Reasonable Accommodations for Individuals Regarded as Having Disabilities Under the Americans with Disabilities Act? Why "No" Should Not Be the Answer

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I. INTRODUCTION

When President George H. Bush signed the Americans with Disabilities Act (ADA)[1] into law, he hailed it as a landmark piece of legislation that would open many "once-closed" doors for individuals with disabilities.[2] One of the ADA's most noticeable features is that in addition to prohibiting employers from firing and failing to hire individuals with disabilities, it places an *affirmative obligation* on employers to *accommodate* an employee's or a candidate's disability;[3] however, because the ADA defines "disability" in three ways,[4] a question arose

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[1] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2000).

[2] At the signing of the ADA, President Bush observed the following: "With today's signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom." President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), *available at* http://www.eeoc.gov/ada/bushspeech.html.

[3] Specifically, the ADA defines "discrimination" as:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .

42 U.S.C. § 12112(b)(5)(A) (2000).

[4] The ADA defines a "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

regarding whether *anyone* who satisfies the disability definition is entitled to an accommodation, or whether the accommodation requirement applies only to those individuals with *actual* disabilities.

Recently, the United States Courts of Appeals for the Eleventh, Tenth, and Third Circuits decided that individuals who are *regarded as* having disabilities *are* entitled to accommodations.[5] Prior to these decisions, four United States Courts of Appeals had determined that individuals regarded as disabled were *not* entitled to ADA accommodations.[6] Before those decisions, the only other United States Court of Appeals to address this issue, the United States Court of Appeals for the First Circuit, assumed the opposite—that individuals regarded as disabled were, in fact, entitled to accommodations.[7] While the First

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (2000).

[5] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004). According to the Code of Federal Regulations, an employee is "regarded as" disabled if she:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
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> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
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> (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(*l*) (2005).

[6] Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998).

[7] Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996). In addition to the cases from the United States Courts of Appeals, several United States District Courts have addressed this issue. Among the opinions that have found that employers do *not* need to accommodate these individuals are *Deppe v. United Airlines*, No. C 96-02941-CRB, 2001 U.S. Dist. LEXIS 11569, at *15 (N.D. Cal. Jul. 29, 2001); *Danyluk-Coyle v. St. Mary's Medical Center*, No. 00-5943, 2001 U.S. Dist. LEXIS 24574, at *4 (E.D. Pa. Apr. 5, 2001); *Fontanilla v. City and County of San Francisco*, No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, at *53 (N.D. Cal. Feb. 28, 2001); *Price v. City of Terrell*, No. 3 99-CV-0269-D, 2000 U.S. Dist. LEXIS 18588, at *13–16 (N.D. Tex. Dec. 20, 2000); *Ross v. Matthews Employment*, No. 00-C-1420, 2000 U.S. Dist. LEXIS 16554, at *13 (N.D. Ill. Oct. 24, 2000); and *Matlock v. City of Dallas*, No. 3:97-CV-2735-D, 1999 U.S. Dist. LEXIS 17953, at *17 (N.D. Tex. Nov. 12, 1999). Among the opinions that have decided that employers *do* have to accommodate these individuals are *Lorinz v. Turner Construction Co.*, No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825, at *22–23 (E.D.N.Y. May 25, 2004); *Miller v. Heritage Products, Inc.*, No. 1:02-cv-1345-DFH, 2004 U.S. Dist. LEXIS 8531, at *27 (S.D. Ind. Apr. 21, 2004); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002); and *Jewell v. Reid's Confectionary Co.*, 172 F. Supp. 2d 212, 219 (D. Me. 2001).

Circuit in *Katz v. City Metal Co.* was not confronted with this issue directly, courts have interpreted *Katz* as requiring accommodations for individuals regarded as having a disability.[8]

It is clear that this issue has now created a split among the United States Courts of Appeals, with four circuits agreeing that accommodations are required in cases involving plaintiffs regarded as disabled,[9] four circuits believing that accommodations are not required in such cases,[10] and four circuits not having decided the issue.[11] Until the Supreme Court answers this question, this confusion will continue.[12]

This Article will first identify and discuss the arguments courts have relied upon to determine that individuals regarded as disabled *are* entitled to accommodations. The Article will then discuss the arguments proffered by courts that have reached the opposite conclusion. Next, the Article will analyze the major federal cases addressing this issue.[13] Finally, this Article will suggest that a bright-line rule denying accommodations in these cases is not the correct way to apply the ADA, and that in most cases, individuals regarded as disabled *should* be entitled to an accommodation.

If, however, courts are unwilling to adopt a bright-line rule requiring accommodations, courts could use a multi-factor test to determine this issue on a case-by-case basis. Regardless of which suggestion courts adopt, an across-the-board refusal to provide

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[8] *D'Angelo*, 422 F.3d at 1235; *Kelly*, 410 F.3d at 675; *Williams*, 380 F.3d at 773; and *Weber*, 186 F.3d at 916–17, interpreted *Katz* as requiring accommodations for individuals regarded as being disabled.

[9] The jurisdictions that require accommodations in these cases are the First, Third, Tenth, and Eleventh Circuits.

[10] The jurisdictions that do not require accommodations are the Fifth, Sixth, Eighth, and Ninth Circuits.

[11] The Second, Fourth, Seventh, and District of Columbia Circuits have not yet answered the issue. When I started writing this Article, only one circuit, the Third Circuit, had specifically held that accommodations are required in these cases; however, since that time, the Eleventh and Tenth Circuits have also reached this conclusion. *D'Angelo*, 422 F.3d 1220; *Kelly*, 410 F.3d 670.

[12] The Supreme Court denied a petition for certiorari in *Williams*, 380 F.3d 751, *cert. denied*, 125 S. Ct. 1725 (2005).

[13] Because not all United States Courts of Appeals have addressed this issue, I will not address cases from the Fourth Circuit or from the D.C. Circuit. In the Fourth Circuit, at least one district court has indicated that accommodations are *not* required in cases involving individuals regarded as disabled. Betts v. Rector and Visitors of the Univ. of Va., 198 F. Supp. 2d 787, 799 (W.D. Va. 2002); *but see* Dean v. Philip Morris USA, Inc., No. 1:02CV149, 2003 U.S. Dist. LEXIS 13035, at *10–11 (M.D.N.C. July 29, 2003) (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (observing that the ADA "does not appear to distinguish between disabled and 'regarded as' individuals in requiring accommodation")).

accommodations to individuals regarded as disabled is flawed and does not further the purposes of the "landmark" legislation President Bush signed into law sixteen years ago.

II. THE ARGUMENTS FOR REQUIRING ACCOMMODATIONS IN "REGARDED AS" CASES

There are several arguments courts have used when deciding that individuals regarded as disabled *are* entitled to accommodations. The most common one is that the ADA's plain language does not distinguish between the various definitions of disability; therefore, all "disabled" individuals should be treated similarly.[14] The courts that require accommodations in "regarded as" cases also find support in the Supreme Court's decision in *School Board of Nassau County v. Arline*,[15] the ADA's legislative history, and in the policies behind the ADA. Additionally, some courts believe that the ADA's interactive process, in which the employer and employee work together to determine an accommodation that would allow the employee to perform the essential functions of her job, demonstrates that accommodations are required for "regarded as" individuals.[16] Finally, these courts have rejected the "windfall" and "bizarre results" arguments made by courts that believe that accommodations are *not* required in "regarded as" cases.[17] Regardless of their reasoning, these courts concluded that plaintiffs regarded as disabled are entitled to accommodations. Although this was the minority position until recently, there are several strong arguments for this position. This Article will now examine those arguments in more detail.

A. The ADA's Plain Language

Not surprisingly, the first argument several pro-plaintiff courts have made with respect to this issue is that the ADA's plain language

[14] Some of the cases that have followed this reasoning include *D'Angelo*, 422 F.3d at 1235–36; *Williams*, 380 F.3d at 774–75; and Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002).

[15] 480 U.S. 273 (1987).

[16] *Jacques*, 200 F. Supp. 2d at 170; Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 219 (D. Me. 2001). *But see* Bishop v. Nu-Way Serv. Stations, Inc., 340 F. Supp. 2d 1008, 1014 (E.D. Mo. 2004) (noting that employers are not required to engage in the interactive process in cases involving individuals regarded as disabled).

[17] *D'Angelo*, 422 F.3d at 1237–39; Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005); *Williams*, 380 F.3d at 774–75; *Jacques*, 200 F. Supp. 2d at 170–71. Throughout the Article, I will refer to the windfall/bizarre result argument as the windfall argument.

requires accommodations for individuals regarded as disabled.[18] Although the ADA does not contain a *specific* provision regarding this particular issue, a combination of the ADA's provisions has led courts to conclude that accommodations are required in cases involving individuals regarded as disabled. According to these courts, the ADA's relevant provisions include the ADA's substantive prohibition against discrimination[19] and its definitions of "discrimination,"[20] "disability,"[21] and "qualified individual with a disability."[22] How these provisions relate to one another is of critical importance; it is why many courts have concluded that the ADA's language requires employers to accommodate individuals regarded as having disabilities.[23] In fact, even courts that have concluded that accommodations are *not* required for individuals regarded as disabled have agreed that the ADA's plain language, if taken at face value, requires accommodations in these situations.[24]

The first relevant provision is the ADA's general prohibition against discrimination.[25] This section, which incorporates the other

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[18] The courts do this because one of the first rules of statutory interpretation is that courts must follow the plain language of the statute. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (noting that the first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

[19] Specifically, the ADA's general prohibition against discrimination states:

> General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (2000).

[20] *See supra* note 3 for the ADA's definition of discrimination.

[21] *See supra* note 4 for the ADA's definition of disability.

[22] 42 U.S.C. § 12111(8) (2000). According to this statutory provision, a "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

[23] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235–36 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774–75 (3d Cir. 2004); Lorinz v. Turner Constr. Co., No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825, at *22–23 (E.D.N.Y. May 25, 2004); Miller v. Heritage Prods., Inc., No. 1:02-cv-1345-DFH, 2004 U.S. Dist. LEXIS 8531, at *27–28 (S.D. Ind. Apr. 21, 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166–68 (E.D.N.Y. 2002); Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218–19 (D. Me. 2001).

[24] Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); *but see* Fontanilla v. City and County of S.F., No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, at *48–49 (N.D. Cal. Feb. 28, 2001) (deciding that the ADA's language is not clear on this issue).

