Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes

Michael D. Moberly
PERCEPTION OR REALITY?: SOME REFLECTIONS ON THE INTERPRETATION OF DISABILITY DISCRIMINATION STATUTES

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It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person, the perception of the employer is as important as reality. ¹

I. INTRODUCTION

Discrimination against persons with disabilities² has been characterized as "an evil on a par with racial, sexual, and ethnic discrimination."³ Recognition of that fact has recently resulted in significant expansions to the legal protections available to such persons.⁴ The most visible and

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² Disability rights advocates appear to prefer the term "persons with disabilities" to such potential alternatives as "disabled persons" or "the disabled." See Jonathan C. Drimmer, Comment, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. REV. 1341, 1342 n.2 (1993).
³ Allen v. Heckler, 780 F.2d 64, 67 (D.C. Cir. 1985); see also Trautz v. Weisman, 819 F. Supp. 282, 294-95 (S.D.N.Y. 1993) (stating that "[t]he history of discrimination against individuals with disabilities, while less noted than racial or sex discrimination, is no less a story of a group that has traditionally suffered . . . the badge of inferiority emplaced by a society that often shuns their presence"). But cf. D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1486-87 (7th Cir. 1985) (stating that "handicaps can be legitimate reasons for exclusion from some jobs — unlike discrimination based on race, ethnic origin, [or] sex . . . . This distinction renders . . . [disability] discrimination less invidious").
⁴ See generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 2 (1992) (observing that "protection against . . . [disability] discrimination . . . [has become] a dominant theme within our legal culture").
comprehensive example is Congress’ enactment of the Americans with Disabilities Act of 1990 (the “ADA”), the stated purpose of which is to provide a comprehensive national mandate that eliminates discrimination against individuals with disabilities. The ADA has been said to reflect a “virtual revolution in the area of rights for the disabled.”

However, the desirability of eliminating disability discrimination has not always been so clear. One commentator noted that when Congress enacted Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits discrimination in employment on the basis of race, color, religion, sex and national origin, there was little public sentiment to regulate discrimination against persons with disabilities. Congress subsequently rejected a number of attempts to amend Title VII to prohibit disability discrimination before finally enacting the ADA, more than twenty-five years after Title VII was passed, to address the limitations of existing disability discrimination legislation.

One manifestation of society’s delayed recognition of the need to eliminate disability discrimination is a wide variation in the language

6. Id. § 12101(b)(1); Fink v. Kitzman, 881 F. Supp. 1347, 1370 (N.D. Iowa 1995); Trautz, 819 F. Supp. at 294. See generally Epstein, supra note 4, at 480 (stating that “Congress has provided a major piece of legislation with the Americans with Disabilities Act of 1990 (ADA), which ushers in an era of extensive regulation . . . of the employment relationship”).
10. Id. § 2000e-2(a).
11. Epstein, supra note 4, at 2; see also Barbara Hoffman, Employment Discrimination Based on Cancer History: The Need for Federal Legislation, 59 TEMP. L.Q. 1, 9 (1986) (stating that “[t]he legal advocacy on behalf of victims of employment discrimination based on their real and perceived disabilities is relatively new in the history of the American civil rights movement”).
12. See Fink, 881 F. Supp. at 1368 (asserting that “[p]eriodically through the mid-1980’s there had been attempts to amend the Civil Rights Act of 1964 to include people with disabilities.”); O’Connor, supra note 8, at 648-49 (stating that “[h]ad Congress been fully intent on protecting the civil rights of handicapped people, it could have accepted one of a number of attempts to amend Title VII . . . to include . . . handicapped.”); Hoffman, supra note 11, at 14 n.73 (stating that “attempts to . . . amend Title VII to include the handicapped as a protected class] have failed”).
14. See 134 CONG. REC. S5, 110 (daily ed. Apr. 28, 1988) (statement of Sen. Weicker). Weicker stated “[t]his is high time that we as a society formally and forcefully prohibit the discrimination that is the greatest handicap to Americans with disabilities.” Id.; Hoffman, supra note 11, at 9-10 (stating that “[d]espite more than a century of protective legislation focusing on race and
of statutes addressing the issue, due in many cases to the need for disability rights advocates to engage in political compromise in order to obtain any protection at all. In particular, both the ADA and its less ambitious predecessor, the Rehabilitation Act of 1973, as well as a number of state employment discrimination statutes, prohibit discrimination against an individual because of a perceived disability. Other state legislatures have not defined the terms “handicap” or “disability” to include perceived disabilities when enacting employ-

gender, people with real and perceived disabilities were without significant federal remedies until . . . 1973.

15. See O’Connor, supra note 8, at 634 (referring to “the variety of definitions [of ‘handicap’] contained in state statutory provisions”); Hoffman, supra note 11, at 14 (concluding that “[a]lthough each state that statutorily prohibits employment discrimination based on handicap describes the protected class as either ‘handicapped’ or ‘disabled,’ state statutes vary widely in their definitions of ‘handicap’ and ‘disability’”).

16. See Drimmer, supra note 2, at 1393 (observing that although there is a “recognition that society discriminates against people with disabilities,” they have only been granted “partial protection and guaranteed[d] partial rights” as a matter of “political compromise”); Steven J. Rollins, Comment, Perceived Handicap Under the Wisconsin Fair Employment Act, 1988 Wis. L. Rev. 639, 644 (stating that the legal definition of handicap “reflects the blend of medical and social considerations upon which public policy decisions, such as eligibility for entitlements or protection from discrimination, are based”); cf. O’Connor, supra note 8, at 648 (observing that “the Rehabilitation Act represents a compromise”).


22. The trend is in favor of replacing the term “handicap” with the term “disability,” see Capitano v. Arizona, 875 P.2d 832, 834 (Ariz. Ct. App. 1993), in part because individuals with disabilities often object to being characterized as “handicapped.” See Helen L. v. DiDario, 46 F.3d 325, 330 n.8 (3d Cir. 1995) (stating that “[t]he change in nomenclature from ‘handicap’ to ‘disability’ reflects . . . awareness that individuals with disabilities find the term ‘handicapped’ objectionable”); O’Connor, supra note 8, at 634 n.16 (stating that “[d]isabled individuals often vehemently protest being labelled as handicapped”). However, because a number of states continue to utilize the term handicap, see, e.g., Bogue v. Better-Bilt Aluminum Co., 875 P.2d 1327, 1331-32 (Ariz. Ct. App. 1994), both terms are used in this article; cf. Emily A. Spieler, Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia, 95 W. Va. L. Rev. 333, 381 n.177 (1992-93) (arguing that “[t]he use of the term ‘handicap’ in state law is equivalent to the current use of the term ‘disability’ in the more recently
ment discrimination legislation,24 or have adopted definitions that appear to exclude from coverage persons who are mistakenly perceived to be disabled.25

In interpreting these various statutes, courts have reached differing results.26 This is not surprising, given that the legal principles pertaining to perceived disabilities have been described as “elusive, at best.”27 This article explores those principles and some of the cases considering them,28 and, where applicable, subsequent legislative responses to those cases.29 The article also discusses the policy considerations underlying the perceived disability issue,30 as well as its practical ramifications.31

23. A “perceived” disability can arise in several contexts. The term can apply to an individual with an impairment mistakenly viewed by the employer as a limiting condition when in fact it does not significantly restrict the individual’s employment abilities. Bogue, 875 P.2d at 1335. The concept also applies to an individual with an impairment that does limit his or her ability to secure, retain or advance in employment, but only because of the attitudes of others toward the impairment. Id. Finally, a perceived handicap may exist where the employer erroneously believes an individual has an impairment that the individual does not actually have. See, e.g., Sanchez v. Lagoudakis, 486 N.W.2d 657, 660 (Mich. 1992); Chico Dairy Co. v. West Va. Human Rights Comm’n, 382 S.E.2d 75, 86 (W. Va. 1989) (Workman, J., dissenting); Barnes v. Washington Natural Gas Co., 591 P.2d 461, 465 (Wash. Ct. App. 1979). It apparently was to the latter situation that the term was first applied. See Rollins, supra note 16, at 640 n.8.

24. See Chico Dairy, 382 S.E.2d at 83.

25. See, e.g., id. at 78 n.1.


28. One court recently noted that “[u]ntil this point in time, . . . few ‘perceived disability’ cases have been litigated and, consequently, decisional law . . . is hen’s-teeth rare.” Cook v. Rhode Island, 10 P.3d 17, 22 (1st Cir. 1993).

29. See, e.g., Sanchez, 486 N.W.2d at 659 n.13, 662 (Mich. 1992) (referring to the Michigan legislature’s amendment of the Michigan Handicapper’s Civil Rights Act to include perceived disabilities within the statutory definition of “handicap” after the Michigan Court of Appeals had held that the Act did not apply to perceived disabilities).

30. See infra notes 173-95 and accompanying text.

31. See infra notes 251-73 and accompanying text.
The article concludes that although, as a matter of policy, individuals who are erroneously perceived to be disabled ordinarily should be protected by disability discrimination legislation, a legislature legitimately might choose not to provide such protection. Further, courts should not lightly assume that a legislature’s silence on the issue is consistent with an intent to prohibit perceived disability discrimination.

II. THE CASES

A. Barnes v. Washington Natural Gas Co.

The first state court decision to consider the perceived disability issue, Barnes v. Washington Natural Gas Co., involved a plaintiff who claimed to have been wrongfully terminated because his employer mistakenly believed that he suffered from epilepsy. The plaintiff alleged that a termination based upon a perceived but nonexistent disability violated the Washington State Law Against Discrimination.

