MAINE HUMAN RIGHTS COMMISSION

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BASIS STATEMENT AND RESPONSE TO COMMENTS

Changes to Rules Addressing Definition of "Physical or Mental Disability"
December 11, 2006

BASIS STATEMENT

Pursuant to 5 M.R.S.A. § 4566(7), and the requirements of the Administrative Procedures Act ("APA"), 5 M.R.S.A. § 8001 et. seq., the Maine Human Rights Commission has adopted amendments to its rules interpreting the definition of "physical or mental disability" in the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4553(7-A, 7-B). These changes are made to the Commission's rules, Chapter 3: *Employment Regulations of the Maine Human Rights Commission*; Chapter 5: *Public Accommodations Regulations Relating to Physical or Mental Disability Discrimination in Public Conveyances of the Maine Human Rights Commission*; Chapter 7: *Accessibility Regulations of the Maine Human Rights Commission*; and Chapter 8: *Housing Regulations of the Maine Human Rights Commission*.

These amendments repeal the former definition of "physical and mental disability" in the above-mentioned rules and implement a new definition consistent with the Maine Supreme Judicial Court's recent decision in *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, in which the Court ruled that the former definition was invalid because it required a showing of a substantial limitation on a major life activity. Under these amended rules, there is no longer a requirement of a substantial limitation on a major life activity. Rather, the rules separately define some of the terms in the MHRA definition of "physical or mental disability" and provide a list of exceptions.

In promulgating these amendments, the Commission engaged in a consensus-based rule development process pursuant to the APA. The Commission formed a work group of representatives of organizations with an interest in the development of the disability rules. The group met on two occasions in the summer and fall of 2006. The members of the work group were James Erwin, Esq. (representing the Maine Pulp and Paper Association), David Webbert, Esq. (Maine Employment Lawyers Association), Chad Hansen, Esq. (Disability Rights Center), Peter Gore (Maine Chamber of Commerce), Jeffrey Young, Esq. (Maine AFL-CIO, Maine State Employees Association), and Derek Langhauser, Esq. (Maine Community College System). Although consensus was not reached, the process did provide valuable assistance to the Commission in formulating these rules.

The Commission has considered all relevant information available to it, including, but not limited to, the statements and arguments filed. A public hearing was held on Monday, November 13, 2006 and comments were received for ten days thereafter.

COMMENTS AND RESPONSES

The following individuals and organizations submitted comments:

- Chad Hansen, Esq., commented on behalf of the Disability Rights Center.
- Peter Gore commented on behalf of the Maine State Chamber of Commerce.
- David Webbert, Esq., commented on behalf of the Maine Employment Lawyers Association.
- Charles Einsiedler, Jr., Esq., and Katharine I. Rand, Esq., commented on behalf of Pierce Atwood LLP.
- Michael Messerschmidt, Esq., commented on behalf of Preti, Flaherty, Beliveau & Pachios LLP.
- Curtis Webber, Esq.

The following is a summary of the comments received and the Commission's responses.

Comments.
Chad Hansen, Esq., commented on behalf of the Disability Rights Center. Mr. Hansen commented in favor of the proposed rule, with one suggested modification. In order to avoid the risk of a court misinterpreting the rule, he suggested that the Commission add clarifying language in the definition of "physical or mental disability," Section 1, paragraph (C)(2), that a person need only meet one of the terms in Section 1, paragraph (C)(1)(a) to be covered. David Webbert, Esq., representing the Maine Employment Lawyers Association, commented in support of the proposed rule, subject to two modifications. First, Mr. Webbert shared the same concern as Mr. Hansen with respect to the interpretation of (C)(1)(a). Mr. Webbert suggested that the following clarifying language (shown in italics) be added to paragraph (C)(2): "For purposes of subsection (C)(1)(a) only, the following terms have the following meaning *(these terms are overlapping alternatives, only one of which must be satisfied under subsection (C)(1)(a))*: . . ."

