the only viable alternative left in the wake of the *Whitney* decision.

V. LEGISLATIVE SOLUTIONS

Legislators have several options to consider in revising the MHRA. First, the Legislature could simply adopt the federal standard as incorporated in both the ADA and the Rehabilitation Act, essentially codifying the Commission's initial regulatory

---

152. *See* cases cited *supra* note 67.

153. *Whitney*, 2006 ME 37, ¶ 36, 895 A.2d at 317 n.3 (Clifford, J., dissenting) (noting that "[o]ur decision in *Rozanski* never considered or addressed either of the issues presented to us by the federal court, and therefore did not 'necessarily reject the 'substantially limits' qualification to the definition of disability,' as the Court states."). *See* discussion Part II.C.

154. *See* Brief of Amicus Curiae for Maine State Chamber of Commerce et al, *supra* note 134, at 24-28.

155. *Whitney*, 2006 ME 37, ¶ 27, 895 A.2d at 315-16.

156. The Commission has adopted changes to its regulatory definition of "physical or mental disability" in light of *Whitney*. *See infra* notes 167-69 and accompanying text.

requirement of a substantial limitation on a major life activity.[157] Such a result would harmonize the amended definition with the overwhelming common law precedent that has interpreted the MHRA in lockstep with the federal statutes.[158] Additionally, that solution would promote continuity for Maine's employers who have relied on such precedent as well as the Commission's regulations in formulating appropriate work-place policies relating to discrimination. Finally, the inclusion of the "substantially limits" requirement would bring Maine into alignment with a large majority of other jurisdictions that have chosen to do the same.[159] However, criticism has abounded in

---

157. As of this writing, the Maine Legislature is considering, in response to the *Whitney* decision, a bill that would repeal the existing definition of "physical or mental disability" and amend it to include a physical or mental impairment that "substantially limits one or more of a person's major life activities," "significantly impairs physical or mental health," or "requires special education, vocational rehabilitation, or related services." Comm. Amendment B to L.D. 1027 (123rd Legis. 2007). The new definition would also included certain conditions regardless of severity, including absent, artificial, or replacement limbs, alcoholism, bipolar disorder; blindness, cancer, Crohn's disease, cystic fibrosis, deafness, diabetes, substantial disfigurement, epilepsy, heart disease, HIV or AIDS, major depressive disorder, mental retardation, multiple sclerosis, muscular dystrophy, paralysis. Parkinson's disease, and schizophrenia. *Id.* In addition, certain conditions are expressly excluded from the scope of the statute, including pedophilia, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and tobacco smoking. *Id.*

The *Whitney* decision has also sparked a heated exchange among members of the Maine employment law bar. *See* Katy Rand, *Employment at Will in Maine: R.I.P.?*, 22 Me. B.J. 12 (2007); David G. Webbert, *In Defense of Whitney*, 22 Me. B.J. 104 (2007); Katy Rand, *In Definse of 'R.I.P.'*, 22 Me. B.J. 108 (2007); David Webbert, *Final Thoughts*, 22 Me. B.J. 111 (2007).

158. *See* cases cited *supra* note 67 and accompanying text.

159. Currently, thirty-nine jurisdictions have incorporated some form of the federal requirement of a substantial limitation on a major life activity within their employment discrimination laws: Alaska (ALASKA STAT. § 18.80.300(12) (West, Westlaw through 2005 legislation)); Arizona (ARIZ. REV. STAT. ANN. § 41-1462(2) (West, Westlaw through 2006 Second Regular Session)); Arkansas (ARK. CODE ANN. § 16-123-102(3) (West, Westlaw through 2006 First Extraordinary Session)); Colorado (COLO. REV. STAT. ANN. § 24-34-301(2.5)(a) (West, Westlaw through the end of the 2006 First Extraordinary Session)); Delaware (DEL. CODE ANN. tit.19, § 722(4) (West, Westlaw through 75 Laws 2006, ch. 441)); District of Columbia (D.C. CODE § 2-1401.02(5A) (West, Westlaw through September 2006)); Florida (FLA. STAT. § 413.08(1)(b) (West, Westlaw through 2006 Second Regular Session)); Georgia (GA. CODE ANN. § 34-6A-2(3) (West, Westlaw through end of the 2006 Regular Session)); Hawaii (HAW. REV. STAT. § 378-1) (West, Westlaw through April 2006)); Idaho (IDAHO CODE ANN. § 67-5902(15) (West, Westlaw through 2006 First Extraordinary Session)); Indiana (IND. CODE ANN. § 22-9-1-3(r) (West, Westlaw through 2006 Second Regular Session)); Kansas (KAN. STAT. ANN. § 44-1002(j) (West, Westlaw through 2005 Regular Session)); Kentucky (KY. REV. STAT. ANN. § 344.010(4) (West, Westlaw through end of 2006 Regular Session and First Extraordinary Session)); Louisiana (LA. REV. STAT. ANN. § 46:2253(1) (West, Westlaw through all 2006 First Extraordinary and Regular Session Acts)); Massachusetts (MASS. GEN. LAWS ch. 151B, § 1(17) (West, Westlaw through 2006 Second Regular Session)); Michigan (MICH. COMP. LAWS § 37.1103(d)(i)(A) (West, Westlaw through P.A. 2006, No. 1-442)); Minnesota (MINN. STAT. § 363A.03(12) (West, Westlaw through 2006 Regular Session)); Missouri (MO. REV. STAT. § 213.010(4) (West, Westlaw through 2006 Second Regular Session)); Montana (MONT. CODE ANN. § 49-2-101(19)(a) (West, Westlaw through 2005 Regular Session)); Nebraska (NEB. REV. STAT. § 48-1102(9) (West, Westlaw through 2006 Second Regular Session)); Nevada (NEV. REV. STAT. 613.310(1) (West, Westlaw through 2005 73rd Regular Session and the 22nd Special Session)); New Hampshire (N.H. REV. STAT. ANN. § 354-A:2(IV) (West, Westlaw through end of 2006 Regular Session)); New Mexico (N.M. STAT. ANN. § 28-1-2(M) (West, Westlaw through 2006 Second Regular Session)); North Carolina (N.C. GEN. STAT. § 168A-3(7a) (West, Westlaw through end of 2006 Regular Session)); North Dakota (N.D. CENT. CODE § 14-02.4-02(5) (West, Westlaw through 2005 Regular Session)); Ohio (OHIO REV. CODE ANN. § 4112.01(13) (West, Westlaw through 2006)); Oklahoma (OKLA. STAT. tit. 25, § 1301(4) (West, Westlaw through end of 2006 Second Extraordinary Session));