[25] 42 U.S.C. § 12112(a) (2000).

relevant terms, provides that "[n]o covered entity shall *discriminate* against a *qualified individual with a disability* because of the *disability* of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[26] Thus, it is clear that to show an ADA violation, the plaintiff must prove that the employer "discriminated" against her.[27] It is also clear that the plaintiff must be a "qualified individual with a disability."[28] Thus, we must now evaluate those terms.

The next relevant term is "discrimination."[29] Included within this definition is subsection five, which prohibits "*not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" as long as the accommodation would not pose an "undue hardship" on the employer's operations.[30] Thus, it is clear that both the substantive prohibition against discrimination and the definition of discrimination protect "qualified individuals with disabilities."

Thus, the next critical term is "disability."[31] And, as was mentioned before, there are three prongs to this definition. First, an employee has a "disability" if she has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."[32] Second, she can satisfy the "disability" definition if she has "a record of such an impairment."[33] Finally, and most important for the purposes of this Article, she can satisfy the "disability" definition by "being regarded as having such an impairment."[34]

The final relevant term is "qualified individual with a disability."[35] The ADA protects only those people who satisfy this definition, and those individuals with disabilities who are not *qualified* can not seek the ADA's protection. A "qualified individual with a disability" is "an individual with a *disability* who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that

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[26] *Id.* (emphasis added).

[27] *Id.*; *see supra* note 3 for the statutory definition of "discrimination."

[28] *See supra* note 22 for the statutory definition of "qualified individual with a disability."

[29] 42 U.S.C. § 12112(b) (2000).

[30] *Id.* § 12112(b)(5)(A) (emphasis added).

[31] *Id.* § 12102(2).

[32] *Id.* § 12102(2)(A).

[33] *Id.* § 12102(2)(B).

[34] *Id.* § 12102(2)(C).

[35] *See supra* note 22 for the statutory definition of "qualified individual with a disability."

such individual holds or desires."[36] The definition makes no distinction between actual disabilities and "regarded as" disabilities, and the courts that have concluded that accommodations are required for "regarded as" individuals have used this lack of a distinction as a basis for those opinions.[37]

Thus, when pro-plaintiff courts read the ADA's provisions, they realize that the Act's plain language requires employers to accommodate individuals who are regarded as disabled.[38] This plain language argument is typically the first one these pro-plaintiff courts use when interpreting this issue because, as the Supreme Court noted in *Robinson v. Shell Oil Co.*,[39] the statutory language is the first place courts should look when attempting to interpret a statute.[40] Although the plain language argument might be these courts' first argument, it is by no means their only argument, as they have found several other reasons to conclude that accommodations are required for cases involving individuals regarded as having a disability.

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[36] 42 U.S.C. § 12111(8) (2000) (emphasis added).

[37] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235–36 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004); Lorinz v. Turner Constr. Co., No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825, at *22–23 (E.D.N.Y. May 25, 2004); Miller v. Heritage Prods., Inc., No. 1:02-cv-1345-DFH, 2004 U.S. Dist. LEXIS 8531, at *27–28 (S.D. Ind. Apr. 21, 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002); Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218–19 (D. Me. 2001).

[38] The following cases all relied on the ADA's plain language to reach the conclusion that accommodations are required for individuals "regarded as" disabled: *D'Angelo*, 422 F.3d at 1235–36; *Kelly*, 410 F.3d at 675–76; *Williams*, 380 F.3d at 774–75; *Lorinz*, 2004 U.S. Dist. LEXIS 28825, at *22–23; *Miller*, 2004 U.S. Dist. LEXIS 8531, at *27–28; *Jacques*, 200 F. Supp. 2d at 166–68; *Jewell*, 172 F. Supp. 2d at 218–19. Even some of the United States Courts of Appeals that came to the opposite conclusion conceded that the ADA's plain language would justify such an interpretation. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999). These courts have ignored the ADA's plain language based on their belief that applying the plain language would yield "bizarre results."

[39] 519 U.S. 337 (1997).

[40] *Id.* at 340 (noting that the first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

B. The Supreme Court's Opinion in School Board of Nassau County v. Arline,[41] *the ADA's Legislative History, and the Policies Behind the ADA*

Other reasons courts have concluded that the ADA requires accommodations for individuals regarded as disabled are the Supreme Court's decision in *School Board of Nassau County v. Arline*,[42] the ADA's legislative history, which specifically references *Arline*, and the policies underlying the ADA. Some courts have concluded that because the Court in *Arline* determined that under the Rehabilitation Act,[43] an individual who had a record of an impairment that substantially limited a major life activity could be entitled to an accommodation, an individual regarded as having a disability under the ADA is also entitled to such an accommodation.[44] Additionally, courts have concluded that Congress's extensive reliance on *Arline* when drafting the ADA[45] further supports the proposition that "regarded as" plaintiffs are entitled to accommodations. Finally, and related to the ADA's legislative history, are the policies behind the ADA, which many courts believe support a requirement that employers provide accommodations in "regarded as" cases.

In its *Arline* opinion, the Court discussed individuals with records of handicaps,[46] those who were "regarded as" having handicaps, and

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[41] 480 U.S. 273 (1987).

[42] *Id.*

[43] The Rehabilitation Act can be found at 29 U.S.C. §§ 791–794e. Most ADA cases are interpreted in a manner similar to cases brought under the Rehabilitation Act, as one provision of the ADA provides that "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (citation omitted).

[44] Some of the courts that have relied upon *Arline* for the conclusion that individuals regarded as being disabled are entitled to accommodations under the ADA include *D'Angelo*, 422 F.3d at 1236–37; *Williams*, 380 F.3d at 775; and *Jacques*, 200 F. Supp. 2d at 166–67.

[45] *See, e.g.*, 136 CONG. REC. E1913, E1914 (daily ed. June 13, 1990) (statement of Rep. Hoyer), 1990 WL 80290 ("[T]he act retains the flexib[le] definition that was first adopted in Section 504 of the Rehabilitation Act of 1973, that has been in effect for over 15 years, and that was recently explicated clearly by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)."); H.R. REP. NO. 101-485, pt. 3 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453 ("The rationale for this third test [the "regarded as" prong of the disability definition], as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*.").

[46] Originally, Congress used the word "handicap" in the Rehabilitation Act. This terminology was eventually changed to "disability." *See* Mahon v. Crowell, 295 F.3d 585, 589 (6th Cir. 2002).

how employers' and co-workers' perceptions about these issues can be just as debilitating as actual handicaps.[47] Since *Arline*, several courts have expressed their belief that because Congress repeatedly referenced *Arline* when discussing the ADA's "regarded as" prong of its disability definition,[48] the logical conclusion is that Congress intended that accommodations be available for people regarded as disabled.[49] In *Arline*, the plaintiff, a teacher who had contracted tuberculosis, sued her employer for violating the Rehabilitation Act.[50] The plaintiff suffered her initial outbreak in 1957, but between 1957 and 1977 the disease was in remission.[51] The plaintiff tested positive again once in 1977 and twice in 1978.[52] In 1979, the school board terminated the plaintiff as a result of her positive tests.[53] The district court ruled against the plaintiff, but the Eleventh Circuit concluded that the plaintiff did suffer from a handicap[54] and remanded for a determination of whether the plaintiff was "otherwise qualified" for her position and whether there was an accommodation that would allow her to perform her job.[55]

The Supreme Court started its analysis by discussing the history behind the Rehabilitation Act, focusing on the definition of "handicapped individual."[56] The Court noted that Congress had amended that definition to include those with a record of having handicaps and those who were regarded as having handicaps.[57] According to the Court, by expanding this definition, Congress was showing its concern about "'archaic attitudes and laws'" and about "'the fact that American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'"[58]

The first issue the Court addressed was whether the plaintiff was a "handicapped individual" within the meaning of the Rehabilitation Act.[59] The Court quickly decided that she fell under this definition,

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[47] *Arline*, 480 U.S. at 282–84.

[48] *See supra* note 45.

[49] *See D'Angelo*, 422 F.3d at 1236–37*; see also Williams*, 380 F.3d at 775; *Jacques*, 200 F. Supp. 2d at 166–67.

[50] *Arline*, 480 U.S. at 275–76.

[51] *Id.* at 276.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 277.

[55] *Id.*

[56] *Arline*, 480 U.S. at 277–78.

[57] *Id.* at 279 (citing 29 U.S.C. § 706(7)(B)).

[58] *Id.* (quoting S. REP. NO. 93-1297, at 50 (1974)).

[59] *Id.* at 279–80.

viewing her 1957 hospitalization as sufficient evidence that she had a record of a handicap.[60] The Court next addressed the employer's assertion that it terminated the plaintiff not because of her disease, but rather due to the threat her condition posed to others. The Court concluded that it was not possible to "meaningfully distinguish" between the contagious disease and its possible contagious effects.[61]

When it addressed the "regarded as" prong of the handicap definition, the Court noted that Congress extended protection to individuals with non-substantially limiting impairments because "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[62] The Court also observed that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[63]

After concluding that the plaintiff satisfied the Rehabilitation Act's definition of a handicapped individual, the Court addressed whether she was "otherwise qualified" to perform her job with or without a reasonable accommodation.[64] On this question, the Court remanded the case to the district court to determine whether an individual with a record of having a handicap could perform the essential functions of her job *with* a reasonable accommodation.[65] Because reasonable accommodations only become an issue if the court determines that the individual has a disability,[66] and because the *Arline* plaintiff, who had a record of a disability, was possibly entitled to an accommodation, courts since *Arline* have determined that these accommodations are required in cases involving any of the three prongs of the disability definition, including the "regarded as" prong.[67] In addition, because Congress referenced *Arline* when discussing the "regarded as" prong of the ADA's disability definition,[68]

[60] *Id.* at 280–81.

[61] *Id.* at 282.

[62] *Arline*, 480 U.S. at 283.

[63] *Id.* at 284.

[64] *Id.* at 287.

[65] *Id.* at 289.

[66] *See, e.g.*, D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1236–37 (11th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166–67 (E.D.N.Y. 2002).

[67] *See, e.g.*, *D'Angelo*, 422 F.3d at 1236; *Williams*, 380 F.3d at 775; *Jacques*, 200 F. Supp. at 166–67.