The employer argued that by prohibiting discharges based upon the presence of a “sensory, mental or physical handicap,” the Washington legislature had limited the class protected by the statute to persons who actually have a disability. The court disagreed, however, relying upon an administrative regulation adopted by the Washington State Human Rights Commission that included conditions that are “perceived to exist, whether or not [they] exist[] in fact” within the definition of handicap. Rejecting the contention that the Commission had exceeded its authority in promulgating this regulation, the court held that the act

32. See infra notes 274-85 and accompanying text.
33. See infra notes 283-85 and accompanying text.
35. Id. at 462.
36. Id.
38. Id. § 49.60.180.
39. Barnes, 591 P.2d at 463-64. The terms “sensory, mental, or physical handicaps” were not defined in the statute. Seguine, supra note 22, at 551 n.123.
40. The Washington State Human Rights Commission is an agency established by the Washington State Law Against Discrimination “with powers with respect to elimination and prevention of discrimination in employment.” WASH. REV. CODE ANN. § 49.60.010.
42. See Barnes, 591 P.2d at 463-65.
protected both the disabled and those perceived to be disabled. The court supported its decision with the following explanation:

The essence of unlawful employment discrimination is the application of unreasonable generalizations about people to the hiring, promotion and discharge of workers. . . . Proscriptions of discrimination against handicapped persons were added . . . because of . . . prejudgments often made about persons afflicted with sensory, mental or physical handicaps, such as epilepsy. . . . It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap . . . and exclude from its provision those perceived as having such a condition. . . . The intent of the law is to protect workers against . . . prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.

B. Chico Dairy Co. v. West Virginia Human Rights Comm'n

The Barnes decision was contradicted ten years later by the West Virginia Supreme Court in Chico Dairy Co. v. West Virginia Human Rights Commission. In Chico Dairy, the plaintiff wore a prosthetic eye after losing her left eye to cancer as an infant. Apparently, the plaintiff's eye socket around the prosthesis had become somewhat sunken or hollow. The plaintiff was employed as an assistant manager in one of the employer's stores. After twice being passed over for promotion, she resigned. She filed a complaint with the West Virginia Human Rights Commission alleging that her resignation constituted a constructive discharge, and that her employer had unlawfully discriminated against

43. Id. at 465.
44. Id. at 464-65.
46. Id. at 77.
47. Id.
48. Id.
49. Id. at 77-78.
50. Id. at 78. Under West Virginia law, a constructive discharge occurs when “working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit.” Slack v. Kanawha County Hous. & Redevelopment Auth., 423 S.E.2d 547, 558 (W. Va. 1992). Generally speaking, the discriminatory denial of a promotion, standing alone, does not rise to the level of a constructive discharge. See, e.g., Davis v. Pioneer Screw & Nut Co.,

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss2/2
her on the basis of an "alleged" handicap.\textsuperscript{51} The latter allegation was based upon evidence that the plaintiff had been denied promotions because of a supervisor's concern that her appearance might be objectionable to the employer's customers.\textsuperscript{52} The plaintiff did not contend that she was disabled, but instead "refer[red] to the manner in which the employer regarded her physical appearance."\textsuperscript{53}

Following an evidentiary hearing, the West Virginia Human Rights Commission concluded that the employer violated the West Virginia Human Rights Act\textsuperscript{54} by discriminating against the plaintiff on the basis of what the area supervisor believed to be a disability.\textsuperscript{55} The West Virginia Circuit Court reversed on appeal, holding that the Commission's finding of discrimination was erroneous as a matter of law because the statute required an actual, and not merely a perceived, impairment.\textsuperscript{56} Both the plaintiff and the Human Rights Commission appealed.\textsuperscript{57}

The West Virginia Supreme Court began its analysis with the unremarkable observation that the proper interpretation of the West Virginia Human Rights Act depends in part upon the statutory definition

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\item \textsuperscript{706} F. Supp. 547, 549 (E.D. Mich. 1989).
\item \textsuperscript{51} Chico Dairy, 382 S.E.2d at 78.
\item \textsuperscript{52} Id. at 77-78. Such "customer preference" defenses have been rejected in most discrimination contexts. \textit{See} Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.) ("[I]t would be totally anomalous ... to allow the preferences and prejudices of ... customers to determine whether ... discrimination was valid. Indeed, it was, to a large extent, these very prejudices [employment discrimination laws were] meant to overcome.")., cert. denied, 404 U.S. 950 (1971). Disability discrimination cases are no exception. \textit{See}, \textit{e.g.}, Fink v. Kitzman, 881 F. Supp. 1347, 1369-70 (N.D. Iowa 1995) (describing the pervasive discrimination persons with disabilities have experienced on the purported ground that "others would feel uncomfortable around them"). However, the defense retains some vitality, both in the disability discrimination context and elsewhere. \textit{Compare} Hodgdon v. Mount Mansfield Co., 624 A.2d 1122, 1132 (Vt. 1992) (leaving open the possibility that an employer regarding an individual as "unfit to be seen by customers" might show that "a particular physical condition is a bona fide occupational qualification for a particular job") \textit{with} Avigliano v. Sumitomo Shoji Am., Inc., 638 F.2d 552, 559 (2d Cir. 1981) (concluding that Title VII's "bona fide occupational qualification" defense must be applied in a manner that gives "due weight to ... a person's ... acceptability to those persons with whom the [employer] does business").
\item \textsuperscript{53} Chico Dairy, 382 S.E.2d at 78 (emphasis added); \textit{see also} id. at 80 n.4 (observing that the plaintiff had alleged a violation of the West Virginia Human Rights Act "on the basis of the employer's perception of a 'facial deformity,' not on the basis of blindness or an actual handicap").
\item \textsuperscript{54} W. VA. CODE §§ 5-11-1 to 5-11-19 (Michie 1994 & Supp. 1995). The Act made it unlawful for an employer to "discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or handicapped ... ." \textit{Id.} § 5-11-9.
\item \textsuperscript{55} Chico Dairy, 382 S.E.2d at 78.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\end{itemize}
of "handicap."\textsuperscript{58} Under that definition, the court noted, "[T]he term 'handicap' means any physical or mental impairment which substantially limits one or more of an individual's major life activities."\textsuperscript{59} 

While individuals who are merely perceived to be disabled do not fall within the statutory definition,\textsuperscript{60} the West Virginia Human Rights Commission adopted an "interpretive rule" that purported to expand the statutory definition to provide protection for persons who were regarded as having a disability.\textsuperscript{61} This rule was adopted verbatim from the definition of handicap appearing in the Rehabilitation Act of 1973.\textsuperscript{62}

A footnote explaining the purpose of the rule stated that an expansion of the statutory definition was required to make clear that the law prohibited discrimination against both disabled individuals and those incorrectly perceived to be disabled.\textsuperscript{63} The drafters of the rule explained that discrimination on the basis of a perceived disability is as grounded in prejudice or stereotypes about the abilities of a person who is not physically or mentally "normal" as is discrimination on the basis of an actual disability.\textsuperscript{64}

Expressing no disagreement with these policy arguments,\textsuperscript{65} the West Virginia Supreme Court held that the rule was invalid because it enlarged the statutory definition beyond the legislature's intent.\textsuperscript{66} The court based its holding upon the fact that while the state statutory definition had been adopted after perceived disability protection had been added to the federal Rehabilitation Act definition,\textsuperscript{67} the West Virginia

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\item[58.] Id. at 79. See generally O'Connor, supra note 8, at 633: [N]early every state has enacted statutory protections for handicapped persons in the workplace. More than in any other area of civil rights litigation, the effectiveness of these protections has turned on the definition given to the protected class — both in the manner in which the legislature has chosen to define "handicap," and in the ways in which the courts have construed and interpreted that definition.

O'Connor, supra note 8, at 633.

\item[59.] Chico Dairy, 382 S.E.2d at 79 n.3 (quoting W. VA. CODE § 5-11-3(t) (1981)).

\item[60.] See id. at 84. "The West Virginia statute requires an actual, existing handicap." Id.

\item[61.] Id. at 79 (quoting W. VA. CODE OF STATE RULES § 77-1-2.7 (1982)).

\item[62.] See id. at 79, 84. The Rehabilitation Act defines an "individual with a disability" to mean "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(b) (1988 & Supp. V 1994).

\item[63.] Chico Dairy, 382 S.E.2d at 79 n.3, 80.

\item[64.] Id. at 80.

\item[65.] See id. at 85 n.10.

\item[66.] Id. at 80. The court also held, in the alternative, that the rule was invalid because it was a "legislative" rather than an "interpretive" rule and had not been promulgated in accordance with the statutory requirements applicable to legislative rules. Id. at 80-82.

\item[67.] Id. at 84.
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legislature in “obvious contrast” had adopted a more restrictive definition requiring an actual, existing disability. Therefore, the court concluded, the Commission’s rule conflicted with the clear legislative intent by expanding the rights created by the statute.

The Chico Dairy court distinguished Barnes v. Washington Natural Gas Co. on the grounds that the statute at issue in Barnes did not define the term “handicap.” In addition, contrary to the administrative rule invalidated by the Chico Dairy court, the administrative regulation providing protection for individuals with perceived disabilities in Barnes fell “within the state administrative agency’s broad authority to promulgate rules and regulations having the force and effect of law without legislative review and approval.”

The Chico Dairy court’s holding was temporally limited by the West Virginia legislature’s intervening amendment to the West Virginia Human Rights Act which made the statutory definition of handicap identical to the federal definition encompassing perceived disabilities. The West Virginia Supreme Court nevertheless confirmed the Chico Dairy holding in subsequent cases where it was determined that the amended statutory definition was not applicable.