recent years regarding the federal standard as overly restrictive, particularly in light of federal decisions that have significantly reduced the class of protected persons.[160]

In light of this criticism, another option for the Legislature is to consider the approaches of other states that deviate from the federal definition. Of the states that do not include a "substantiality" requirement within their anti-discrimination laws, a small minority have disability definitions that do not require any limitation on a major life activity,[161] a solution that seemingly would place Maine precisely where *Whitney* has left it. California's Fair Employment and Housing Act (FEHA),[162] on the other hand, has adjusted the federal standard while still maintaining the requirement of some degree of limitation. Specifically, the FEHA contains definitions for both mental and physical disabilities indicating that conditions must only "limit" rather than "substantially limit" a major life activity.[163] A 2001 amendment to the law clarified that "[t]his distinction is intended to result in broader coverage under the law of this state than under that federal act."[164] A condition "limits" a major life activity under the statute if it "makes the achievement of the major life activity difficult."[165] The California statute goes on to expressly exclude certain conditions that would not meet the definition of mental or physical disability, including "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use

---

Oregon (OR. REV. STAT. § 659A.100(1)(a) (West, Westlaw through end of 2005 Regular Session)); Pennsylvania (43 PA. CONS. STAT. ANN. § 954(p.1) (West, Westlaw through 2006 Regular Session)); Rhode Island (R.I. GEN. LAWS § 42-87-1 (West, Westlaw through 2005 January Session)); South Carolina (S.C. CODE ANN. § 1-13-30(n) (West, Westlaw through end of 2005 Regular Session)); South Dakota (S.D. CODIFIED LAWS § 20-13-1(4) (West, Westlaw through end of 2006 Regular Session)); Tennessee (TENN. CODE. ANN. § 4-21-102(9)(A) (West, Westlaw through 2006 First Extraordinary Session and Second Regular Session)); Texas (TEX. LAB. ANN. § 21.002(6) (West, Westlaw through end of 2006 Third Called Session)); Utah (UTAH CODE ANN. § 34A-5-102(5) (West, Westlaw through end of 2006 legislation)); Vermont (VT. STAT. ANN. tit. 21, § 495d(5) (West, Westlaw through 2005 First Session)); Virginia (VA. CODE ANN. § 51.5-3 (West, Westlaw through end of the 2006 Special Session I)); West Virginia (W. VA. CODE § 5-11-3(m) (West, Westlaw through 2006 Second Extraordinary Session)); Wisconsin (WIS. STAT. § 111.32(8) (West, Westlaw through 2005)).

160. *See, e.g.*, Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections For All Workers*, 14 STAN. L. & POL'Y REV. 321, 322 (2003) ("In the years since the ADA's enactment, the federal courts have chipped away at the law's protected class by adopting overly narrow rules for the analysis of who meets the statutory definition of 'disability.'"); Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 303 (2005) ("Many commentators have lamented the law as ineffectual and . . . have been especially dismayed about the U.S. Supreme Court's narrowing of the law's protection.").

161. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-51(15) (West, Westlaw through 2006 Regular Session) (defining physical disability as "any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device"); N.Y. EXEC. LAW § 292(21) (West , Westlaw through L.2006, chapter 742) (defining disability as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques").

162. CAL. GOV'T CODE §§ 12900-12996 (West 2007).

163. *See* CAL. GOV'T CODE § 12926(i)(1), (k)(1)(B) (West, Westlaw through 2006 Regular Session).