[68] *See supra* note 45.

courts have concluded that the ADA's legislative history also supports requiring accommodations in "regarded as" cases.[69]

Related to the legislative history behind the ADA are the various policies Congress wanted to further when passing this legislation. By relying on *Arline* when discussing the ADA, Congress made clear that one of these policies was to eliminate disability discrimination by eliminating stereotypes about people with disabilities and diseases.[70] The Supreme Court made this clear in *Arline*, and some courts have concluded that not providing accommodations in "regarded as" cases would frustrate that purpose.[71] For example, the court in *Jacques v. DiMarzio, Inc.* concluded that "'failure to mandate reasonable accommodations [in "regarded as" cases] would undermine the role the ADA plays in ferreting out disability discrimination in employment.'"[72] This sentiment was echoed in *Deane v. Pocono Medical Center*, where the plaintiff argued that "the 'regarded as' prong of the disability definition is premised upon the reality that the perception of disability, socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough."[73] Thus, some courts have concluded that not requiring accommodations would not do enough to eliminate disability discrimination in the workplace.

Another policy behind the ADA, and one that is also related to the goal of trying to eliminate employer bias, was expressed in *Jewell v. Reid's Confectionary Co.*,[74] where the court noted that one purpose of the ADA was to punish employers who made stereotypic assumptions about their employees.[75] Because not requiring accommodations in "regarded as" cases would frustrate that goal, the court in *Jewell* decided that accommodations were required.[76] One final goal of the

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[69] *See, e.g.*, *D'Angelo*, 422 F.3d at 1236; *Williams*, 380 F.3d at 775; *Jacques*, 200 F. Supp. 2d at 166–67.

[70] 42 U.S.C. § 12101 (2000). *See also* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002) (noting that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace").

[71] *See, e.g.*, *D'Angelo*, 422 F.3d at 1236–37; *Williams,* 380 F.3d at 775; *Jacques*, 200 F. Supp. 2d at 166–67.

[72] *Jacques*, 200 F. Supp. 2d at 167 (quoting Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998)).

[73] *Deane*, 142 F.3d at148 n.12.

[74] 172 F. Supp. 2d 212 (D. Me. 2001).

[75] *Id.* at 219.

[76] *Id.*

ADA was to allow capable employees to remain in the workforce.[77] Allowing accommodations in "regarded as" cases would entitle more individuals to remain employed, which would further that policy.

Thus, the Supreme Court's opinion in *Arline*, the ADA's legislative history, and the purposes behind the ADA are all cited by courts when concluding that accommodations are required in cases involving individuals regarded as disabled. These, however, are not the only reasons courts use when interpreting the ADA in a pro-employee manner. The next few sections of this Article will address the other reasons why courts conclude that accommodations are required in "regarded as" cases.

C. The ADA's Interactive Process for Determining Reasonable Accommodations

Some courts have used the structure of the ADA, its legislative history, and the Equal Employment Opportunity Commission's (EEOC) regulations encouraging employers and employees to work together to develop appropriate workplace accommodations to conclude that employees who are regarded as disabled are entitled to accommodations.[78] These courts reasoned that this interactive process provides additional evidence that accommodations are required in "regarded as" cases.

Specifically, the court in *Jacques v. DiMarzio, Inc.*[79] used the existence of the "mandatory" interactive process to conclude that accommodations are required in "regarded as" cases.[80] When addressing this interactive process, the *Jacques* court pointed out that Congress noted:

> A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations . . . . Employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation.[81]

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[77] 42 U.S.C. § 12101 (2000).

[78] *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002); *see also Jewell*, 172 F. Supp. 2d at 218–19.

[79] 200 F. Supp. 2d 151.

[80] *Id.* at 168–70. Although not all courts have addressed this particular issue, most courts have concluded that this process is, in fact, mandatory. *See, e.g.*, Barnett v. U.S. Airways, Inc., 228 F.3d 1105 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

[81] *Jacques*, 200 F. Supp. 2d at 168 (quoting S. REP. NO. 101-116, at 34 (1989)) (citing H.R. REP. NO. 101-485, pt. 2, at 65 (1990), *as reprinted in* 1990 U.S.C.C.A.N. at 303, 348).

This issue was also addressed in the EEOC's regulations, which provide:

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[82]

As the *Jacques* court pointed out, the EEOC has further observed that the employer should initiate this interactive process without being asked to do so by the employee if the employer: (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[83] According to *Jacques*, this does not require that an employer know of an *actual* disability, but rather only that the employer have "enough information to put it on notice that the employee *might* have a disability."[84] This, according to *Jacques*, leads to the conclusion that the interactive process is triggered once the employee is regarded as having a disability, not once the employer knows that to be the case.[85] Furthermore, because this process is meant to allow employers to keep capable employees in the workforce, the *Jacques* court concluded:

> In a practical sense, therefore, the interactive process is more of a labor tool than a legal tool, and is a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled. It is clearly a mechanism to allow for early intervention by an employer, outside of the legal forum, for exploring reasonable accommodations for employees who are *perceived to be* disabled.[86]

The *Jacques* court thus concluded that this interactive process is more evidence that accommodations are required for individuals regarded as disabled.[87] This is not, however, the final reason some

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[82] 29 C.F.R. § 1630.2(o)(3) (2005).

[83] *Jacques*, 200 F. Supp. 2d at 168–69 (citing EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, EEOC Comp. Man. (CCH), § 902, at 5459 (March 1, 1999), *available at* http://www.eeoc.gov/policy/docs/accommodation.html).

[84] *Id.* at 169 (emphasis added).

[85] *Id.*

[86] *Id.* at 170 (emphasis added).

[87] *Id.*

courts are deciding that individuals regarded as disabled are entitled to accommodations; many courts have specifically rejected the arguments made by other courts that concluded accommodations are *not* required in these cases.

D. Rejection of the Windfall Argument and the Belief that Employers Should be Held Accountable if They Refuse to Shed Erroneous Perceptions About Their Employees

One of the most common arguments used by courts that have concluded that employees regarded as disabled are *not* entitled to accommodations is the "windfall" argument, which focuses on the practice of entitling employees who are erroneously regarded as disabled by their employers to accommodations while similarly situated employees, whom employers do not regard as disabled, are not entitled to such accommodations.[88] Some courts, including the Eighth and Ninth Circuits, conclude that this is a "bizarre result" that provides a windfall to these "regarded as" employees.[89] Despite the fact that many pro-employer courts have used this argument, several other courts have specifically rejected it.

The Eleventh Circuit in *D'Angelo v. ConAgra Foods, Inc.*,[90] the Tenth Circuit in *Kelly v. Metallics West, Inc.*,[91] the Third Circuit in *Williams v. Philadelphia Housing Authority Police Department*,[92] and the Eastern District of New York in *Jacques v. DiMarzio, Inc.*[93] all rejected this windfall argument, concluding that employees who are regarded as disabled are not situated similarly to those employees who are not regarded as disabled by their employers; therefore, "regarded as" employees receive no "windfall."[94] As the court in *Jacques* made clear, "an employee who is simply impaired and an employee who is impaired *and* 'regarded as' disabled are not similarly situated since the 'regarded as' disabled employee is subject to the stigma of the disabling and discriminatory attitudes of others."[95]

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[88] *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999).

[89] *See, e.g.*, *Kaplan*, 323 F.3d at 1232; *Weber*, 186 F.3d at 917.

[90] 422 F.3d 1220 (11th Cir. 2005).

[91] 410 F.3d 670 (10th Cir. 2005).

[92] 380 F.3d 751 (3d Cir. 2004).

[93] 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

[94] *D'Angelo*, 422 F.3d at 1237–39; *Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 775–76; *Jacques*, 200 F. Supp. 2d at 170–71.

[95] *Jacques*, 200 F. Supp. 2d at 170. The court in *Jacques* also rejected the *Weber* argument that "undeserving" employees would force accommodations upon their employers, noting that the ADA's interactive process contains a good faith requirement

The Third Circuit raised a similar concern in *Williams*, when it rejected the windfall argument and concluded that accommodations are required in "regarded as" cases.[96] In echoing the *Jacques* court's concerns, the court in *Williams* noted that individuals regarded as disabled are not treated similarly to those who are not regarded as disabled, and that "[t]he employee whose limitations are perceived accurately gets to work, while [the plaintiff whose limitations are not perceived correctly] is sent home unpaid. This is precisely the type of discrimination the 'regarded as' prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA."[97]

More recently, the Tenth Circuit also rejected this argument in *Kelly*, concluding that it "fail[ed] to understand" the Eighth and Ninth Circuits on this issue.[98] In addition to acknowledging its failure to understand the Eighth and Ninth Circuits' concerns, the *Kelly* court raised another argument in favor of requiring accommodations: employers who are unwilling to change their views about whom they regard as disabled should bear the responsibility of accommodating the limitations imposed by those alleged disabilities.[99] The Tenth Circuit observed that when an employer is unwilling to shed these inaccurate stereotypes, it "must be prepared to accommodate the artificial limitations created by [its] own faulty perceptions."[100]

Thus, while some courts have used the windfall argument to support the conclusion that accommodations are not required in cases involving individuals regarded as disabled, other courts have rejected that argument. The rejection of this argument, combined with the Supreme Court's opinion in *Arline*, the ADA's plain language, purposes, legislative history, and interactive process, have all played a role in some courts' conclusions that accommodations are required in cases involving individuals regarded as disabled. However, as this Article will now address, there are several arguments on the other side of this issue—that the ADA does *not* require accommodations in cases involving individuals regarded as disabled.

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and that this requirement would shield employers from this type of concern. *Id.* at 170–71.

[96] *Williams*, 380 F.3d at 775–76.

[97] *Id.*

[98] *See* Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005); *see also D'Angelo*, 422 F.3d at 1237–39 (rejecting the windfall argument accepted by the Eighth and Ninth Circuits).

[99] *Kelly*, 410 F.3d at 676.

[100] *Id.*

III. THE ARGUMENTS AGAINST REQUIRING ACCOMMODATIONS IN "REGARDED AS" CASES

Just as several courts have found reasons to conclude that accommodations are required in "regarded as" cases, there are several other courts that have determined that accommodations are not required in such cases. Among the explanations these courts have used to reach this conclusion are the allegedly ambiguous text of the ADA and the interpretation of the EEOC's regulations on this issue, some portions of the ADA's legislative history, the windfall argument, the public policy argument, the common sense argument, and an argument based on the EEOC's position. Regardless of which reason, or combination of reasons, they use, many courts to address this issue have concluded that accommodations are not required in these cases.