For example, in Casteel v. Consolidation Coal Co., the court observed that in both Chico Dairy and an earlier case, Ranger Fuel Corp. v. West Virginia Human Rights Commission, it had refused to expand the statutory definition of handicap by holding that the legislature “clearly intended to limit the protection of the Human Rights Act to those individuals with substantial handicaps.” In Fourco Glass Co. v. West Virginia Human Rights Commission, the court likewise applied the Chico Dairy decision to reject the claim of an employment
applicant asserting that he had not been hired as a result of a perceived disability. The court commented that prior to the passage of the statutory amendment, the West Virginia Human Rights Commission did not have the authority to fashion an interpretive rule because the statute did not treat a perceived disability as an actual disability.

C. Annear v. Iowa

The Iowa Supreme Court reached essentially the same result in Annear v. Iowa. The plaintiff in Annear was employed as a maintenance worker at a facility operated by the Iowa Department of Public Defense. During the final years of the plaintiff’s employment, he was assigned to light duty due to a back injury. He ultimately applied for long-term disability benefits under the employer’s disability insurance policy, and began receiving such benefits immediately after his employment was terminated.

After back surgery improved the plaintiff’s condition, he sought to return to his former position. Although his physician provided the employer with a medical release stating that the plaintiff was capable of returning to work and performing the duties of his former position, the plaintiff was informed that there were no vacancies due to budgetary restraints. Moreover, the employer told the plaintiff that when additional employees were considered, there will be no favoritism and that all applicants would compete on an equal footing.

After a lower classified position for which the plaintiff had applied was filled by another applicant, the plaintiff filed suit against the employer under the Iowa Civil Rights Act. The plaintiff contended that the employer’s stated reason for declining to rehire him — “the

79. See id. at 65.
80. Id. at 66.
81. 454 N.W.2d 869 (Iowa 1990).
82. Id. at 870.
83. Id.
84. Id. at 870-71.
85. Id. at 871.
86. Id.
87. Id.
88. Id.
89. See id.
relative merit of the competing applicants' was pretextual, and that the real reason for refusal was the plaintiff’s perceived physical disability.

The plaintiff argued that he was entitled to a jury instruction which defined disabled persons as including individuals “who are regarded as being handicapped although not in fact deserving that characterization.” The plaintiff relied on an administrative regulation promulgated by the Iowa Civil Rights Commission as an aid in administering the Iowa Civil Rights Act. That regulation defined disabled persons as individuals having a physical or mental impairment that substantially limits one or more of their major life activities. The regulation went on to define a person “regarded” as having an impairment as one who “[h]as none of the impairments defined to be ‘physical or mental impairments,’ but is perceived as having such an impairment.”

In a previous decision, the Iowa Supreme Court relied upon this regulation to conclude that individuals who are not actually disabled but whose employers nevertheless perceive them to be disabled are considered to be “disabled” under the Iowa Civil Rights Act. The court rejected this proposition, however, holding that an employer’s failure to hire an applicant because it erroneously believed he was unable to work would not constitute unlawful discrimination prohibited by the Iowa Civil Rights Act. The court concluded that applying the administrative regulation to such a decision would expand the scope of disability discrimination claims beyond the breadth of the statute by which they had been created.

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91. Annear, 454 N.W.2d at 874. “A desire to hire the more experienced or better qualified applicant is a nondiscriminatory, legitimate [basis for] a hiring decision.” Holder v. Old Ben Coal Co., 618 F.2d 1198, 1202 (7th Cir. 1980).
92. Annear, 454 N.W.2d at 874. Specifically, the plaintiff contended that the employer’s representatives involved in the hiring process erroneously believed that his disability continued to exist after his corrective surgery. Id.
93. Id.
94. The Iowa Civil Rights Commission has the statutory authority to “adopt, publish, amend and rescind regulations consistent with and necessary for the enforcement” of the Iowa Civil Rights Act. Sommers v. Iowa Civil Rights Comm’n, 337 N.W.2d 470, 475 (Iowa 1983) (quoting IOWA CODE § 601A.5(10) (1981)).
95. Annear, 454 N.W.2d at 875.
97. Id. § 8.26(5).
99. Annear, 454 N.W.2d at 875.
100. Id.
promulgating rules cannot exceed the agency’s statutory authority. The precise impact of the Annear holding was clouded by the court’s suggestion that the regulation might apply in a situation involving a “categorial organic disorder of the body.” The court’s only indication of what it meant by this suggestion was its reference to Sommers v. Iowa Civil Rights Commission, where the fact that the plaintiff was viewed adversely by others did not persuade the court that she was necessarily perceived as having a physical or mental impairment. Instead, the Sommers court concluded that an individual’s physical condition must independently fall within the definition of “impairment,” which “relates to an organic disorder of the body,” before the perceptions of others are considered in determining if the condition is a substantial disability.

Notwithstanding the Annear court’s arguable qualification of its holding, the United States Court of Appeals for the Eighth Circuit concluded that Annear prohibits individuals who are merely perceived to be disabled from claiming the protection of the Iowa Civil Rights Act. Other recent Iowa cases are more equivocal. For example, in Henkel Corp. v. Iowa Civil Rights Commission, the Iowa Supreme Court indicated that the regulation at issue in Annear may continue to give content to the statutory definition. In Miller v. Sioux Gateway Fire Department, the court quoted from a pre-Annear case, Probasco v. Iowa Civil Rights Commission, that defined “handicapped individual” so that it included a person regarded as having a physical or mental impairment which substantially limits a major life activity. And in Fink v. Kitzman, the United States District Court for the Northern District of Iowa stated that under Iowa law, a disabled person includes any person with a physical or mental impairment that substantially limits one or more major life activities, or who is regarded as having such an

101. Id.
102. Id.
103. 337 N.W.2d 470 (Iowa 1983).
104. Id. at 476-77.
105. Id. at 476.
108. Id. at 810.
109. 497 N.W.2d 838 (Iowa 1993).
110. 420 N.W.2d 432 (Iowa 1988).
111. Miller, 497 N.W.2d at 841.
impairment.\textsuperscript{113}

Since none of the recent Iowa cases directly address the issue of whether the Iowa Civil Rights Act covers perceived disabilities,\textsuperscript{114} the Eighth Circuit's characterization of \textit{Annear} appears to be the operative one.\textsuperscript{115} As noted earlier,\textsuperscript{116} that characterization is consistent with the West Virginia Supreme Court's interpretation of the West Virginia Human Rights Act in \textit{Chico Dairy v. West Virginia Human Rights Commission}\textsuperscript{117} and its progeny.\textsuperscript{118}

\textbf{D. \textit{Sanchez v. Lagoudakis}}

In \textit{Sanchez v. Lagoudakis},\textsuperscript{119} the Michigan Court of Appeals reached a strikingly similar result.\textsuperscript{120} The plaintiff in \textit{Sanchez} was employed as a waitress in the defendant's restaurant.\textsuperscript{121} After hearing a rumor that the plaintiff contracted acquired immunodeficiency syndrome ("AIDS"), the employer informed the plaintiff that she was prohibited from returning to work until she had secured medical evidence indicating that she did not have the disease.\textsuperscript{122} Although the results of the plaintiff's subsequent blood test were negative, she refused to return to work because she had been thoroughly embarrassed by the entire incident.\textsuperscript{123}

The plaintiff brought suit under the Michigan Handicappers' Civil Rights Act,\textsuperscript{124} alleging that the employer unlawfully discriminated

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\item Id. at 1378.
\item In \textit{Miller}, for example, the court was able to avoid the perceived disability issue because "the evidence showed an actual impairment." \textit{Miller}, 497 N.W.2d at 841. The plaintiff in \textit{Henkel Corp.} was likewise found to be disabled because he suffered from a "mental condition [that] substantially limited his ability to work and learn." \textit{Henkel Corp.}, 471 N.W.2d at 810. Finally, although the plaintiff in \textit{Fink} suffered from carpal tunnel syndrome, the court concluded that the employer did not believe that her condition "even . . . impaired [her] job performance," let alone that it rendered her disabled. \textit{Fink}, 881 F. Supp. at 1379. Thus, while the court apparently assumed that the Iowa Civil Rights Act prohibits perceived disability discrimination, it was not actually required to decide that issue. \textit{See id.} at 1377-79.
\item Surprisingly, \textit{Annear} was not even discussed in \textit{Miller}, \textit{Henkel Corp.} or \textit{Fink}.
\item \textit{See supra} notes 45, 50 and accompanying text.
\item \textit{382 S.E.2d} 75 (W. Va. 1989).
\item \textit{See supra} notes 45, 50 and accompanying text.
\item \textit{See id.} at 375.
\item \textit{Id.} at 374.
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
against her on the basis of a disability. The trial court granted the employer’s motion for summary judgment, finding that the plaintiff suffered no actual disability within the meaning of the Act, and that the absence of a disability prohibited recovery.

The Michigan Court of Appeals affirmed the trial court’s ruling. The court noted that the Act defined handicap as “a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder . . . .” Because the plaintiff had no actual “determinable physical or mental characteristic,” she did not fall within the statutory definition. The court reasoned that if the Michigan legislature had intended for the statute to apply to perceived disabilities, it would have so stated, and therefore the court refused to expand the statutory definition to include situations where “no handicap exists but others perceive such a handicap.” The court found no support for a contrary interpretation in cases involving the federal Rehabilitation Act because, unlike the Michigan statute, the Rehabilitation Act specifically includes perceived disabilities within its definition of handicap.