Response.
The Commission believes that it is unnecessary to include the suggested language in the rule. Both the statutory and the regulatory definitions provide, in relevant part, that "physical or mental disability" means "any disability, infirmity, malformation, disfigurement, congenital defect, <u>or</u> mental condition. . . ." (Emphasis added.) The Commission believes that the use of the conjunction "or" provides sufficient guidance that the terms in (C)(1)(a) should be interpreted as alternatives and not collectively subject to any one definition in (C)(2). The Commission also notes that each of the terms in (C)(1)(a) are separately defined in (C)(2), further clarifying that they should be interpreted separately.

Comment.
Mr. Webbert also commented that Section 1, paragraph (C)(4)(c)(ii) should be revised to remove the language "and is no longer engaging in such use." That paragraph provides that an individual with psychoactive substance use disorder resulting from current illegal use of drugs shall not be excluded from coverage if she "is participating in or seeking to participate in a supervised rehabilitation program and is no longer engaging in such use." Mr. Webbert commented that the MHRA expressly provides that an "employer shall make reasonable accommodation to an alcoholic or drug user who is seeking treatment or who has successfully completed treatment." 5 M.R.S.A. § 4572(2)(F)(1)(d). Because the Act explicitly protects a "drug user who is seeking treatment," and does not require that the person no longer be engaging in drug use, Mr. Webbert commented that the rule should be amended to eliminate the language "and is no longer engaging in such use." Under such an amendment, Mr. Webbert commented that a drug user who needs treatment in order to stop drug use would be protected.

Response.
The Commission agrees that the "and is no longer engaging in such use" language in the proposed rule would be partially inconsistent with 5 M.R.S.A. § 4572(2)(F)(1)(d). That statutory provision only applies, however, in the context of reasonable accommodations in employment. It does not follow that a drug user who is "seeking treatment or who has successfully completed treatment" but is still engaging in drug use is entitled to the protection of the MHRA in other contexts. The Law Court has stated that the MHRA is modeled on the Rehabilitation Act of 1973 and has impliedly incorporated the exceptions from the Rehab Act into the MHRA. See Winston v. Maine Technical College System, 631 A.2d 70, 75 (Me. 1993) (holding based on the Rehab Act that sexual behavior disorders are not covered by the MHRA). The Rehab Act requires that a person who has completed or is participating in a drug rehabilitation program be "no longer engaging in such use." 29 U.S.C. § 705(20)(C)(ii)(I), (II). In order to make the rule consistent with 5 M.R.S.A. § 4572(2)(F)(1)(d), however, a new paragraph 3.02(C)(4)(c)(iv) will be added to the rule, which will provide that an individual will not be excluded who "in the context of a reasonable accommodation, is seeking treatment or has successfully completed treatment."

Comment.
Michael Messerschmidt, Esq., commented on behalf of the management practice of his law firm, Preti, Flaherty, Beliveau & Pachios LLP, that the proposed rule is objectionable because it overshadows certain aspects of the MHRA and dilutes its true intent and purpose. Mr. Messerschmidt objected to the inclusion of the language "or seeking to participate in" in paragraph (C)(4)(c)(ii), discussed above. Mr. Messerschmidt commented that there is no need to promulgate a rule on this subject in order to comply with the *Whitney* decision. Moreover, Mr. Messerschmidt commented that the "seeking to participate" language is an impermissible construction of the MHRA. The MHRA requires that an employer reasonably accommodate an alcoholic or drug user who is "*seeking treatment* or has successfully completed treatment." 5 M.R.S.A. §

4572(2)(F)(1)(d) (emphasis added). The Rehab Act, on which the MHRA was modeled, provides that an individual with a disability is not excluded if she "*is participating in* a supervised rehabilitation program. . . ." 29 U.S.C. § 705(20)(C)(ii)(II) (emphasis added). Mr. Messerschmidt commented that neither the MHRA nor the Rehab Act cover drug users who are merely "seeking to participate in" a treatment program.