A. Allegedly Ambiguous Text of the ADA

As discussed previously, courts that have concluded that the ADA requires accommodations for individuals regarded as disabled relied on the ADA's plain language and its failure to distinguish between the three prongs of the disability definition.[101] These courts believe that the ADA's plain language is clear, and that there is no reason to treat an individual differently, depending on which disability definition the individual satisfies.[102] Even most courts that have concluded that individuals regarded as disabled are *not* entitled to accommodations conceded that following the ADA's plain language would require accommodations in these cases.[103]

There is, however, at least some authority that the ADA's language is not so clear, and that when read in conjunction with the EEOC's regulations implementing Title I of the ADA and with portions of the ADA's legislative history, the outcome for this issue should be that individuals regarded as disabled should not receive accommodations. Specifically, in *Fontanilla v. City and County of San Francisco*,[104] the United States District Court for the Northern District of California concluded that an employee who was regarded as dis-

[101] *See, e.g.*, *D'Angelo*, 422 F.3d at 1235–36; *Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 774; *Jacques*, 200 F. Supp. 2d at 166.

[102] *See, e.g.*, *D'Angelo*, 422 F.3d at 1235–36; *Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 774; *Jacques*, 200 F. Supp. 2d at 166.

[103] Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).

[104] No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919 (N.D. Cal. Feb. 28, 2001).

abled was not entitled to an accommodation.[105] The plaintiff in *Fontanilla* sued his employer for several causes of action, including two claims under the ADA.[106] After the court addressed the plaintiff's "disparate treatment" claim, the court addressed the plaintiff's second claim, which was based on the employer's failure to accommodate.[107] It was during this discussion that the court reached the conclusion that the ADA's language was not clear as to whether individuals regarded as disabled were entitled to ADA accommodations, and that it was therefore appropriate to look to other sources of statutory interpretation.[108] This interpretation of the ADA's text as ambiguous conflicts with just about all other courts, even those holding that accommodations are not required in these cases.[109]

After first acknowledging the split of authority, the *Fontanilla* court began its analysis by looking to the ADA's language.[110] According to the court, the language was not as clear as the other courts to decide this issue had concluded, as "the definition of discrimination fails to address whether an employer must accommodate *any* limitations that burden a worker whom the ADA classifies as 'disabled' or whether the employer need only accommodate those limitations that arise *as a result* of the worker's statutorily defined 'disability.'"[111] The court also noted that the definition "fails to address whether the 'known . . . limitations' include *perceived* limitations that do not in fact exist."[112] Finally, the court noted that no other ADA provisions explicitly addressed those issues.[113] Therefore, the court found the ADA was ambiguous regarding this issue.[114]

The court next analyzed the provision of the ADA indicating that the statute's purpose was to create a level playing field in the workplace and concluded that requiring employers to accommodate

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[105] *Id.* Since *Fontanilla*, the Ninth Circuit has ruled that accommodations are not required for individuals regarded as disabled under the ADA; however, the Ninth Circuit did not follow the reasoning articulated by the district court in *Fontanilla*. *Kaplan*, 323 F.3d at 1236.

[106] *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *4.

[107] *Id.* at *41.

[108] *Id.* at *46–56.

[109] For example, in both *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999), and *Kaplan*, 323 F.3d at 1232, the courts agreed that the ADA's language was clear and that it did not distinguish between individuals with actual disabilities and individuals regarded as being disabled.

[110] *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *47–48.

[111] *Id.* at *48.

[112] *Id.* (alteration in original).

[113] *Id.*

[114] *Id.* at *48–49.

some non-actually disabled employees and not other non-disabled employees frustrated that goal.[115] Therefore, the court concluded that the ADA's language suggests that accommodations are not required in "regarded as" cases.[116] After addressing the statutory language, the court further supported its conclusion by reference to the EEOC regulations and guidelines regarding this issue and some portions of the ADA's legislative history.[117]

B. The EEOC's Regulations and Interpretive Guidelines

Although most courts have not resorted to evaluating the EEOC's regulations and interpretive guidelines, the court in *Fontanilla* supported its conclusion that accommodations are not required in "regarded as" cases by doing so.[118] Although these sources do not directly address this issue, the *Fontanilla* court used them to bolster its holding that accommodations are not required.[119] The court pointed to three separate provisions to reach this conclusion.

The first provision to which the court turned was the appendix to 29 C.F.R. § 1630.9, which states that "an individual with a disability is 'otherwise qualified' . . . if he or she is qualified for a job, except that, *because of the disability*, he or she needs a reasonable accommodation."[120] The court then pointed out that the appendix also states that "employers are obligated to make reasonable accommodation *only to the physical or mental limitations resulting from the disability* of a qualified individual."[121] Finally, the *Fontanilla* court noted that the appendix states that "when a qualified individual with a disability has requested a reasonable accommodation . . . the employer . . . should . . . ascertain the precise job-related limitations *imposed by the individual's disability* and how those limitations should be overcome with a reasonable accommodation."[122] The court read these provisions and concluded that the natural result of such a reading was that employers need not accommodate employees who are regarded as disabled.[123] The court next turned to portions of the ADA's legislative history for further support.

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[115] *Id.* at *49–50.

[116] *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *50.

[117] *Id.* at *50–53.

[118] *Id.* at *52–53.

[119] *Id.*

[120] *Id.* at *52 (citing 29 C.F.R. app. § 1630.9 (1991)).

[121] *Id.* (citing 29 C.F.R. app. § 1630.9 (1991)) (emphasis added).

[122] *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *52–53 (citing 29 C.F.R. app. § 1630.9 (1991)).

[123] *Id.* at *53.

C. Selected Portions of the ADA's Legislative History

Although many courts have found that the legislative history behind the "regarded as" prong of the ADA's disability definition supports the proposition that employers must accommodate individuals regarded as having disabilities,[124] the court in *Fontanilla* reached the opposite conclusion.[125] The court cited a house report discussing the "regarded as" prong and used that legislative history to reach its pro-employer conclusion.[126] In addition to the passage quoted in the footnote below,[127] the *Fontanilla* court also observed that neither of the two examples provided in the house report involved accommodation issues.[128] The two examples, one involving a cosmetic disfigurement and the other involving an able-bodied worker with some type of anomaly, did not address the accommodation issue, which led the *Fontanilla* court to state that "[n]othing in the legislative history indicates Congress gave even passing consideration to requiring employers to accommodate the limitations of workers 'regarded as' disabled who were not actually disabled."[129] Therefore, although many courts have used the legislative history behind the ADA to conclude that accommodations *are* required for individuals regarded as disabled, the *Fontanilla* court used the legislative history to reach the opposite conclusion.

Despite the several justifications the court in *Fontanilla* used to conclude that accommodations are not required in "regarded as"

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[124] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1237–39 (11th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166–68 (E.D.N.Y. 2002).

[125] *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *50–52.

[126] *Id.*

[127] The specific language from the House report states:

> The rationale for this third test (the "regarded as" prong) as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *School Board of Nassau County v. Arline*. The Court noted that, although an individual may have an impairment that does not substantially limit a major life activity, the reactions of others may prove just as disabling. "Such an impairment may not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." The Court concluded that, by including this test, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

Id. at *50–51 (quoting H.R. REP. NO. 101-485, pt. 3 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453).

[128] *Id.* at *51–52.

[129] *Id.*

cases, the most popular justification for denying accommodations in these cases is the windfall argument, which will now be addressed.

D. Windfall Argument

One of the most common rationales for preventing individuals regarded as having disabilities from receiving accommodations is the argument that providing accommodations for these individuals produces a windfall, and that this produces a bizarre result.[130] Although the courts that have followed this argument acknowledge that applying the plain language of the ADA would result in accommodations in "regarded as" cases, they nonetheless refuse to require accommodations because such an outcome is, in their view, "bizarre."[131]

Two United States Courts of Appeals that have concluded accommodations are not required in "regarded as" cases have both relied on this argument: the Eighth Circuit in *Weber v. Strippit, Inc.*,[132] and the Ninth Circuit in *Kaplan v. City of North Las Vegas*.[133] After noting that reasonable accommodations are required in cases involving plaintiffs with actual disabilities, the *Weber* court noted that:

> The reasonable accommodation requirement makes considerably less sense in the perceived disability context. Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results. Assume, for instance, that [the plaintiff's] heart condition prevented him from relocating . . . but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate [the plaintiff] without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive [the plaintiff's] heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate [the plaintiff's] condition . . . . Although [the plaintiff's] impairment is no more severe in this example than in the first, [the plaintiff] would now be entitled to accommodations for a non-

[130] For example, the courts in *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–18 (8th Cir. 1999), and *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232–33 (9th Cir. 2003), have followed the "bizarre results" argument to conclude that accommodations are not required in cases involving individuals regarded as disabled. The courts do this because it is one way to ignore the plain language of a statute. *See* Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001) (noting that courts must look beyond the plain language of a statute if following the plain language would yield an absurd result).

[131] *Weber*, 186 F.3d at 917; *Kaplan*, 323 F.3d at 1232–33.

[132] 186 F.3d 907 (8th Cir. 1999).

[133] 323 F.3d 1226 (9th Cir. 2003).

> disabling impairment that no similarly situated employees would enjoy.
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> . . . .
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> The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.[134]

Four years later, when the Ninth Circuit was asked to address this issue, it relied on the windfall argument in *Weber*.[135] After first noting that the ADA did not distinguish between actual disabilities and "regarded as" disabilities,[136] the Ninth Circuit opined that the absence of a distinction between the different prongs of the disability definition was "not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations."[137] According to the court, "because a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results," it was necessary to look beyond the ADA's literal language.[138] The court relied on *Weber* to conclude that individuals regarded as disabled are not entitled to accommodations.[139] The Ninth Circuit noted the problems such a reading would yield:

> If we were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result . . . .[140]

Although acknowledging that this was not an "easy question" because of the ADA's language, the Ninth Circuit concluded that accommodations are not required for individuals regarded as disabled.[141] *Weber* and *Kaplan* are two examples of courts concluding

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[134] *Weber*, 186 F.3d at 916–17.

[135] *Kaplan*, 323 F.3d at 1232.

[136] *Id.*

[137] *Id.* As will be discussed later in this Article, the Eleventh Circuit specifically rejected this argument. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1238–39 (11th Cir. 2005).

[138] *Kaplan*, 323 F.3d at 1232 (citing *Weber*, 186 F.3d at 917; Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001) (noting that courts must look beyond the plain language of a statute if following the plain language would yield an absurd result)).