The decisions in Sanchez, Chico Dairy Co. v. West Virginia Human Rights Commission, and Annear v. Iowa are consistent with the United States Supreme Court’s analysis in Shaare Tefila Congregation v. Cobb. In Shaare Tefila Congregation, members of a Jewish congregation sued various defendants who had spray-painted the walls of the congregation’s synagogue with anti-Semitic graffiti, alleging that the defendants’ actions were motivated by racial prejudice, and therefore

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125. Sanchez, 457 N.W.2d at 374.
126. The court nevertheless conditioned dismissal of the plaintiff’s claim upon the employer’s reimbursing the plaintiff for lost wages, costs and attorneys’ fees. Id. The Michigan Court of Appeals characterized this aspect of the trial court’s ruling as “suspect,” but declined to review it further because it had not been raised on appeal. Id.
127. Id.
128. Id. at 375.
129. Id. (quoting MICH. COMP. LAWS §37.1103(b)).
130. Id.
131. Id.
133. Sanchez, 457 N.W.2d at 375 (discussing 29 U.S.C. § 706(7)(B)).
135. 454 N.W.2d 869 (Iowa 1990).

The plaintiffs apparently conceded that Jewish people are not a racially distinct group, but argued that their claim nevertheless was actionable because the defendants “viewed Jews as [being] racially distinct.” The district court disagreed and dismissed the claim. The United States Court of Appeals for the Fourth Circuit affirmed, holding that section 1982 does not apply to “situations in which a plaintiff is not a member of a racially distinct group but is merely perceived to be so.” The Supreme Court apparently agreed with that analysis:

We agree with the Court of Appeals that a charge of racial discrimination within the meaning of § 1982 cannot be made out by alleging only that the defendants were motivated by racial animus; it is necessary as well to allege that defendants’ animus was directed towards the kind of group that Congress intended to protect when it passed the statute. To hold otherwise would unacceptably extend the reach of the statute.

Although Shaare Tefila Congregation involved perceived racial discrimination, the analogy to perceived disability discrimination is obvious. However, the analysis in Shaare Tefila Congregation


138. Shaare Tefila Congregation, 481 U.S. at 616.

139. Id. On this point, the Supreme Court ultimately concluded that the relevant inquiry is not “whether Jews are considered to be a separate race by today’s standards, but whether, at the time § 1982 was adopted, Jews constituted a group of people Congress intended to protect,” and held that at the time § 1982 was enacted, “Jews . . . were among the peoples then considered to be distinct races . . . .” Id. at 617-18.

140. Id. at 616 (emphasis added).

141. Id.


143. Shaare Tefila Congregation, 481 U.S. at 617.

144. Id. The Supreme Court nevertheless reversed the Court of Appeals’ decision on the ground that Jewish people are not merely perceived to be a racially distinct group but, for purposes of section 1982, are in fact a “distinct race[].” Id. at 617-18.

145. See Chevron Corp. v. Redmon, 745 S.W.2d 314, 316 (Tex. 1988) (“Just as plaintiffs in Federal Title VII and age discrimination actions must show that they are members of a protected class, [a plaintiff] must first show that she is within the protected class before she can recover under [a handicap discrimination statute].”) (authority omitted); Barnes v. Washington Natural Gas Co., 591 P.2d 461, 465 (Wash. Ct. App. 1979) (holding that just as a person perceived to belong to a minority racial or ethnic group “may be discriminated against because of [her] perceived racial characteristics, a person . . . may be discriminated against because of his or her perceived handicap.
actually begs the critical issue, which is identifying precisely what group it is that the legislature intended to protect.146

Less than one week after the Michigan Court of Appeals decided *Sanchez v. Lagoudakis,*147 the Michigan legislature gave notice that the Michigan Handicappers' Civil Rights Act was intended to protect individuals who are perceived to be disabled148 by amending the act to include perceived disabilities within the definition of handicap.149 That expression of legislative intent prompted the Michigan Supreme Court to reverse the Michigan Court of Appeals' decision in *Sanchez* and observe that "[c]learly, under the current version, when the act ... speaks of discrimination by an employer against an individual because of a handicap, this includes an individual who, while not handicapped, is regarded as having a handicap."150


In *Burris v. City of Phoenix,*151 the plaintiff applied for a job as a firefighter with the City of Phoenix.152 After he passed the required pre-employment tests, the City offered him a position.153 When the

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146. *Shaare Tefila Congregation*, 481 U.S. at 617. In *Barnes v. Washington Natural Gas Co.*, for example, the Washington Court of Appeals interpreted a state employment discrimination statute as providing protection against discrimination on the basis of perceived disabilities by concluding that "[t]he class protected by the statute is those persons whom the employer discharges or intends to discharge because he believes the person is afflicted with a 'sensory, mental, or physical handicap.'" 591 P.2d 461, 465 (Wash. Ct. App. 1979) (quoting WASH. REV. CODE ANN. § 49.60.180) (emphasis added).


148. *Cf. Rogers v. Campbell Foundry Co.*, 447 A.2d 589, 591 (N.J. Super. Ct. App. Div. 1982) (holding that "those perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped"), cert. denied, 453 A.2d 852 (N.J. 1982); *Fahn v. Cowlitz County*, 610 P.2d 857, 867 (Wash. 1980) (Dolliver, J., dissenting) (reasoning "if the [condition] of an employee or an applicant for employment is perceived by the employer to be a physical handicap, then, by action of the employer, the plaintiffs are in a protected class").

149. *See Sanchez*, 486 N.W.2d at 659 n.13, 662 (Mich. 1992) (quoting MICH. COMP. LAWS § 37.1103(e)).

150. *Id.* at 662. However, the statute actually at issue in *Sanchez* was the pre-amendment version, which was silent as to the perceived disability issue. *See id.* at 659-60 & n.13, 662. The Michigan Supreme Court's reliance upon the statutory amendment to support its implicit conclusion that the statute originally covered perceived disabilities is questionable, and in any event inconsistent with the analysis in *Chico Dairy Co. v. West Va. Human Rights Comm'n*, 382 S.E.2d 75, 85 n.10 (W. Va. 1989), where a similar statutory amendment was found to reflect a "change" in the law.


152. *Id.* at 1342.

153. *Id.*
City later learned that the plaintiff had a history of cancer, the City rescinded the offer even though the plaintiff no longer had the disease.\(^\text{154}\)

The trial court ruled that the City had violated the Arizona Civil Rights Act (the "ACRA")\(^\text{155}\) by refusing to hire the plaintiff solely because of its perception that he was disabled.\(^\text{156}\) The City argued on appeal that the plaintiff's history of cancer did not meet the statutory definition of "handicap" under the ACRA,\(^\text{157}\) and that the trial court had erred by expanding the definition to include individuals with perceived disabilities.\(^\text{158}\)

The Arizona Court of Appeals rejected the City's argument.\(^\text{159}\) The court concluded that cancer is a handicap within the meaning of the ACRA,\(^\text{160}\) and that the act covered an individual who no longer had cancer but was denied a job on the basis of a history of cancer.\(^\text{161}\) “Thus, Burris holds that an individual may be handicapped if he once had a condition which, although now of no effect, continues to substantially restrict or limit that individual's general ability to secure, retain or advance in employment because of the stigma associated with the

\(^{154}\) Id. at 1342-43.


\(^{156}\) Burris, 875 P.2d at 1343.

\(^{157}\) Id. at 1344. At the time, the Arizona Civil Rights Act defined a "handicap" as a "physical impairment that substantially restricts or limits an individual's general ability to secure, retain or advance in employment." Ariz. Rev. Stat. Ann. § 41-1461(4), amended by 1994 Ariz. Laws, ch. 258, § 1.

\(^{158}\) Burris, 875 P.2d at 1344. The trial court had stated:

Court and counsel have argued over the definition of "handicap." The legislature seems to favor a narrow definition, while Appellate Courts and the Federal system opt for a more liberal definition. In this case, the City treated [the plaintiff] as if he were handicapped. They thought and perceived him to have a limitation when they . . . refused to hire him.

To now say that they are vindicated because he doesn't fall into the Statutory definition of handicap, is not appropriate.

Equity and public policy will not allow such a result.

Id. at 1343-44 (emphasis in original).

\(^{159}\) See id. at 1343-45.

\(^{160}\) Id. at 1345; but cf. Andrews v. Jones Truck Lines, 741 F. Supp. 867, 872 (D. Kan. 1990) (plaintiff "fail[ed] to meet the threshold requirement [of establishing] that he [was] handicapped" because he had "not proffered any evidence that his cancerous condition ha[d] in any way substantially limited any of his life's activities"); Lyons v. Heritage House Restaurants, Inc., 432 N.E.2d 270, 274 (III. 1982) (plaintiff was not handicapped within the meaning of state antidiscrimination statute where she had "not alleged that her cancer ha[d] substantially hindered her in any of [her major life] activities").

\(^{161}\) Burris, 875 P.2d at 1345.
Although *Burris* has been characterized as a perceived disability case, it actually addressed discrimination on the basis of a "history" of handicap, which is a slightly different theory of disability discrimination. The analysis in *Burris* is generally applicable to both theories, however, and was expressly extended to perceived disability discrimination in *Bogue v. Better-Bilt Aluminum Co.*

The plaintiff in *Bogue* alleged that the defendant unlawfully refused to hire him because it perceived him to have a hearing impairment. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed. The Arizona Court of Appeals relied upon its analysis in *Burris* in holding that the trial court had erred, stating: "We cannot on the one hand conclude that the ACRA provides protection to applicants whose physical impairment substantially limits their general employability and on the other hand deny protection to those applicants whom employers only regard as having such impairment."

### III. POLICY CONSIDERATIONS

There is no question that individuals erroneously perceived to have a disability are denied employment opportunities because of the prejudiced attitudes or ignorance of others. In *Burris v. City of Phoenix*, for example, the court cited evidence that individuals who have been cured of cancer frequently face barriers to employment.
opportunities that are unrelated to their qualifications.  