Response.
In light of the addition of 3.02(C)(4)(c)(iv), discussed above, it is no longer necessary to include the language "or seeking to participate in" in the definition of "physical or mental disability." That language was added to achieve consistency with the reasonable accommodation provision for drug users in 5 M.R.S.A. § 4572(2)(F)(1)(d). Because the new rule provision 3.02(C)(4)(c)(iv) will achieve that consistency, the "or seeking to participate in" language will be removed. The proposed rule, Section 1, Chapter 3, Section 3.02(C)(4)(c), will thus be revised as follows:

> *(c) Psychoactive substance use disorders resulting from current illegal use of drugs, although this shall not be construed to exclude an individual who –*
>
> *(i) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;*
>
> *(ii) is participating in ~~or seeking to participate in~~ a supervised rehabilitation program and is no longer engaging in such use; ~~or~~*
>
> *(iii) is erroneously regarded as engaging in such use, but is not engaging in such use; or*
>
> *(iv) in the context of a reasonable accommodation, is seeking treatment or has successfully completed treatment.*

Outside of the context of reasonable accommodations in employment, however, the definition of "physical or mental disability" will not contain a comparable provision to 3.02(C)(4)(c)(iv), as there is no corollary to 5 M.R.S.A. § 4572(2)(F)(1)(d) elsewhere in the MHRA. Thus the proposed rule, Section 7, Chapter 5, Part II, Section (B)(4)(c); Section 12, Chapter 7, Section 7.01(4)(c); and Section 28, Chapter 8, Section 8.03(4)(c), will be revised as follows:

> *(c) Psychoactive substance use disorders resulting from current illegal use of drugs, although this shall not be construed to exclude an individual who –*

(i) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) is participating in ~~or seeking to participate in~~ a supervised rehabilitation program and is no longer engaging in such use; or

(iii) is erroneously regarded as engaging in such use, but is not engaging in such use.

Comments.
Charles Einsiedler, Jr., Esq., and Katharine Rand, Esq., commented on behalf of their law firm, Pierce Atwood LLP, that the current situation cannot be remedied by administrative rulemaking. Mr. Einsiedler commented that the Commission has engaged in an admirable process to arrive at a regulation in light of the statute and *Whitney* and has done about as good a job as could be done. Nevertheless, Pierce Atwood commented that the Commission's attempt cannot achieve an acceptable result. Pierce Atwood commented that, under *Whitney*, the statutory definition means that virtually everyone is disabled. The rule as drafted purports to limit the reach of this definition and is therefore subject to the same legal challenge as in *Whitney*. Pierce Atwood commented that the Law Court in *Whitney* held that the plain language of the Act's definition of disability is "not ambiguous," thereby severely circumscribing the Commission's authority to adopt any meaningful gloss on the definition. Pierce Atwood commented that the definition of "disability" within the proposed rule of "limits one or more major life activities" seeks to again read into the statutory language an effects-based interpretation, which, although it is the only practical definition for employers, is an approach that was rejected by the Law Court.

Peter Gore commented on behalf of the Maine State Chamber of Commerce. Mr. Gore commented neither in support of nor in opposition to the proposed rule. He commented that the rule provides some important clarification for employers, such as the transitory condition exclusion. Nevertheless, Mr. Gore is concerned that this could be held out as a false hope in light of the uncertainty after *Whitney*.

Mr. Hansen commented that the proposed rule is appropriate. He commented that the definition of "disability" ("limits one or more major life activities"), which is imported from the California state statute, is appropriate. Mr. Hansen commented that the proposed rule will provide for consistency in the determination of whether a person has a disability under the MHRA.

Curtis Webber, Esq., who represented the plaintiff in *Whitney*, commented in favor of the proposed rule. Mr. Webber commented that he is not concerned that the proposed rule is contrary to the *Whitney* decision because the rule is a legitimate and reasonable interpretation of the MHRA.

Response.
The Commission agrees with Mr. Webber that the new rule is a valid construction of the MHRA. In Whitney, the Law Court's reference to the statutory definition being unambiguous was tied only to its conclusion that the statute's plain meaning does not allow a regulatory requirement of a substantial limitation on a major life activity. The new rule removes that requirement.