[139] *Id.*

[140] *Id.*

[141] *Kaplan*, 323 F.3d at 1232–33.

that the windfall justification for denying accommodations outweighed the ADA's language. This justification for denying accommodations is not, however, the final one courts have used to rule in favor of employers on this issue. As the next few sections of the Article will demonstrate, there are still other reasons courts have decided this issue in favor of employers.

E. Conflict with the ADA's Purposes

Courts have also used policy arguments when deciding that "regarded as" individuals are not entitled to accommodations. According to these courts, the arguments are premised on two ideas: (1) encouraging equality in the workplace and dispelling false stereotypes regarding people with disabilities; and (2) preserving a company's financial resources for accommodations that actually disabled employees need rather than spending these resources on employees who are merely regarded as disabled.[142]

On the issue of dispelling stereotypes about people with disabilities, the Ninth Circuit in *Kaplan* reasoned that requiring accommodations for non-disabled employees would be "a perverse and troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly indicative of the individual ability of [people with disabilities].'"[143] The court observed, "[w]ere we to entitle 'regarded as' employees to reasonable accommodation, it would do nothing to encourage those employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability."[144] Thus, the Ninth Circuit believed that allowing accommodations in these cases would frustrate one of the ADA's purposes.[145]

With respect to the use of employer resources to provide accommodations for individuals regarded as disabled, the court in *Kaplan* specifically identified this as one reason for not requiring accommodations for such individuals. The Ninth Circuit noted that "[t]o require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the em-

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[142] *Id.* at 1232.

[143] *Id.* (quoting 42 U.S.C. § 12101(a)(7)) (alteration in original).

[144] *Id.*

[145] As was mentioned earlier, another purpose of the ADA that courts believe would be frustrated by requiring accommodations for "regarded as" employees is that of creating a level playing field for all similarly-situated employees. Fontanilla v. City and County of S.F., No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, *49 (N.D. Cal. Feb. 28, 2001).

ployers' limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential."[146] This concern, however, should have been a non-issue, as the ADA requires that any accommodation an employee requests not pose an undue hardship.[147]

Nonetheless, the Ninth Circuit provided two policy reasons why employers should not be required to accommodate individuals whom they regard as having a disability. In addition to those reasons, and in addition to the ones discussed earlier, there is yet another reason some courts have denied accommodations in these cases—common sense.

F. Common Sense

At least two district courts have ruled against "regarded as" plaintiffs on this issue based on their perception that requiring accommodations in these cases defies common sense.[148] Although these courts did not provide detailed analysis for their opinions, they did ultimately conclude that accommodations are not required in "regarded as" cases.

In *Cebertowicz v. Motorola Inc.*,[149] the Northern District of Illinois ruled against the plaintiff on her "regarded as" claim for two reasons. First, the plaintiff failed to present evidence that her employer regarded her as disabled.[150] Second, the court followed the holdings from the Eighth and Fifth Circuits, which concluded that employers need not accommodate plaintiffs regarded as disabled.[151] According to the *Cebertowicz* court, the plaintiff was "urging that [the defendant] be held liable for failing to accommodate a non-existent disability. *That makes no sense* . . . ."[152] The court then referred to the Third Circuit's footnote in *Deane*, in which that court pointed out the "considerable force" to the argument that individuals regarded as disabled are not entitled to ADA accommodations.[153] Ironically, the concern the Third Circuit expressed over this issue in *Deane v. Pocono Medical*

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[146] *Kaplan*, 323 F.3d at 1232.

[147] *See supra* note 3.

[148] Powers v. Tweco Prods., Inc., 206 F. Supp. 2d 1097 (D. Kan. 2002); Cebertowicz v. Motorola, Inc., 178 F. Supp. 2d 949 (N.D. Ill. 2001).

[149] 178 F. Supp. 2d 949 (N.D. Ill. 2001).

[150] *Id.* at 953.

[151] *Id.* at 953–54 (citing Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998)).

[152] *Id.* at 954 n.8 (emphasis added).

[153] *Id.* (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 148–49 n.12 (3d Cir. 1998)).

Center[154] became irrelevant after its subsequent decision in *Williams v. Philadelphia Housing Authority Police Department*, in which it ruled that accommodations *are* required in "regarded as" cases.[155]

The United States District Court for the District of Kansas also relied on the common sense argument in *Powers v. Tweco Products, Inc.*,[156] where the court first determined that the plaintiff could not prove that her employer regarded her as disabled and then concluded that even if the plaintiff had established this, she would not have been able to prevail on a failure to accommodate claim because the ADA does not require accommodations for "regarded as" employees.[157] Specifically, when addressing why the ADA does not have such a requirement, the court stated, "[t]o begin with, *common sense*, if nothing else, would preclude plaintiff from claiming that she was not 'disabled' but that she nonetheless was entitled to an accommodation for a nonexistent disability."[158] Thus, the courts in *Powers* and *Cebertowicz* agreed that common sense counsels against requiring accommodations in cases involving "regarded as" plaintiffs.[159]

Therefore, courts have identified several reasons why individuals regarded as disabled are not entitled to reasonable accommodations. However, it is not just the federal courts that have reached this conclusion; the EEOC has also taken the position that accommodations are not required in such cases.

G. The Equal Employment Opportunity Commission's Position

One agency responsible for implementing the ADA is the EEOC.[160] Unfortunately for plaintiffs, this agency has decided that individuals regarded as disabled are not entitled to accommodations. Although this issue has not been specifically addressed in the Code of Federal Regulations or in the appendix to it,[161] the agency has made its position clear in three separate places: (1) written opinions from

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[154] 142 F.3d 138 (3d Cir. 1998).

[155] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004).

[156] 206 F. Supp. 2d 1097 (D. Kan. 2002).

[157] *Id.* at 1112–14.

[158] *Id.* at 1114 (emphasis added).

[159] *Id.*; Cebertowicz v. Motorola, Inc., 178 F. Supp. 2d 949 (N.D. Ill. 2001).

[160] Congress delegated this authority to the EEOC in 42 U.S.C. §§ 12116, 12117 (2000).

[161] *But see* Fontanilla v. City and County of S.F., No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, *52–53 (N.D. Cal. Feb. 28, 2001) (determining that the EEOC's regulations and guidelines indicate that accommodations are not required for individuals regarded as disabled).

the agency;[162] (2) an amicus brief filed in a case involving this issue;[163] and (3) the agency's training manual.[164] Some courts that have ruled in favor of employers have based their opinions on the EEOC's position, despite performing little analysis of it.[165]

As this section of the Article has demonstrated, courts have relied upon several arguments in determining that accommodations are not required in cases involving individuals regarded as disabled; however, as was discussed earlier, there are also many arguments why accommodations should be required. In the Article's next section, I will examine several opinions and explain how those courts reached their conclusions.

IV. OPINIONS FROM THE UNITED STATES COURTS OF APPEALS AND THE UNITED STATES DISTRICT COURTS

This section of the Article will highlight cases from the United States Courts of Appeals and from the United States District Courts that have addressed the issue of whether "regarded as" individuals are entitled to accommodations. Despite the recent pronouncements from the Eleventh, Tenth, and Third Circuits, many courts to address this issue have held that individuals regarded as disabled are *not* entitled to accommodations. Unless and until the Supreme Court answers this question, there will continue to be uncertainty surrounding this issue in jurisdictions where the court of appeals has not issued a definitive ruling.

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[162] Baldassarre v. Potter, EEOC Doc. No. 01A05157, 2003 WL 21372676, at *3 (EEOC June 6, 2003); Adams v. Potter, EEOC Doc. No. 03A20060, 2002 WL 31107277, at *3 (EEOC Sept. 13, 2002); Clair v. Apfel, EEOC Doc. No. 01961246, 1998 WL 56612, at *2 (EEOC Feb. 4, 1998); Huddy v. Runyon, EEOC Doc. No. 01953454, 1997 WL 348684, at *2 (EEOC June 19, 1997); Schultz v. Runyon, EEOC Doc. No. 05950724, 1996 WL 562981 at *10 (EEOC Sept. 26, 1996); Olsen v. Runyon, EEOC Doc. No. 01943977, 1995 WL 710567, at *6 (EEOC Nov. 29, 1995); Crisostomo v. Bentsen, EEOC Doc. No. 01933372, 1994 WL 745883, at *6 (EEOC Sept. 1, 1994); Bookspan v. Dalton, EEOC Doc. No. 01933202, 1995 WL 384514, at *4 (EEOC June 21, 1994); Howard v. Widnall, EEOC Doc. No. 01931905, 1994 WL 747979, at *5 (EEOC May 12, 1994).

[163] Derbis v. United States Shoe Corp., No. 94-2312, 1995 U.S. App. LEXIS 27636 (4th Cir. May 2, 1995).

[164] Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (citing EEOC Training Manual).

[165] *See id.* As discussed earlier, at least one court has interpreted the EEOC's regulations and guidelines in a manner denying reasonable accommodations for individuals regarded as disabled. *Fontanilla*, 2001 U.S. Dist. LEXIS 6919, at *52–53.

A. The First Circuit

In *Katz v. City Metal Co.*,[166] the United States Court of Appeals for the First Circuit addressed the issue of "regarded as" disabilities and reasonable accommodations.[167] The *Katz* court did not squarely address the issue, but did assume that such accommodations were required.[168]

The plaintiff in *Katz* had worked as a salesman and customer relations employee for approximately one year when he suffered a heart attack.[169] Following several weeks of medical leave, the plaintiff was terminated, even after he had asked to be retained on a part-time basis, at a lower salary, and with any accommodations needed to allow him to work.[170] As a result of being terminated, the plaintiff brought suit under the ADA and under the parallel state law.[171] After the plaintiff presented his case, the defendant moved for judgment as a matter of law.[172] One of the issues the defendant raised was whether the plaintiff established that he had a disability under the ADA.[173] The trial judge decided that the plaintiff had failed to prove that he had a disability within the meaning of the Act and that the defendant was entitled to judgment as a matter of law.[174]

On appeal, the First Circuit quickly concluded that the trial judge was incorrect in finding that there was insufficient evidence of a disability.[175] Relying on the ADA's definition of disability and the EEOC's definitions of "physical or mental impairment,"[176] "substantially limits,"[177] and "major life activities,"[178] the First Circuit disagreed

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[166] 87 F.3d 26 (1st Cir. 1996).

[167] *Id.* at 33–34.