Moreover, an individual who is incorrectly perceived to have a disability may be as aggrieved by discriminatory treatment as a person who actually has a disability. In this regard, individuals with perceived disabilities and those with actual disabilities may be equally deserving of statutory protection.

However, the primary purpose of laws prohibiting disability discrimination is to insure that the “truly disabled” are free from discrimination based on unfair stereotypes or prejudice. For this reason, legislatures and courts generally conclude that individuals are not entitled to protection unless they suffer from impairments that “significantly decrease [their] general ability to obtain satisfactory employment elsewhere.”

Since employers presumably do not discriminate against individuals they do not perceive to be disabled, a particular employer’s mistaken perception will seldom limit an individual’s general ability to secure employment elsewhere unless the individual has some actual impairment — or history of an impairment — about which other employers might form a similar (albeit mistaken) impression. If this is the case, many of the problems associated with perceived disability discrimination can be addressed simply by expanding the protection afforded to persons

175. Id. at 1344-45.
178. Capitano, 875 P.2d at 836.
181. See Bogue, 875 P.2d at 1336 (holding that “if [an] employer refuses to hire an individual because the individual is erroneously perceived to have [an] impairment, unless that perceived impairment substantially restricts or limits the individual’s general employability, the applicant is not handicapped”); Tudyman v. United Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984) (stating that “refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual”).
182. In Susie v. Apple Tree Preschool & Child Care Ctr., 866 F. Supp. 390, 392 n.3 (N.D. Iowa 1994), for example, the plaintiff was perceived to have epilepsy even though she “may not have [had] epilepsy, but rather some other disorder.” Id. See also Rose City Oil Co. v. Missouri Comm’n on Human Rights, 832 S.W.2d 314, 317 (Mo. Ct. App. 1992) (holding that plaintiff was not protected by the perceived handicap provisions of the Missouri antidiscrimination statute because he “suffered from nothing,” and the statute required “the existence of a condition which might be perceived to be a handicap”).
with a history of disability, or by interpreting the terms "disability" or "impairment" somewhat more broadly, than has traditionally been the case. There may be little need to protect persons who are mistakenly perceived to be disabled despite having no impairment (or a history of an impairment), however, because those individuals are likely to suffer from discrimination only in relatively isolated, job-specific and nonrecurring circumstances.

Applying essentially the same analysis, some courts have refused to extend protection to employees who have no physical limitations that an employer could perceive to be disabilities. A legislature may engage in similar reasoning in declining to extend protection to individuals who are erroneously perceived to be disabled despite having no actual impairment, on the ground that only those persons who, because of a disability, have substantial difficulty finding work are truly in need of

183. Cancer is a good example to analyze. See Estate of Latimer v. Filtronetics, Inc., 913 S.W.2d 51, 56 (Mo. Ct. App. 1995) ("Cancer, even in remission . . ., could be seen as a condition that would substantially impair [a person's] major life activities."); Burris, 875 P.2d at 1344-45 (stating that "there is little question that cancer history raises barriers to employment opportunities which are unrelated to a person's qualifications"). One commentator has observed that "[a]t least two states specifically protect employees with a cancer history," and advocates the enactment of federal legislation providing such protection by the use of definitional language "such as 'cancer history' or 'medical condition.'" Hoffman, supra note 11, at 14, 15. See generally Bogue, 875 P.2d at 1335 (explaining that "an individual may be handicapped if he once had a condition which, although now of no effect, continues to substantially restrict or limit that individual's general ability to secure, retain or advance in employment because of the stigma associated with the condition"); Allen v. Heckler, 780 F.2d 64, 66 (D.C. Cir. 1985) (recognizing that "discrimination also occurs against those who at one time had a disabling condition").

184. See, e.g., Bay City Fire Dep't., 451 N.W.2d at 534-35 (finding it unnecessary to determine whether plaintiff could recover under a perceived disability theory because his congenital spinal defect constituted an actual disability despite physician's conclusion that his spine was "normal, healthy, and lacking pathological signs of degeneracy or trauma"); Chico Dairy Co. v. West Va. Human Rights Comm'n, 382 S.E.2d 75, 85-86 (W. Va. 1989) (Workman, J., dissenting) (arguing that it was unnecessary to reach the issue of whether plaintiff had a perceived disability because her blindness in one eye should have been treated as "an actual, existing handicap").

185. But cf. Cook v. Rhode Island, 10 F.3d 17, 22 (1st Cir. 1993) (observing that the Rehabilitation Act's "perceived disability model can be satisfied whether or not a person actually has a physical or mental impairment").

186. See American Motors Corp. v. Labor & Indus. Review Comm'n, 350 N.W.2d 120, 125 (Wis. 1984) (observing that the "particular concern" of perceived disability discrimination legislation is "ensuring that the protections afforded by . . . handicap discrimination provisions also apply to persons having a disability or impairment that does not actually . . . limit the capacity to work but nevertheless is perceived to do so") (emphasis added).

187. Id. at 125; Rose City Oil Co., 832 S.W.2d at 317.

188. But cf. Rollins, supra note 16, at 653 (criticizing the view that there should be "some unspecified threshold level of impairment which must be crossed" before an individual can be perceived as having a disability).
There is nothing inherently illogical in that policy decision.\textsuperscript{190} Presumably for these reasons, the need of the "class" is not often cited in support of the argument that employment discrimination statutes should protect individuals erroneously perceived to be disabled.\textsuperscript{191} The focus instead is on the fact that discriminatory conduct should be proscribed regardless of whether it is based on an accurate perception of an individual's condition.\textsuperscript{192} The court in \textit{Sanchez v. Lagoudakis},\textsuperscript{193} for example, stated that "[i]f the employer acts on a belief that the employee has a handicap, . . . it is inconsequential whether the employee actually has the handicap because, in either hypothesis, the employer has undertaken the kind of discriminatory action that the [law] prohibits."\textsuperscript{194} There is considerable force to that argument, as the \textit{Sanchez} court went on to explain:

\begin{quote}


‘perceived’ as such, [a] Legislature could . . . reasonably conclude[] that the pressing issue [is] to ensure that only the truly disabled are protected, . . . since those not actually handicapped but only perceived as such in certain situations could ordinarily obtain employment elsewhere.

\textit{Id.}

191. \textit{See}, e.g., \textit{Sanchez v. Lagoudakis}, 486 N.W.2d 657, 660 (Mich. 1992) (observing that the proper focus in a perceived handicap case is on "the employer's conduct — the employer's belief or intent — and not the employee's condition"); Rollins, \textit{supra} note 16, at 646 (observing that "the concept of perceived handicap requires a shift in focus from the individual's condition to the [particular] employer's perception, attitude and state of mind").

192. \textit{See} Bay City Fire Dep't v. Department of Civil Rights, 451 N.W.2d 533, 536 (Mich. Ct. App. 1989) (Reilly, J., concurring) (stating that "[t]he employer's conduct is equally objectionable in either case"); \textit{see also} Barnes v. Washington Natural Gas Co., 591 P.2d 461, 465 (Wash. Ct. App. 1979) ("It makes no difference to the employee whether he is discharged because he, in fact, is handicapped . . . or that the employer perceives that he is. The employer has terminated the employment for the same reason — a reason which constitutes discrimination contrary to the provisions of the statute.").


The purpose of the [statute at issue in \textit{Sanchez}] is to prevent discrimination — a process of thinking and conduct by the employer — based on handicap. . . . [I]t would be inconsistent with that purpose to deny protection to those who are the victims of this process even though the perception is erroneous that they are handicapped. The harm on which the legislature focused is the same whether the object of the discrimination was handicapped or not.
\end{quote}
The purpose of [handicap discrimination] act[s] is to prohibit employers from discriminating on the basis of handicap. It would not be consistent with that purpose to relieve employers who so discriminate of liability if, although they acted in a prohibited discriminatory manner, it later turns out that their belief was in fact erroneous. The key as far as the act is concerned is that the employer acted on the belief of a handicap.9

IV. STATUTORY ANALYSIS

Many who favor prohibiting perceived disability discrimination as a matter of policy might nevertheless agree that as a matter of statutory construction, some of the cases interpreting state statutes to provide such protection have been decided incorrectly.196 Perhaps the clearest examples of this possibility are the Arizona Court of Appeals' decisions in Burris v. City of Phoenix197 and Bogue v. Better-Bilt Aluminum Co.198

Neither the statutory definition of "handicap" in effect at the time Burris and Bogue were decided199 nor the applicable legislative history

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195. Sanchez, 486 N.W.2d at 660 n.16. The court in Burris likewise noted that [i]t would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the class a person 'perceived' by the employer to have the handicap, [because]

... [p]rejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent.


196. One disability rights advocate has acknowledged that less than half of the state disability discrimination statutes in existence in the mid-1980's prohibited discrimination based on perceived disabilities. Hoffman, supra note 11, at 20; see also Brief of Amicus Curiae The City of Bisbee at 10, Burris v. City of Phoenix, 875 P.2d 1340 (Ariz. Ct. App. 1993) (No. 1 CA-CV 90-545) [hereinafter Burris Amicus Brief] (observing that "one need not disagree with the policy concerns [favoring the prohibition of perceived disability discrimination] to recognize that... those concerns fall within the province of the legislative, and not the judicial, branch"); cf. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 527 (4th Cir. 1986) (holding that "[a]lthough we sympathize with appellant's position... it cannot support a claim of... discrimination solely on the basis of defendant's perception"), rev'd on other grounds, 481 U.S. 615 (1987).

of that provision\textsuperscript{200} appears to support the holdings in those cases.\textsuperscript{201} The Arizona legislature first amended the Arizona Civil Rights Act to prohibit disability discrimination in 1985,\textsuperscript{202} well after the Rehabilitation Act\textsuperscript{203} had been amended to protect individuals who are regarded as having an impairment.\textsuperscript{204} The purpose of the Rehabilitation Act amendment was to “protect[] those persons who do not have a present or past impairment, but are perceived by others as having an impairment.”\textsuperscript{205} The Senate Report accompanying the amendment states:

[T]he new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as [T]itle VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of [the Act] . . . those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities . . . . Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.\textsuperscript{206}

When Arizona first considered amending the ACRA to prohibit

\textsuperscript{200} There actually is relatively little legislative history regarding the amendment of the ACRA to provide protection for disabled individuals. \textit{See} O’Connor, \textit{supra} note 8, at 656 n.136; \textit{Burris} Reply at 6 n.6.