The Commission disagrees that the definition of "disability" ("limits one or more major life activities") is inconsistent with Whitney. The former rule contained a requirement of a substantial limitation on a major life activity that applied to the entire statutory definition of "physical or mental disability," which consists of many subcategories. Two of those subcategories are "disability" and "malformation." The Court held that the "substantially limits" requirement was inconsistent with the term "malformation" in the statutory definition, which term had been interpreted in Rozanski v. A-P-A Transport, Inc., 512 A.2d 335, 340 (Me. 1986) to cover asymptomatic conditions. The Court did not address whether the "substantially limits" requirement was in some way inconsistent with the subcategorical term "disability."

In promulgating these rules, the Commission has carefully chosen definitions that are consistent with the terms in the MHRA. In order to address the Law Court's concerns in Whitney, the terms are defined individually rather than being collectively subject to a "substantially limits" requirement.

Comment.
Pierce Atwood commented that the rule does not go far enough in bringing balance and reason in the post-*Whitney* "everyone is disabled" workplace. They commented that it is troubling that the terms "infirmity," "malformation," "disfigurement," "congenital defect," and "mental condition" are no longer subject to any limitation based upon the effect of those conditions on an individual. They state that, under the proposed rule, a person with "aggressive tendencies" may be determined to have a protected disability.

Response.
The Commission believes that the definitions are appropriate as written. The cited definitions track the definitions of physical and mental "impairments" in the federal Rehab Act, Americans with Disabilities Act ("ADA"), and Fair Housing Act. The exceptions will exclude conditions that are ordinarily experienced by the average person in the general population or are transitory and minor. The definition of "minor" conditions does address the extent to which the conditions have an adverse impact on an

individual, albeit with a broader list of factors than the "substantially limits . . . major life activities" model.

The Commission does not believe that a person with "aggressive tendencies," which are not linked to a mental or psychological disorder, would be a person with a protected "mental condition" under the new rule. The "mental impairment" standard under federal law, upon which the "mental condition" standard is mirrored, does not include common personality traits that are not symptoms of a mental or psychological disorder. See 29 C.F.R. § 1630, App. § 1630.2(h). Courts have found it helpful to refer to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders in determining what conditions are mental or psychological disorders under the ADA and Rehab Act. See Bercovitch v. Baldwin Sch., 133 F.3d 141, 155 n. 18 (1st Cir. 1998); DeMar v. Car Freshner Corp., 49 F. Supp. 2d 84, 89 (D.N.Y. 1999).

Comments.
Pierce Atwood commented that the definition for "disability" ("limits one or more major life activities") is difficult to apply. Moreover, Pierce Atwood commented that, in light of the fact that mitigating measures are disregarded, every near-sighted individual in the state has a disability under the standard. Michael G. Messerschmidt, Esq., commented that the "makes achievement of a major life activity difficult" qualification of "limits one or more major life activities" would cover someone who cannot "easily" perform a major life activity, which is too broad. Mr. Messerschmidt suggested qualifying the phrase "limits one or more major life activities" with "causes meaningful difficulty in the achievement of a major life activity."

Response.
*The Commission does not accept the commentator's proposed alternative language. The definition for the term "disability" is borrowed in large part from the definitions of physical and mental disability in California's Fair Employment and Housing Act. See Cal. Gov. Code § 12926(i), (k). By borrowing statutory language from another state, the Commission intends that that state's interpretations of its law will offer guidance in interpreting the corresponding provisions in Maine law. The Commission does not agree that the standard "makes achievement of a major life activity difficult" will result in too many people being covered. Although broader than the ADA, the California standard has been interpreted to exclude minor conditions that do not limit major life activities. See, e.g., Ageman v. AFG Indus., Inc., 2002 U.S. App. LEXIS 23994, **3 (9th Cir. 2002) (unpublished opinion) (light-duty work requests for brief periods immediately after surgery insufficient).*

Comments.
Pierce Atwood commented that the exceptions listed in (C)(4)(a) are difficult to apply and too inclusive. They ask how an employer is to determine whether a condition is "ordinarily experienced by the average person." Mr. Messerschmidt commented that

there will always be two sides to the issue of what sorts of conditions the average person experiences.