[168] *Id.*

[169] *Id.* at 28.

[170] *Id.* at 29.

[171] *Id.*

[172] *Katz*, 87 F.3d at 29.

[173] *Id.* at 30–31.

[174] *Id.* at 30.

[175] *Id.*

[176] The Code of Federal Regulations defines "physical or mental impairment" as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2005).

[177] The Code of Federal Regulations defines "substantially limits" as:

with the lower court's decision[179] for two reasons. First, the court concluded that there was sufficient evidence to allow a jury to conclude that the plaintiff suffered from an actual disability.[180] Second, and most important for purposes of this Article, the court concluded that the plaintiff also could have satisfied the "regarded as" prong of the ADA's definition of disability.[181] With respect to the "regarded as" issue, the court highlighted several pieces of evidence that created a genuine issue of fact, and noted that the district court did not adequately address this argument when the plaintiff attempted to raise it; this mistake, the First Circuit concluded, justified reversal and remand.[182]

As was previously indicated, the First Circuit did not directly address the issue of whether accommodations are required in "regarded as" cases. The court did, however, suggest that accommodations are required in these cases.[183] Specifically, the court observed:

> Congress, when it provided for perception to be the basis of disability status, probably had principally in mind the more usual case in which a plaintiff has a long-term medical condition of some kind, and the employer exaggerates its significance by failing to make a reasonable accommodation. But both the language and policy of the statute seem to us to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so. And, of course, it may well be that [the plaintiff] was both actually disabled and perceived to be so.[184]

Thus, the First Circuit indicated that individuals regarded as having disabilities are entitled to the same protections as those with actual disabilities, and those protections include reasonable accommo-

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> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (2005).

[178] The Code of Federal Regulations defines "major life activities" as: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2005).

[179] *Katz*, 87 F.3d at 31.

[180] *Id.* at 33.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

dations.[185] Ultimately, the First Circuit concluded that the issue of whether the plaintiff would have been able to perform the essential functions of his position *with a reasonable accommodation* was a jury question.[186]

After the opinion in *Katz*, several courts have concluded that the First Circuit understands the ADA to require accommodations for employees regarded as having disabilities.[187] Five years after *Katz*, a district court within the First Circuit revisited the issue of whether individuals who are regarded as disabled are entitled to a reasonable accommodation in *Jewell v. Reid's Confectionary Co.*[188]

In *Jewell*, the plaintiff sued his former employer under the ADA and other federal and state laws.[189] The plaintiff had worked as a delivery driver for the defendant for several years before suffering two heart attacks that left him unable to drive.[190] He requested another position within the company, but the company indicated that it "had nothing for him," effectively terminating him.[191] After receiving notice of his right to sue from the EEOC and an analogous state agency, the plaintiff filed his multi-count complaint.[192]

Addressing the arguments raised by the defendant in its motion to dismiss, the court found that although the plaintiff could not demonstrate that he was either actually disabled or that he had a record of being disabled, he could possibly prove that he was regarded as being disabled.[193] The court then addressed the defendant's argument that even if it regarded the plaintiff as disabled, it did not owe him a duty to accommodate that disability.[194] The defendant's argument relied primarily on *Weber v. Strippit, Inc.*,[195] which had concluded that these "regarded as" plaintiffs are not entitled to accom-

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[185] *Katz*, 87 F.3d at 33.

[186] *Id.*

[187] Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 219 (D. Me. 2001). The Courts of Appeals that read *Katz* this way include the United States Courts of Appeals for the Eleventh, Tenth, Third and Eighth Circuits. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675–76 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004); Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999).

[188] 172 F. Supp. 2d at 218–19.

[189] *Id.* at 215.

[190] *Id.* at 214–15.

[191] *Id.* at 215.

[192] *Id.*

[193] *Id.* at 216–17.

[194] *Jewell*, 172 F. Supp. 2d at 218–219.

[195] 186 F.3d 907 (8th Cir. 1999).

modations.[196] The court in *Jewell* rejected this argument for several reasons. First, it relied on *Katz* for the proposition that individuals regarded as disabled are entitled to accommodations,[197] despite recognizing that the First Circuit "did not engage in a substantive analysis of the legislation and case law."[198] Because the First Circuit held that the issue of whether the plaintiff in *Katz* could have performed his job *with* accommodations could have reached the jury, the *Jewell* court concluded that such accommodations are allowed in "regarded as" cases.[199]

The *Jewell* court disagreed with the Eighth Circuit's reasoning in *Weber*.[200] The court noted that it "[could not] agree with *Weber* that the disparity in treatment between non-disabled employees whom an employer perceives as disabled, and those whom it does not perceive as disabled, is of sufficient concern to foreclose" a "regarded as" plaintiff's claim.[201] The court also took note of the ADA's interactive process, which requires an employer to engage in a dialogue with an employee to determine the extent of his limitations and the possible accommodations available to him.[202] This, the court reasoned, further supported the idea that "regarded as" plaintiffs are entitled to accommodations.[203] In the court's view, if an employer does not engage in this process, but rather takes some type of adverse action against the employee, there is nothing "bizarre" about finding an ADA violation.[204]

Finally, the court concluded that one purpose of the ADA was to punish employers for making "stereotypic" assumptions about an individual and his abilities, and that not requiring accommodations in this situation would run counter to that goal.[205] As a result, the court determined that plaintiffs regarded as disabled were entitled to accommodations.[206]

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[196] *Jewell*, 172 F. Supp. 2d at 218 (citing *Weber*, 186 F.3d at 917; Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998); Fontanilla v. City and County of S.F., No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, *15 (N.D. Cal. Feb. 28, 2001)).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 218–19.

[201] *Id.* at 218–19.

[202] *Jewell*, 172 F. Supp. 2d at 219. This interactive process was discussed in detail earlier in this Article in Section II.C.

[203] *Jewell*, 172 F. Supp. 2d at 219; *see also* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002).

[204] *Jewell*, 172 F. Supp. 2d at 219.

[205] *Id.*

[206] *Id.*

Although it never confronted the issue directly, the First Circuit does require employers to accommodate individuals whom they regard as disabled. Similar to the First Circuit, the Second Circuit has also failed to engage in a thorough discussion of this issue; however, one court within the Second Circuit has issued a comprehensive explanation as to why it believes these plaintiffs should be accommodated.

B. The Second Circuit

Although the United States Court of Appeals for the Second Circuit has not directly addressed this issue, one of the most often-cited cases for the proposition that the ADA requires accommodations for plaintiffs regarded as disabled comes from a district court within the Second Circuit. Specifically, the opinion in *Jacques* v. *DiMarzio, Inc.*,[207] from the Eastern District of New York, is one of the cases most pro-plaintiff courts cite when concluding that the ADA requires accommodations in "regarded as" cases.[208]

In *Jacques*, after first denying the defendant's motion for summary judgment on a separate issue, the Eastern District of New York decided sua sponte to address this issue of whether a plaintiff regarded as disabled is entitled to an accommodation.[209] Neither party had raised the issue at the initial summary judgment stage, but after the court learned of *Weber v. Strippit, Inc.*[210] from the Eighth Circuit, it decided to address this issue.[211]

In *Jacques*, the plaintiff, who suffered from psychiatric problems such as depression and bipolar disorder, was terminated after she experienced difficulties getting along with co-workers and expressed

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[207] 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

[208] Interestingly, the Second Circuit has had two occasions post-*Jacques* to decide whether the ADA requires accommodations for individuals regarded as disabled. In both cases, however, the Second Circuit decided not to answer the question. Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 64 (2d Cir. 2003); Shannon v. New York City Transit Auth., 332 F.3d 95, 104–05 (2d Cir. 2003). The court in *Shannon* did, however, express doubt about whether such an accommodation would be necessary. Unlike the Second Circuit, the United States District Court for the Eastern District of New York followed the *Jacques* opinion and concluded that individuals regarded as disabled are, in fact, entitled to accommodations. Specifically, in *Lorinz v. Turner Construction Co.*, No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825, at *22–23 (E.D.N.Y. May 25, 2004), the court decided to follow *Jacques* and deny the defendant's motion for summary judgment. With respect to this particular issue, the court noted that it found "Judge Block's reasoning in *Jacques* persuasive that 'regarded as' disabled plaintiffs are entitled to accommodations under the ADA." *Id.*

[209] *Jacques*, 200 F. Supp. 2d at 169.

[210] 186 F.3d 907 (8th Cir. 1999).

[211] *Jacques*, 200 F. Supp. 2d at 169.

numerous safety concerns to her employer.[212] She had also discussed the possibility of working from home; however, her former employer rejected this option.[213] At the initial summary judgment stage, the court focused its attention on whether the plaintiff was able to establish that she did, indeed, have a disability.[214] The court concluded that although the plaintiff was unable to establish that she had an actual disability or that she had a record of having a disability, the plaintiff was able to create a genuine issue of fact with respect to whether she was regarded as having a disability.[215]

The plaintiff argued that her employer regarded her as being substantially limited in the ability to interact with others.[216] Although the Second Circuit had never answered the question of whether interacting with others was indeed a major life activity,[217] the court agreed with the Ninth Circuit's conclusion that it is.[218] The court was careful to note, however, that in order to satisfy this aspect of an ADA claim, a plaintiff must show more than "trouble getting along with coworkers"; she must show high levels of hostility, social withdrawal, and severe problems.[219] Applying that standard to the plaintiff's case, the court concluded that there was at least a genuine issue of material fact regarding this issue.[220] The court then determined that there was a triable issue of fact regarding whether the plaintiff could have performed her job with a reasonable accommodation.[221] As was noted earlier, however, the court did not initially address the precise issue of accommodations for "regarded as" plaintiffs. However, after learning of the *Weber* opinion, the court decided to address the issue.[222]

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[212] *Id.* at 154–55.
[213] *Id.* at 155.
[214] *Id.* at 156–61.
[215] *Id.* at 161–62.
[216] *Id.* at 159.
[217] *Jacques*, 200 F. Supp. 2d at 160.
[218] *Id.* (citing McAlindin v. County of San Diego, 192 F.3d 1226, 1234 (9th Cir. 1999)).
[219] *Id.* at 160.
[220] *Id.* at 161.
[221] *Id.*
[222] *Id.* at 163.