\textsuperscript{201} \textit{See}, e.g., \textit{Bogue}, 875 P.2d at 1334 (observing that while “many state anti-discrimination laws specifically provide that it is an unfair employment practice to discriminate against an individual because of a perceived handicap,” there is “no explicit perceived handicap provision in the ACRA”); \textit{O’Connor}, \textit{supra} note 8, at 655 (observing that the ACRA definition of handicap “made[] no provision for . . . protecting . . . those with a history of an impairment or regarded as having an impairment”).

\textsuperscript{202} \textit{See} \textit{ARIZ. LAWS}, ch. 167.


\textsuperscript{204} \textit{Id.} § 706(8)(B)(iii). The Rehabilitation Act originally defined a “handicapped individual” as “any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services . . . .” \textit{Pub. L. No.} 93-112, 87 Stat. 357 (current version at 29 U.S.C. §§ 701-794 (1988 & Supp. V 1994)). Congress expanded the definition in 1974 to “preclude discrimination against [a] person who . . . is regarded as having an impairment [but who] may . . . have no actual incapacity.” \textit{School Bd. of Nassau County v. Arline}, 480 U.S. 273, 279 (1987) (quoting \textit{Southeastern Community College v. Davis}, 442 U.S. 397, 405-06 n.6 (1979)).


disability discrimination in 1982,207 the bill introduced in the Arizona House of Representatives was to follow the amended federal definition by including a person with a “physical impairment which substantially limits one or more major life activities,” as well as one who is “regarded as having such an impairment,” within the definition of “a handicapped individual.” 208 That effort failed209 because when Arizona subsequently amended the act in 1985 to prohibit discrimination on the basis of disability,210 the provision protecting individuals who are regarded as having an impairment was not included.211

The Arizona legislature’s failure to adopt the Rehabilitation Act definition is significant not only because states that permit recovery when the employer discriminates against an individual because of a perceived disability generally have statutory definitions of handicap similar to the Rehabilitation Act definition,212 but also because the Arizona Court of Appeals has stated that where the language of the Rehabilitation Act is broader than that of the ACRA, Arizona does not follow federal law.213 The fact that the Arizona legislature consciously rejected a bill patterned after the Rehabilitation Act definition makes its failure to adopt that definition even more significant214 because the rejection of a legislative amendment ordinarily “indicates that the . . . legislature did not intend [for the legislation] to include the provisions embodied in the rejected amendment.”215

Similar reasoning prompted the West Virginia Supreme Court to conclude that the adoption of a state statutory definition of handicap that

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207. See H.B. 2440, 35th Leg., 2d Sess., 1982 ARIZ. LAWS.
208. Passage taken from Arizona House Bill 2440.
209. See Burnis Reply at 6 n.6.
210. See ARIZ. REV. STAT. ANN. § 41-1463.
211. See Bogue, 875 P.2d at 1334; Burnis Reply at 6 n.6.
213. Bogue, 875 P.2d at 1332.
214. The Arizona legislature had followed the amended Rehabilitation Act definition elsewhere. In a statute providing “handicapped persons” who apply for public employment with “preference points” on merit examinations, the legislature defined a “handicapped person” as “anyone who has a physical or mental impairment which substantially limits one or more major life activities or has a record of such impairment or is regarded as having such an impairment . . . .” ARIZ. REV. STAT. ANN. § 38-492.B (West 1985 & Supp. 1995).
215. MacDonald v. General Motors Corp., 784 F. Supp. 486, 498 (M.D. Tenn. 1992); see also Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 538 (9th Cir. 1985) (“[I]t is well-settled that the rejection of amendments offered in the course of enactment is often probative in ascertaining legislative intent.”). But cf. United States v. Stauffer Chem. Co., 684 F.2d 1174, 1184 (6th Cir. 1982) (“[T]he language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action.”), aff’d, 464 U.S. 165 (1984).
was more restrictive than the Rehabilitation Act definition "after the tripartite definition was added to the federal statute" reflected a "legislative decision to restrict the protection against discrimination on the basis of 'handicap' to those cases in which the discrimination was on the basis of an actual, existing, physical or mental impairment." The Texas Supreme Court reached a similar conclusion in *Chevron Corp. v. Redmon*, as did the Michigan Court of Appeals in *Sanchez v. Lagoudakis*, and it is not clear why the Arizona Court of Appeals reached a different result.

The fact that *Burris* and *Bogue* may have been decided incorrectly is further illustrated by the Arizona legislature’s decision to amend the ACRA after those cases were decided to include within the definition of "handicap" the condition of "[b]eing regarded as having a physical impairment." There are two possible ways to interpret this amendment, as represented by the conflicting decisions in *Chico Dairy Co. v. West Virginia Human Rights Commission* and *Sanchez v. Lagoudakis*.

As noted earlier, the West Virginia legislature amended the West Virginia Human Rights Act to include within the act’s protection individuals who are regarded as having an impairment while *Chico Dairy Co.* was pending on appeal. The West Virginia Su-

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217. Id. at 78 n.1 (emphasis omitted).
218. 745 S.W.2d 314, 318 (Tex. 1987). In Ritchie v. City of Houston, No. CIV.A. H-87-504, 1988 WL 24676 (S.D. Tex. Mar. 7, 1988), the United States District Court for the Southern District of Texas relied upon *Chevron Corp.* to hold that an individual whose potential employer regarded his history of lymphoma as a physical impairment substantially limiting his major life activities was not protected by the Texas Human Rights Act even though he was protected under the Rehabilitation Act.
220. *See Bogue*, 875 P.2d at 1332 (noting that "[w]here the Rehabilitation Act is broader than the ACRA, we do not follow the federal law").
221. *See generally Bailey v. Menzie*, 505 N.E.2d 126, 128 (Ind. Ct. App. 1987) (observing that "an amendment adding a provision to a statute" may reflect the legislature’s view that "the statute as originally drafted did not contain the provision," or that the provision implicitly was, "in fact, a part of the statute").
222. *See supra* part II and accompanying notes.
223. *See supra* part II and accompanying notes.
225. *Id.* § 5-11-3(0).
226. *See Chico Dairy Co.*, 382 S.E.2d at 85 n.10.
The supreme Court relied upon this “change” in the law as evidence that, prior to the amendment, “the legislature had decided not to protect against the mere perception of a handicap.”

The Michigan Supreme Court, by contrast, relied upon a similar amendment to the Michigan Handicappers’ Civil Rights Act following the Michigan Court of Appeals’ decision in Sanchez v. Lagoudakis to reach precisely the opposite conclusion. The Michigan Supreme Court apparently concluded that the amendment supported its interpretation of the pre-amendment version of the act (which was silent as to perceived disabilities) to prohibit discrimination against individuals erroneously perceived to be disabled.

Given the legislative history of Arizona’s statutory definition of “handicap,” the analysis in Chico Dairy Co., as opposed to Sanchez, appears to be more appropriate for Arizona. The amendment to the ACRA, by including perceived disabilities within the definition following the Burris and Bogue decisions, obviously reflects the fact that, as constituted at the time of the amendment, the Arizona legislature agreed with the result reached in those cases. However, it is not necessarily an indication that the legislature sitting at the time “handicap” was originally defined held the same view.

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229. Id.; see also Fourco Glass Co. v. West Va. Human Rights Comm’n, 383 S.E.2d 64, 66 (W. Va. 1989) (“Prior to the amendment, the statute did not envision a ‘perceived handicap’ as a ‘handicap.’”)


232. Sanchez, 486 N.W.2d at 662.

233. See id. at 660-62, 662 n. 31.

234. See id. at 661.

235. See Burris Reply at 1-2 (discussing the similarity between Chico Dairy Co. and Burris).


237. Cf. American Motors v. Labor & Indus. Review Comm’n, 350 N.W.2d 120, 123 n.4 (Wis. 1984) (commenting that “[t]he legislative history . . . indicates that the legislature patterned the statutory definition of ‘handicapped individual’ after the definitions of handicap that this court [has] previously adopted.”). One commentator has written, “In 1980 the Wisconsin Supreme Court interpreted the [Wisconsin Fair Employment] Act’s protection to include persons who were not actually handicapped but who were, nonetheless, discriminated against because they were perceived as being handicapped. One year later, the supreme court’s definition of handicap was incorporated into the Act. Rollins, supra note 16, at 639.

238. See generally Bailey v. Menzie, 505 N.E.2d 126, 128 (Ind. Ct. App. 1987) (“[A]n amendment may . . . clarify that the [added] provision is, in fact, a part of the statute.”).