164. CAL. GOV'T CODE § 12926.1 (West, Westlaw through 2006 Regular Session).

165. CAL. GOV'T CODE § 12926(i)(1)(B), (k)(1)(B)(ii) (West, Westlaw through 2006 Regular Session).

disorders resulting from the current unlawful use of controlled substances or other drugs."[166]

The FEHA model is attractive because it maintains a limitation on a major life activity that prevents an overly broad application of the statute without requiring a showing of "substantiality." Furthermore, by expressly excluding specific conditions, it provides some certainty and prohibits frivolous claims without the need for judicial interpretation in certain specifically defined circumstances, such as the instructor's claim in *Winston*. A potential disadvantage of the FEHA model, however, is that for many other circumstances, like the one that arose in *Whitney*, the statute is not entirely clear. Does a heart condition that limits work hours to forty-five hours a week "limit" rather than "substantially limit" a major life activity? Such a scheme would seem to invite uncertainty and much contested litigation.

A third option for legislative consideration lies closer to home. In response to the *Whitney* decision, the Maine Human Rights Commission has adopted changes to the regulatory definition of "physical or mental disability."[167] These regulations initially define "physical or mental disability" according to the three-part definition described by the *Whitney* majority, essentially breaking down the exact language of the statute into three distinct categories.[168] The rule then goes on to give specific definitions of terms used in the opening phrase of the statutory definition:

> (a) "Disability" means a physiological or mental condition that limits one or more major life activities, including, but not limited to, functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, lifting, reproduction, eating, sleeping, driving, and working. The term "limits one or more major life activities" means makes achievement of a major life activity or activities difficult.
>
> (b) "Infirmity" means a physiological disorder affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.
>
> (c) "Malformation" means a defective or abnormal bodily formation affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.
>
> (d) "Disfigurement" means an externally visible malformation.
>
> (e) "Congenital defect" means a bodily defect present at birth affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

---

166. *See* CAL. GOV'T CODE § 12926(i)(5), (k)(6) (West, Westlaw through 2006 Regular Session).

167. Me. Human Rights Comm'n, 94-348 Proposed Changes to Rules, http://www.maine.gov/mhrc/laws/Proposed%20Rule%20(revised).pdf. As of this writing, these rules had been adopted but were still awaiting review by the Office of the Attorney General. *See* Maine Human Rights Commission, Laws & Regulations, Proposed/Adopted Changes, http://www.maine.gov/mhrc/laws/changes.html.

168. *Id.* at 1.

> (f) "Mental condition" means any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[169]

In addition, the regulations contain a list of exceptions that are expressly not included within the definition, including "[c]onditions that are ordinarily experienced by the average person in the general population or are both transitory and minor," such as "minor cuts or bruises, the common cold, typical flu, upset stomach or ordinary headaches."[170]

These regulations seem to attempt to satisfy the holding of *Whitney* while addressing a concern that the court's broad reading of the statute would cover trivial conditions. In so doing, they incorporate several aspects of California's FEHA model, including the elimination of a substantiality requirement, the definition of "limits one or more major life activities" and the express exclusion of specific conditions. Accordingly, the language of the regulations is subject to the same vagueness concerns that accompany the California approach. Specifically, how are courts or employers to make an accurate determination of when a condition "makes achievement of a major life activity" difficult, or what conditions, beyond those specifically mentioned, are beyond the reach of statutory protection because they are "experienced by the average person"?

Despite these deficiencies, the amended regulations provide a viable "middle ground" between the limitations imposed by a substantiality requirement and the all-encompassing reading of the definition of disability offered by the *Whitney* majority. They represent an improvement over the current interpretation of the MHRA left in the wake of *Whitney* by providing greater clarity and setting more definitive standards by which to determine the scope of protection offered by the statute. The Legislature should consider a definition similar to that currently proposed by the Commission as a viable alternative to the present disability definition under the MHRA.

VI. CONCLUSION

In *Whitney v. Wal-Mart Stores, Inc.*, the Law Court failed to recognize an inherent ambiguity within the MHRA. Along the way, the court rejected years of precedent and invalidated an agency regulation that had been promulgated and relied on by Maine courts for over twenty years. In holding that the definition of disability under the MHRA was clear and unambiguous, the court effectively left employees, employers, practitioners, and courts without any common law or administrative guidance as to what exactly constitutes a protected disability in Maine. The Legislature should respond to the *Whitney* decision by amending the statutory definition of disability under the MHRA. An unambiguous definition would provide much needed clarity to all parties involved and prevent an overly broad application of anti-discrimination protection under state law in Maine.

---

169. *Id.* at 1-2.

170. *Id.* at 2. The proposed rules also expressly exclude "transvestism, transsexualism, pedophelia; exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments; sexual behavior disorders; compulsive gambling; kleptomania; pyromania; or . . . psychoactive substance abuse disorders resulting from current illegal use of drugs." *Id.* at 3.