The court started this analysis by quoting *Weber*[223] and observing that there was a split of authority on this issue.[224] The court also acknowledged that *Weber* "sweeps broadly" and would eliminate accommodations in all "regarded as" cases.[225] After acknowledging that most courts disfavored requiring accommodations in these cases, the court concluded that such plaintiffs are entitled to reasonable accommodations.[226] The court did this for several reasons: (1) the ADA's plain language; (2) the ADA's legislative history, along with the Supreme Court's decision in *School Board of Nassau County v. Arline*;[227] (3) the mandatory interactive process referred to by the EEOC and discussed in the ADA's legislative history; and (4) the Eighth Circuit's faulty reasoning in *Weber*.[228]

First, with very little discussion, the court concluded that the ADA's plain language does not distinguish between those who are actually disabled and those who are regarded as disabled.[229] Construing the Act's definition of "qualified individual," the court concluded that because the term does not treat "regarded as" individuals any differently than actually disabled individuals, no such difference in treatment was required.[230] The court also noted that several other courts had acknowledged that the ADA does not distinguish between actually disabled and "regarded as" individuals, yet they still came to the conclusion that accommodations are not required in "regarded

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[223] *Jacques*, 200 F. Supp. 2d at 164. The specific language to which the *Jacques* court referred is the following:

> [i]mposing liability on employers who fail to accommodate nondisabled employees who are simply regarded as disabled would lead to bizarre results. Assume, for instance, that [plaintiff's] heart condition prevented him from relocating . . . but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate [plaintiff] without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive [plaintiff's] heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate [plaintiff's] condition by, for instance, delaying his relocation . . . . Although [plaintiff's] impairment is no more severe in this example than in the first, [plaintiff] would now be entitled to accommodations for a non-disabling impairment that no similarly situated employee would enjoy.

Id. (quoting *Weber*, 186 F.3d at 916) (alterations in original).

[224] *Id.* at 164–66.

[225] *Id.* at 164.

[226] *Id.* at 166.

[227] 480 U.S. 273 (1987).

[228] *Jacques*, 200 F. Supp. 2d at 166.

[229] *Id.*

[230] *Id.*

as" cases.[231] In support of its opposite conclusion, the *Jacques* court reiterated its view that the ADA's plain language supports accommodations in these cases.

After addressing the plain language, the court focused on the ADA's legislative history.[232] The court noted that this legislative history focused on the Supreme Court's decision in *Arline*,[233] which concluded that societal perceptions and their effect on society's treatment of plaintiffs regarded as disabled could be just as disabling as actual disabilities.[234] In *Arline*, the Supreme Court concluded that the plaintiff was entitled to a remand on the accommodation issue, despite the fact that she was not "actually" handicapped.[235] In light of this legislative history and the holding in *Arline*, the *Jacques* court observed that the "'regarded as' prong of the disability definition is based upon the reality that the perception of disability, socially con-

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[231] *Id.* The court relied on *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999), and *Deane v. Pocono Medical Center*, 142 F.3d 138, 147 (3d Cir. 1998), for the proposition that the plain language does not distinguish between individuals who are actually disabled and those who are regarded as disabled. In its plain language argument, the court also relied on *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), for the proposition that "the first step in interpreting a statute 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'"

[232] *Jacques*, 200 F. Supp. 2d at 166–68.

[233] *Id.* at 166–67 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 274 (1987)). The court focused on the House report, which relied on *Arline* and expressed the rationale behind the ADA's "regarded as" prong:

> The Court [in *Arline*] noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."
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> The Court concluded that, by including this test, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."
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> Thus, a person who [suffers an adverse employment action] because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as" prong], whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.
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> Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding . . . acceptance by co-workers and customers.

Id. at 166–67 (second, third, and fourth alterations in original) (quoting H.R. REP. NO. 101-485, pt. 3 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453).

[234] *Arline*, 480 U.S. at 284.

[235] *Id.* at 289.

structed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough to eliminate the limitation . . . ."[236] Thus, the court concluded, "failure to mandate reasonable accommodations would undermine the role the ADA plays in ferreting out disability discrimination in employment."[237]

Before ending its discussion of the ADA's legislative history, the court in *Jacques* provided two hypotheticals to further explain why individuals who are "regarded as" disabled should be entitled to accommodations.[238] In both hypotheticals, the plaintiffs were denied accommodations, even though their physical or mental impairments (which were not sufficient to satisfy the actual disability prong) caused co-workers to refuse to work with them and caused the employees to be fired.[239] Under *Weber*, as interpreted by the *Jacques* court, these terminations would have been acceptable, even though the plaintiffs were terminated as a direct result of their coworkers' stereotypes and fears.[240] According to the *Jacques* court, this could not have been an outcome Congress intended.[241]

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[236] *Jacques*, 200 F. Supp. 2d at 167 (quoting *Deane*, 142 F.3d at 148 n.12) (internal quotation marks omitted).

[237] *Id.* (internal quotation marks omitted) (quoting *Deane*, 142 F.3d at 148 n.12). The court also relied on the Supreme Court's recent opinion in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), in which the Court noted that the ADA "seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace." *Id.* at 401. The Court continued, "[t]hese objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike." *Id.*

[238] The specific examples the *Jacques* court gave were the following:

> 1) Plaintiff A, a police officer, has a mild form of multiple sclerosis. Even though he is not disabled under the ADA, his employer has learned of the impairment and mistakenly believes that it substantially limits his ability to work. Many of his fellow officers also know of the impairment, and as a consequence, refuse to work with him for fear that he will be an unreliable partner. He is fired.
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> 2) Plaintiff B, an office worker, has a mild form of schizophrenia. Even though she is not disabled under the ADA, her employer has learned of the impairment and mistakenly believes that it substantially limits her ability to interact with others. Many of her co-workers also know of the impairment, and as a consequence, believe her to be "crazy." She is unable to interact with her co-workers because of their attitudes and is fired.

Jacques, 200 F. Supp. 2d at 167–68.

[239] *Id.* at 168.

[240] *Id.*

[241] *Id.*

The court concluded its discussion of the legislative history by noting that "[c]ategorically denying reasonable accommodations to 'regarded as' plaintiffs would allow the prejudices and biases of others to impermissibly deny an impaired employee his or her job because of the mistaken perception that the employee suffers from an actual disability. This is the concern addressed by Congress, but ignored by *Weber*."[242]

The next reason the *Jacques* court gave for requiring accommodations for "regarded as" plaintiffs was the interactive process Congress and the EEOC mentioned when addressing accommodations and the ADA.[243] Most courts, *Jacques* noted, have concluded that this interactive process is mandatory.[244] According to *Jacques*, the process is triggered when the employer has reason to know that an employee *might* have a disability.[245] This is further evidence that even those employees without actual disabilities are entitled to accommodation.[246] The court then went on to echo the argument discussed earlier in Section II.C of this Article.[247]

The final reason the *Jacques* court offered in support of its conclusion that employers are required to accommodate employees who are regarded as disabled was the specific criticism of *Weber*.[248] In criticizing *Weber*, the *Jacques* court questioned the Eighth Circuit's heavy reliance on *Deane v. Pocono Medical Center*.[249] In *Deane*, the Third Circuit indicated there was "considerable force" to the argument that individuals who were "regarded as" disabled were not entitled to ac-

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[242] *Id.*

[243] *Id. See also* 29 C.F.R. § 1630.2(o)(3) (2005) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

[244] *Jacques*, 200 F. Supp. 2d at 168 (citing Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999)).

[245] *Jacques*, 200 F. Supp. 2d at 169.

[246] *Id.*; *see* Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218–19 (D. Me. 2001).

[247] The court also relied on *Taylor v. Phoenixville School District*, 184 F.3d 296, 314 (3d Cir. 1999) (en banc), for the proposition that because the interactive process is triggered once the employer believes than an employee *might* have a disability, this is sufficient evidence to prove that accommodations are required for individuals regarded as having disabilities. *Jacques*, 200 F. Supp. 2d at 169.

[248] *Jacques*, 200 F. Supp. 2d at 170.

[249] 142 F.3d 138 (3d Cir. 1998).

commodations, but it declined to answer that question.[250] Additionally, the *Jacques* court criticized *Weber*'s reliance on *Taylor v. Pathmark Stores, Inc.*,[251] which, although it suggested that allowing accommodations in "regarded as" cases was "odd," acknowledged that the Third Circuit had not yet resolved this particular issue.[252]

In addition, the *Jacques* court took issue with *Weber*'s conclusion that applying the ADA's plain language would yield a "bizarre result."[253] According to the *Weber* court, following the plain language would yield a "bizarre result" because similarly situated employees would be treated differently based on their employers' perceptions.[254] *Jacques* rejected the "bizarre result" contention because "an employee who is simply impaired and an employee who is impaired *and* 'regarded as' disabled are not similarly situated," and thus it is *not* bizarre to treat those two individuals differently.[255] The court continued by stating those who are impaired and regarded as being substantially limited in a major life activity are "subject to the stigma of the disabling and discriminatory attitudes of others."[256] Thus, according to *Jacques*, it is not bizarre to grant these individuals accommodations, nor do such accommodations provide windfalls.[257]

The *Jacques* court's final response to *Weber* addressed the Eighth Circuit's concern that employees might use the ADA to make demands on their employers for accommodations when such accommodations were not necessary for the employees to perform the essential functions of their positions.[258] To rebut that concern, however, the *Jacques* court relied on the ADA's good faith requirement and its provision prohibiting compensatory and punitive damages against employers who engage in the interactive process in good faith.[259]

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[250] The Third Circuit eventually rejected these concerns and ultimately concluded that accommodations are required in these cases. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 772–76 (3d Cir. 2004).

[251] 177 F.3d 180 (3d Cir. 1999).

[252] *Jacques*, 200 F. Supp. 2d at 165 (citing *Taylor*, 177 F.3d at 195–96).

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.* at 170; *see supra* Section III.D for an explanation of the "windfall" argument.

[258] *Jacques*, 200 F. Supp. 2d at 170–71.

[259] *Id.* at 170 n.2 (citing 42 U.S.C. § 1981a(a)(3) (2000)). In another case from a United States District Court within the Second Circuit, *Lorinz v. Turner Construction Co.*, No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825 (E.D.N.Y. May 25, 2004), the court followed Judge Block's reasoning in *Jacques* and concluded that individuals who are regarded as having a disability are, indeed, entitled to reasonable accommoda-

Despite the extensive opinion in *Jacques*, the Second Circuit has not yet given a direct answer to this issue.