239. See Peralta Community College Dist. v. Fair Employment and Hous. Comm’n, 801 P.2d 357, 364 (Cal. 1990) (“The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.”); cf. Bailey, 505 N.E.2d at 128 (“[T]he intent we are searching for is that of the legislature that passed the original statute, not that of any
may reflect recognition of the fact that the legislature as constituted at
the time "handicap" was first defined intended a different interpreta-
tion.\footnote{240}{See generally Bailey, 505 N.E.2d at 128 ("One inference that may be drawn from an amendment adding a provision to a statute is that, in the view of the legislature, the statute as originally drafted did not contain the provision."), (authority omitted).}

The holdings in \textit{Burris} and \textit{Bogue} are undermined by yet another recent amendment to the ACRA.\footnote{241}{See Ariz. Rev. Stat. Ann. § 41-1463.F.} At the time \textit{Burris} and \textit{Bogue} were decided, the act stated that individuals were not protected unless they had informed the employer that they had an impairment or condition that constituted a disability.\footnote{242}{Id. § 41-1463.F.5(a) (repealed 1994).} The individual must also have informed the employer of the nature of the disability and any limitations or restrictions resulting therefrom.\footnote{243}{Id. § 41-1463.F.5(b) (1992) (repealed 1994).} Finally, the employer must have been provided with the names of any health care practitioners who could provide additional information relating to the nature of the disability and its possible effects.\footnote{244}{Id. § 41-1463.F.5(c) (repealed 1994).}

There is an obvious inconsistency in prohibiting individuals who fail to advise their employers of their disabilities from claiming the protection of the act while simultaneously interpreting it to provide protection if their employers merely believe that they are disabled.\footnote{245}{Burris Amicus Brief at 7 ("If... an individual could claim protection from discrimination under the ACRA simply by claiming that the employer had 'perceived' him to be handicapped, the disclosure requirements of [the act] would be rendered meaningless.").} Among other things, the analysis in \textit{Burris} and \textit{Bogue} could have led to a situation in which an individual with no impairment was protected, while an individual with an actual impairment was not protected simply because the impairment was not disclosed to the employer.\footnote{246}{Cf. Rollins, supra note 16, at 654 (referring to the "anomalous result of affording protection to [an] individual who has no impairment, while denying the same protection to [an] individual who has only a slight, but nonetheless actual, impairment").}

The Arizona Court of Appeals dealt with this anomaly by effectively rewriting the statute.\footnote{247}{See Bogue v. Better-Bilt Aluminum Co., 875 P.2d 1327, 1337-38 (Ariz. Ct. App. 1994) (rejecting a "literal" reading of the statute as an unreasonable "interpretation").} Because it is logically impossible for individuals who believe they do not have a disability to provide their employers with the name of the doctor who treated the condition, the court in subsequent legislature. To the extent that the amendment merely represents the opinion of the amending legislature as to how the statute should be construed, it is not controlling.\footnote{248}{Rolllin,...
Bogue held that despite its express language, the ACRA merely required individuals seeking to claim its protection to have informed the employer of their physical condition and, if applicable, any restrictions or limitations that may affect their job performance.248

The Arizona legislature reacted to this strained interpretation of the statute by repealing the provisions with which the Arizona Court of Appeals had struggled.249 The resulting amendment suggests that the legislature recognized that the holdings in Burris and Bogue could not be reconciled with the language of the ACRA as it appeared when those cases were decided.250

V. RAMIFICATIONS OF THE ISSUE

At first blush, the issue of whether state employment discrimination statutes prohibit discrimination on the basis of perceived disabilities appears to be largely academic251 in light of Congress’ enactment of the ADA252 which specifically defines an individual with a disability to include one who is regarded as having an impairment.253 However, the issue in fact retains considerable vitality for a number of reasons.254

First, similar to Title VII,255 the ADA applies only to employers with fifteen or more employees256 while the employment discrimination
statutes in a number of states do not exempt small employers from coverage.\(^{257}\) Thus, an employer with fewer than fifteen employees who discriminates against a person the employer erroneously perceives to be disabled may be liable only if an applicable state statute prohibits such discrimination.\(^{258}\) For this reason, whether a state employment discrimination statute prohibits discrimination on the basis of perceived disabilities is likely to be an issue of considerable importance for many small employers and their employees.\(^{259}\)

In addition, some states may recognize tort claims for wrongful

\(^{257}\) See Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1361 n.5 (Colo. 1988) ("Although Title VII of the Civil Rights Act of 1964 applies only to employers with 15 or more employees,... no such limitation is found in [Colorado’s antidiscrimination legislation]. . . .") (citations omitted). See generally Kerns v. Bucklew, 362 S.E.2d 924, 925 n.2 (W. Va. 1987):

Title VII . . . defin[es] employers subject to its regulations as persons “who [have] fifteen or more employees . . .” 42 U.S.C. § 2000e(b). It is apparent, then, that a substantial number of small businesses are beyond the reach of Title VII . . . due to . . . the size of their workforces. These businesses are, however, subject to state human rights acts, and Congress intended such acts to retain their full vitality so as to regulate business practices falling outside of [federal] protections.

\(^{258}\) Cf. Minnesota Mining & Mfg. Co. v. Minnesota, 289 N.W.2d 396, 401 (Minn. 1979) ("Title VII prohibits an employer from discriminating . . . only if that employer has 15 or more employees. . . . Only state legislation prohibits . . . discrimination by employers of fewer than 15 employees.") (citations omitted).

\(^{259}\) The federal exemption for small employers appears to be based, at least in part, on a Congressional decision to "protect small entities with limited resources from liability for employment discrimination. Miller v. Maxwell's Int'l, Inc., 991 P.2d 583, 587 (9th Cir. 1993). However, the exemption also may be based upon a desire to "reliev[e] the administrative body of the burden of enforcement where few job opportunities are available, and . . . keep[] the agency out of situations in which discrimination is too subtle or too personal to make effective solutions possible." Robinson v. Fair Employment & Hous. Comm'n, 825 P.2d 767, 774 (Cal. 1992). As one court has stated with respect to a similar state statutory exemption:

A sense of justice and propriety led the framers to believe that individuals should be allowed to retain some small measure of the so-called freedom to discriminate; besides, they feared the political repercussions of eliminating totally an area of free choice whose infringement had been so bitterly opposed. In the second place, the framers believed that discrimination on a small scale would prove exceedingly difficult to detect and police. Third, it was believed that an employment situation in which there were [few] . . . employees might involve a close personal relationship between employer and employees and that fair employment laws should not apply where such a relationship existed. Finally, the framers were interested primarily in attacking protracted, large-scale discrimination by important employers and strong unions. Their aim was not so much to redress each discrete instance of individual discrimination as to eliminate the egregious and continued discriminatory practices of economically powerful organizations. Thus they could afford to exempt the small employer.

\(^{Id. at 775\) (quoting Michael C. Tobriner, California FEPC, 16 Hastings L.J. 333, 342 (1965)).
discharge based upon the public policy expressed in a state disability discrimination statute, but not upon public policies underlying federal legislation such as the Rehabilitation Act or the ADA. Individuals in those states may assert a common law wrongful discharge claim.
premised upon perceived disability discrimination only if a state statute prohibits such discrimination.263

One advantage of the common law claim is that individuals asserting it may not be required to exhaust the administrative procedures that often are a prerequisite to bringing suit directly under the applicable statute.264 In states that do not recognize wrongful discharge claims based upon federal public policies,265 victims of perceived disability discrimination must invoke the administrative mechanism set forth in the ADA prior to bringing suit266 unless there exists a state statute prohibiting such discrimination upon which the common law claim can be based.267

This issue also has a significant impact upon the potential remedies

263. See, e.g., Horton, 4 A.D. Cas. (BNA) at 34 ("Since [the California Fair Employment and Housing Act] does not provide a basis for the protection of individuals with 'perceived' disabilities, plaintiff's claim ... that defendant violated the public policy against discrimination of individuals with perceived disabilities [is] ... dismissed.") (capitalization omitted). But cf. Kelley, 873 F. Supp. at 327 (holding that a person can bring a claim for wrongful discharge based on the public policy against disability discrimination embodied in the Arizona Civil Rights Act even though she may not fit "exactly into one of the protected categories recognized in the statute").

264. See, e.g., Rojo v. Kliger, 801 P.2d 373, 387 (Cal. 1990) ("[A]lthough an employee must exhaust the ... administrative remedy before bringing suit on a cause of action under the act or seeking the relief provided therein, exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action."); Leibert v. Transworld Sys., Inc., 39 Cal. Rptr.2d 65, 72 (Cal. Ct. App. 1995) (holding that "the rationale of the [wrongful discharge] claim would be undermined if a violation of a fundamental public policy of the state had to remain unredressed simply because a plaintiff failed to pursue nonexclusive administrative remedies").

265. Some courts have recognized tort claims for wrongful discharge based on public policies reflected in federal statutes. See, e.g., D'Agostino v. Johnson & Johnson, Inc., 628 A.2d 305, 312 (N.J. 1993) ("[T]his Court and other courts ... have found a wrongful-discharge cause of action when based on a clearly-articulated federal policy."); Peterson v. Browning, 832 P.2d 1280, 1283 (Utah 1992) ("A number of state courts ... have recognized that certain federal laws may properly form the basis for a wrongful termination action under a state's public policy exception."); Makovi v. Sherwin-Williams Co., 561 A.2d 179, 188 (Md. 1989) ("Clear public policy under federal as well as [state] ... law can supply the basis for an abusive discharge action ... ").

266. The ADA requires individuals claiming to have been discriminated against to pursue administrative relief prior to bringing suit. See 42 U.S.C. §§ 2000e-5, 12117(a). ("As a condition precedent to filing suit, an ADA plaintiff must exhaust administrative remedies.") Dutton v. Board of County Comm’rs, 2 A.D. Cas. (BNA) 1214, 1215 (D. Kan. 1993) (citations omitted).