Response.
The language "average person in the general population" is borrowed from the regulations interpreting the ADA, although the context here is different. The ADA regulations use the term in the context of analyzing whether an impairment "substantially limits" major life activities. See 29 C.F.R. § 1630.2(j) (comparison with the "average person in the general population"). As with the ADA, the term "average person" here is not intended to imply a precise mathematical "average." See 29 C.F.R. § 1630, App. § 1630.2(h). Rather, the concept is meant to exclude conditions that ordinarily appear in the general population (contrasted with a particular subset of the population such as seniors) and are considered normal. Similar to establishing whether a condition "substantially limits" a major life activity under the federal standard, the determination here can be made with or without expert medical evidence. There are some conditions, for example, that are by common knowledge ordinarily experienced by the average person. Such conditions include the listed examples: minor cuts or bruises, the common cold, a typical flu (as distinguished from, for example, bird flu), an upset stomach, and ordinary headaches. This list is illustrative only, and the Commission would interpret the concept to also exclude conditions such as those listed by some of the commentators: vision loss in the normal range, male-pattern baldness, and minor acne.

Comments.
Pierce Atwood commented that the "transitory and minor" exception will result in permanent minor conditions and temporary serious conditions being covered disabilities under the proposed rule. They commented that the legislature could not have intended every birthmark or broken bone to be covered disabilities, yet that is the effect under *Whitney* and the proposed rule. Mr. Messerschmidt commented that the "transitory and minor" exception is unhelpful because conditions that meet this exception should never be considered "disabilities" in the first place. Moreover, the list of examples included in the exception (minor cuts and bruises, the common cold, etc.) suggests by implication that other minor conditions that are not included in the list may actually qualify as disabilities. To remedy the problem, Mr. Messerschmidt suggested changing the language in the exception from "transitory *and* minor" to "*either* transitory *or* minor."

Response.
The Commission does not accept the commentator's proposed change from "transitory and minor" to "transitory or minor." Although it is true that permanent minor conditions and temporary serious conditions will not be excluded by this exception, they will not necessarily be protected either because they may be subject other exceptions or may not otherwise qualify as a "physical or mental disability" under (C)(1). On the other hand, if the Commission were to change the term "transitory and minor" to "transitory or minor" then a severe temporary condition such as a coma might be excluded. The Commission does not believe that the MHRA should be read that

narrowly. Moreover, using the term "minor" alone would be more susceptible to challenge in light of the Law Court's opinion in Rozanski that part of the statutory definition covers asymptomatic conditions. See Rozanski, 512 A.2d at 340. Requiring that both terms be met, however, is entirely consistent with Rozanski because the conditions at issue in that opinion (an osteophyte and spondylolysis) were not transitory and would not be excluded under the new rule.

Comments.
Mr. Gore and Pierce Atwood commented that, rather than a rule change, the Commission should address the definition of disability by proposing statutory language that would codify the essence of the Commission's rule that was invalidated in *Whitney*. They commented that the former standard provided clarity. Pierce Atwood commented that any perceived problems with the ADA definition could be addressed in the bill. Mr. Gore commented that the *Whitney* decision puts Maine out of the mainstream because other states use the ADA definition. Mr. Gore commented that he is concerned that the proposed rule will contribute to an increased cost of doing business in Maine.

Mr. Webber commented that the plaintiffs' bar is supporting the proposed rule as a compromise. Although they were content with the *Whitney* decision by itself, they are concerned that a bill will be introduced in the legislature importing the ADA standard into Maine. Mr. Webber and Mr. Webbert commented that the definition of disability in the ADA is too narrow. Mr. Webbert commented that many other states have rejected the ADA and have not suffered economically. Mr. Webber commented that the illusion of certainty that the ADA provides is the certainty that the plaintiff will lose.

Response.
The Commission believes that the existing statutory definition, as clarified by the new rule, is a workable definition that provides sufficient clarity for businesses and people with disabilities. The Commission is not persuaded that the regulation at issue will increase the cost of doing business in Maine. The Commission notes that many states recognize broader definitions of disability than the ADA, including Connecticut, Illinois, New Jersey, New York, California, Maryland, Massachusetts, Minnesota, and Rhode Island. Moreover, since the Whitney decision in April 2006, the Commission has not seen an increase in disability claims brought by people with minor disabilities. The Commission notes that it has always interpreted the definition of disability broadly, including under the former rule.