267. In addition, in some states common law wrongful discharge claims premised upon the public policy reflected in an employment discrimination statute apparently can be maintained against small employers who are exempt from liability directly under the statute. See, e.g., Kerrigan v. Magnum Entertainment, Inc., 804 F. Supp. 733, 736 (D. Md. 1992) ("[T]he Court finds that [a] ... wrongful termination claim based on alleged discrimination will lie ... for claimants whose former employers employ fewer than [15] persons."). But cf. Jennings v. Marralle, 876 P.2d 1074, 1083 (Cal. 1994) ("It would be unreasonable to expect [small] employers who are expressly exempted from the [statutory] ban on ... discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.").
If a victim of perceived disability discrimination must rely upon the ADA, then the only remedies available are those specified in the act itself, which "caps" the amount of compensatory and punitive damages to which the plaintiff may be entitled based upon the size of the employer. If, on the other hand, the plaintiff can assert a common law claim for wrongful discharge premised upon a public policy against perceived disability discrimination reflected in a state statute, tort damages generally will be available and, at least theoretically, unlimited.

Finally, many plaintiffs in employment discrimination cases elect to bring their claims in state court, while employers generally prefer that such cases be tried in the federal courts. Whether a plaintiff claiming to have been discriminated against on the basis of a perceived disability can assure that the claim is heard in state court is dependent upon whether the claim can be asserted under state law, or instead must be based on a federal statute such as the ADA. For those individu-

268. The principal basis for some courts' recognition of tort claims for wrongful discharge is the view that statutory remedies for employment discrimination "may, at times, prove to be inadequate." Broomfield v. Lundell, 767 P.2d 697, 705 (Ariz. Ct. App. 1988); see also Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1303 (Or. 1984) (concluding that common law remedies should be available because statutory remedies often "fail to capture the personal nature of the injury done to a wrongfully discharged employee [sic].")


270. See, e.g., Niblo v. Parr Mfg., 445 N.W.2d 351, 355 (Iowa 1989) ("In considering the cause of action for wrongful discharge, we believe that damages caused by mental distress may properly be considered in addition to the lost earnings caused by the termination of employment."); Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 445 (Tenn. 1984) (stating that "[c]ourts recognizing a cause of action for [wrongful] discharge have permitted the recovery of punitive damages").


272. Although the state and federal courts have concurrent jurisdiction over ADA claims, see Jones v. Illinois Cent. R.R. Co., 859 F. Supp. 1144, 1145 (N.D. Ill. 1994); Lillback v. Metro Life Ins. Co., 640 N.E.2d 250, 258 (Ohio Ct. App. 1994), an employer sued in state court under the ADA has the right to remove the case to federal court. Barraclough v. ADP Automotive Claims Servs., Inc., 818 F. Supp. 1310, 1311-12 (N.D. Cal. 1993); Eakin v. Magic Tilt Trailers, 2 A.D. Cas. (BNA) 649, 650 (E.D. La. 1993). See generally Jones, 859 F. Supp. at 1145 ("[T]he existence of . . . concurrent jurisdiction does not alter the fact that ADA actions are federal-question cases."). State statutory discrimination claims (and common law wrongful discharge claims premised on state
als as well, whether a state employment discrimination statute prohibits perceived disability discrimination is an issue of considerable importance.  

**VI. CONCLUSION**

As a matter of policy, individuals erroneously perceived to be disabled should ordinarily fall within the protection of statutes prohibiting discrimination on the basis of disability. Because employers forced to pay for their discriminatory actions are likely to alter their future behavior, imposing liability for perceived disability discrimination would provide greater deterrence of discriminatory employer conduct, which is obviously one of the primary purposes of disability antidiscrimination statutes), on the other hand, generally cannot be removed on federal question grounds. See, e.g., Willy v. Coastal Corp., 855 F.2d 1160, 1171 (5th Cir. 1988) ("[A] wrongful discharge claim is not one that arises under federal law . . . and is hence not removable on that basis."); Korb v. Raytheon, 707 F. Supp. 63, 70 n.6 (D. Mass. 1989) (expressing tentative agreement with the view that "a claim under the Massachusetts Civil Rights Act, without more, does not invoke federal question jurisdiction no matter what the context"). See generally Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 116 (1936) ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States . . . ").

273. In Horton v. Delta Air Lines, 4 A.D. Cas. (BNA) 31, 34 (N.D. Cal. 1993), for example, the court concluded that a victim of perceived disability discrimination could recover only under the ADA, and not under a state employment discrimination statute or on a common law theory premised upon the public policy embodied in the state statute. A plaintiff pursuing an ADA claim in state court in accordance with that decision could not prevent the employer from removing the case to federal court. See Barraclough, 818 F. Supp. at 1311-12; Eakin, 2 A.D. Cas. (BNA) at 650; Jones, 859 F. Supp. at 1145.

274. "[P]ublic policy can clearly be served by adopting [the] interpretation that the prohibition against discrimination because of handicap necessarily includes a proscription against discrimination based on a 'perceived' handicap . . . since the purpose of [such legislation] is to make consideration of an individual's handicap irrelevant to an employer's decisionmaking processes." Brief of Amicus Curiae National Coalition for Cancer Survivorship at 14, Burris v. City of Phoenix, 875 P.2d 1340 (Ariz. Ct. App. 1993) (No. 1 CA-CV 90-545).  

The legislative emphasis on the removal of artificial barriers, on the elimination of stereotypical assumptions about identified groups, and on requiring employers to focus on qualifications rather than categories is the pervasive theme running through federal and [state] anti-discrimination legislation. . . . [The] argument that [an employer] should not be held liable for discriminating against individuals whom it perceives to be handicapped . . . is simply another way of saying that stereotypes or beliefs about the abilities of individuals . . . may, in certain circumstances, be substituted for consideration of individual qualifications when employment decisions are made. Id. at 11-12.


276. See Sanchez v. Lagoudakis, 486 N.W.2d 657, 660 n.16 (Mich. 1992) ("It would not be consistent with [the] purpose [of disability discrimination legislation] to relieve employers who . . . discriminate of liability if, although they acted in a prohibited discriminatory manner, it
discrimination legislation.\textsuperscript{277} However, precisely who should constitute the class protected by disability discrimination legislation is ultimately a policy question for legislative resolution.\textsuperscript{278} A legislature considering that issue would presumably balance the arguments in favor of extending protection to persons erroneously perceived to be disabled against the social cost of employer compliance\textsuperscript{279} and the increase in litigation that inevitably would accompany that result.\textsuperscript{280} Such a legislature might strike that balance in favor of denying protection to individuals incorrectly perceived to be disabled.\textsuperscript{281}

Thus, where an employment discrimination statute has no explicit perceived disability provision,\textsuperscript{282} courts should not lightly assume that the legislature intended to attack discrimination with greater force than is suggested by the statutory language.\textsuperscript{283} The intrinsic appeal of employment discrimination laws may create pressure for constantly expanding protections that occasionally requires a measure of direction


\textsuperscript{278} See Sanchez v. Lagoudakis, 457 N.W.2d 373, 375 (Mich. Ct. App. 1990) ("We offer no comment on the policy arguments . . . favoring application of the act to situations involving perceived handicaps as we believe such arguments are best made to, and decided by, the legislature."), \textit{rev'd}, 486 N.W.2d 657 (Mich. 1992); Chico Dairy Co. v. West Va. Human Rights Comm'n, 382 S.E.2d 75, 85 n.10 (W. Va. 1989) ("[T]he legislature . . . decided not to protect against the mere perception of a handicap; we do not, of course, address the wisdom of the legislature's decision in this regard."); Rollins, supra note 16, at 644 ([T]he legal definition of handicap is a political construct. It reflects the blend of medical and social considerations upon which public policy decisions, such as eligibility for entitlements or protection from discrimination, are based.") (citations omitted).

\textsuperscript{279} See generally O'Connor, supra note 8, at 634 n.10 (discussing the costs involved in "assuring equal access to handicapped persons"). But cf. Hoffman, supra note 11, at 22 (arguing that the social costs of proposed disability discrimination legislation are "far outweighed by the benefits of maximizing the employability of all work-capable individuals, whether handicapped or erroneously perceived as handicapped").

\textsuperscript{280} See \textit{Burris} Reply at 5 n.5 ("One obvious factor any legislature may consider in setting the limits of protection under a statute is the extent to which litigation will result based on the definitions [it] choose[s] to utilize."); 137 \textit{CONG. REC.} S15,479 (daily ed. Oct. 30, 1991) (statement of Sen. Bumpers) ("[T]he job of the [legislature] is to craft legislation on civil rights that is strong enough to dissuade people from discriminating against their employees on the basis of . . . disability . . . but not so liberal that it literally promotes litigation. That is a very delicate balance to achieve."); see generally Thomas P. Owens III, \textit{Note, Employment at Will in Alaska: The Question of Public Policy Torts,} 6 \textit{ALASKA L. REV.} 269, 306 (1989) (discussing the "significant increase in [employment] litigation that inevitably accompanies the broadening of recovery theories.").

\textsuperscript{281} See supra part II and accompanying notes.


\textsuperscript{283} See Lowry v. Clark, 843 F. Supp. 228, 231 (E.D. Ky. 1994).
and control. Courts mindful of that phenomenon should be hesitant to expand liability beyond that supported by the statutory language absent compelling reasons for doing so.\footnote{See Cunningham v. Central Beverage, Inc., 486 F. Supp. 59, 62 (N.D. Tex. 1980).}

\footnote{See generally Lowry, 843 F. Supp. at 231: A mere showing that a plaintiff may be without a ... remedy ... cannot support imposing ... liability if the statute does not create such liability .... Although the purpose of [a statute] ... admittedly [may be] ... to eradicate employment discrimination, a court may not expand liability ... merely to meet that purpose in the absence of a [legislative] ... directive.}