C. The Third Circuit

Unlike the Second Circuit, which despite *Jacques* has yet to become embroiled in this debate, the United States Court of Appeals for the Third Circuit has a unique history of dealing with this issue. The Third Circuit has addressed the "regarded as" issue more than once,[260] and has finally decided that plaintiffs regarded as having disabilities are entitled to accommodations.[261] Before reaching the conclusion that accommodations *are* required in these cases, the Third Circuit delayed deciding this issue on several occasions.[262] Until it decided *Williams*, the Third Circuit's most cited opinion was *Deane v. Pocono Medical Center*,[263] in which the court hinted that "regarded as" individuals were not entitled to accommodations.[264] The Third Circuit eventually rejected its earlier dicta from *Deane*, ultimately concluding in *Williams* that these individuals are entitled to accommodations.[265]

In *Deane*, the plaintiff was terminated after she suffered an injury while working as a nurse.[266] After attempting to recuperate, the plaintiff asked to return to her position, but was denied an accommodation and released.[267] Before the district court, the plaintiff argued that she had an actual disability, that she was "regarded as" having a disability, and that the employer failed to accommodate her.[268] The district court granted summary judgment in favor of the employer, and the plaintiff appealed.[269] On appeal, she argued only that she was "regarded as" having a disability.[270] The court first addressed whether

tions under the ADA. *Id.* at *23 n.7. In *Lorinz*, the court denied the former employer's motion for summary judgment, concluding that there were genuine issues of material fact with respect to whether the plaintiff was regarded as having a disability and whether the plaintiff could have performed the essential functions of her job with a reasonable accommodation. *Id.* at *14, 22–23.

[260] *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999); Deane v. Pocono Med. Ctr., 142 F.3d 138 (3d Cir. 1998).

[261] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004).

[262] Buskirk v. Apollo Metals, 307 F.3d 160, 168 n.2 (3d Cir. 2002); *Taylor*, 184 F.3d at 306; *Deane*, 142 F.3d at 148; *see also* Ruhle v. Hous. Auth. of Pittsburgh, 54 F. App'x 61, 62–63 (3d Cir. 2002).

[263] 142 F.3d 138 (3d Cir. 1998).

[264] *Id.* at 148 n.12.

[265] *Williams*, 380 F.3d at 775–76.

[266] *Deane*, 142 F.3d at 141.

[267] *Id.*

[268] *Id.* at 141–42.

[269] *Id.*

[270] *Id.* at 142.

the plaintiff had created a genuine issue of fact as to whether her employer regarded her as disabled.[271] Relying on EEOC regulations,[272] and on the idea that "'society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment,'"[273] the court concluded that the plaintiff created a genuine issue of fact as to whether her employer regarded her as disabled.[274]

The court next addressed whether the plaintiff created a genuine issue of material fact regarding whether she was a qualified individual.[275] Once again disagreeing with the district court, the Third Circuit concluded that to prove this element, the plaintiff only needed to show that she could have performed the *essential* functions of her position with or without reasonable accommodations.[276] The plaintiff's former employer had argued that she needed to prove that she could have performed *all* of her job functions, but the Third Circuit, relying on the ADA's plain language, concluded that the plaintiff only needed to prove that she could have performed the *essential* functions of her position.[277]

Finally, the court addressed whether the plaintiff was able to create a genuine issue of material fact regarding whether she could have performed the essential functions of her former position without an accommodation.[278] After reviewing the evidence presented at the summary judgment stage, the Third Circuit concluded that there was indeed a genuine issue of material fact as to whether the plaintiff was a "qualified individual" under the ADA and that summary judgment was therefore inappropriate.[279] However, it was during this last part of the Third Circuit's discussion that the court opined on whether "regarded as" plaintiffs are entitled to accommodations.

Specifically, in footnote twelve, the Third Circuit acknowledged that it was not going to answer "the more difficult question" of whether individuals regarded as having disabilities are entitled to

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[271] *Id.* at 143–45.

[272] *See supra* note 5.

[273] *Deane*, 142 F.3d at 143 (quoting H.R. REP. NO. 101-485, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453).

[274] *Id.* at 144–45.

[275] *Id.* at 145; *see supra* note 22.

[276] *Deane*, 142 F.3d at 146–47.

[277] *Id.* at 147.

[278] *Id.* at 147–48.

[279] *Id.* at 148.

ADA accommodations.[280] Although it did not answer the question, the court did address the arguments made by both parties. The plaintiff had argued that the ADA's plain language required employers to accommodate "regarded as" disabilities.[281] The plaintiff also argued that the Supreme Court had already answered this issue in a pro-plaintiff manner in *School Board of Nassau County v. Arline*.[282] Finally, the plaintiff argued that allowing employers to escape liability for failing to accommodate "regarded as" plaintiffs would undermine the ADA's ability to eliminate discrimination in the workplace.[283] Specifically, the plaintiff argued that "the 'regarded as' prong of the disability definition is premised upon the reality that the perception of disability, socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough."[284]

After articulating the plaintiff's arguments, the court addressed the defendant's two counterarguments.[285] First, the defendant argued that interpreting the ADA in the manner urged by the plaintiff would allow healthy employees to sue or threaten to sue employers in order to demand workplace changes.[286] Second, the defendant argued that a plain reading of the ADA would create a windfall for legitimate "regarded as" plaintiffs, who would be entitled to accommodations even after the employers' misconceptions about the employees' conditions had been corrected.[287] Although the Third Circuit "express[ed] no opinion on the accommodation issue,"[288] it did note that the defendant's arguments had "considerable force,"[289] suggesting that had it decided the issue, it would have found that "regarded as" individuals are not entitled to reasonable accommodation.

Six years later, however, the Third Circuit decided that "regarded as" individuals *are* entitled to accommodations.[290] Although

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[280] *Id.* at 148 n.12 ("[W]e need not reach the more difficult question addressed by the panel whether 'regarded as' disabled plaintiffs must be accommodated by their employers if they cannot perform the essential functions of their jobs.").

[281] *Id.*

[282] *Deane*, 142 F.3d at 148 n.12 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288–89 (1987)).

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Deane*, 142 F.3d at 148 n.12.

[289] *Id.*

[290] Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775–76 (3d Cir. 2004).

the Third Circuit had previously hinted in *Deane* that accommodations were probably not required for these individuals, the court came to the opposite conclusion when the issue presented itself in *Williams v. Philadelphia Housing Authority Police Department*.[291] In *Williams*, the Third Circuit reversed the district court's grant of summary judgment in favor of the employer, concluding that there were genuine issues of fact with respect to whether the plaintiff was actually disabled or regarded as disabled.[292] Furthermore, the court confirmed that accommodations are required in "regarded as" cases.[293]

In *Williams*, the plaintiff sued his former employer after it terminated him for failure to request a medical leave of absence.[294] The plaintiff, who had been diagnosed with psychological problems, had been placed on work restrictions after making some threatening statements.[295] After undergoing mental health evaluations, requesting different positions within the department, and having those requests denied, the plaintiff was terminated, and he then sued his former employer.[296] The plaintiff filed a multi-count complaint, alleging, among other things, violations of the ADA and the state law equivalent.[297] By the close of discovery, only the ADA and equivalent state law claims remained, and the district court granted summary judgment in favor of the employer.[298]

After affirming the district court's grant of summary judgment on the plaintiff's ADA retaliation claim,[299] the Third Circuit addressed the discrimination claim.[300] The first issue the court addressed was whether the plaintiff satisfied the definition of disability under the ADA.[301] With respect to this specific issue, the court first had to decide whether the plaintiff could satisfy the "actual disability" prong of the ADA's definition.[302] Concluding that there was a genuine issue of fact with respect to whether the plaintiff was substantially limited in

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[291] *Id.* at 775.
[292] *Id.* at 768.
[293] *Id.* at 775–76.
[294] *Id.* at 756–58.
[295] *Id.* at 756.
[296] *Williams*, 380 F.3d at 758.
[297] *Id.* (state law equivalent is the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. §§ 951–963) (West 1991 & Supp. 2005).
[298] *Id.*
[299] *Id.* at 761.
[300] *Id.* at 761–76.
[301] *Id.* at 762–68.
[302] *Williams*, 380 F.3d at 762–66.

the ability to work, the court decided that summary judgment on that issue was inappropriate.[303]

The court then focused its attention on whether there was an issue of fact with respect to whether the defendant regarded the plaintiff as disabled.[304] Believing that reasonable jurors could conclude that the defendant regarded the plaintiff as disabled, the court decided that summary judgment was inappropriate.[305]

Next, the court turned to the issue of whether a plaintiff who is "regarded as" having a disability is entitled to an accommodation.[306] Despite the Third Circuit's previous concerns in *Deane*, the *Williams* court concluded that the ADA does require accommodations for those who fall within this prong of the definition of disability.[307] After referencing the split of authority on this issue,[308] the court decided that the "better reasoned"[309] opinions came from those courts that require accommodations for "regarded as" plaintiffs.

In support of this view, the court first referenced the plain language of the ADA.[310] After reviewing the ADA's definitions of "discrimination" and "disability," the court determined that the statute's plain language mandates that accommodations be provided to those regarded as disabled.[311] Both *Kaplan v. City of North Las Vegas*[312] and *Weber v. Strippit, Inc.*[313] acknowledged that the plain language would yield a pro-plaintiff result, but concluded that applying the plain language would yield a "bizarre result."[314] The Third Circuit in *Williams* did acknowledge that in some cases this interpretation of the ADA *could* yield a bizarre result, but concluded that such a possibility did not warrant an "across-the-board" refusal to apply the ADA's plain language.[315]

After looking to the ADA's plain language, the court focused on the ADA's legislative history.[316] The court determined that the "re-

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[303] *Id.* at 766.
[304] *Id.* at 766–68.
[305] *Id.* at 767.
[306] *Id.* at 772.
[307] *Id.* at 774–75.
[308] *Williams*, 380 F.3d at 773.
[309] *Id.*
[310] *Id.* at 774.
[311] *Id.*
[312] 323 F.3d 1226, 1232 (9th Cir. 2003).
[313] 186 F.3d 907, 916 (8th Cir. 1999).
[314] *Williams*, 380 F.3d at 773–74.
[315] *Id.* at 774.
[316] *Id.*

garded as" prong was intended by Congress to cover employees who, although not actually disabled, felt the effects of being disabled as a result of the "myths, fears and stereotypes" of others.[317] Thus, for the *Williams* court, the legislative history confirmed that Congress intended to extend the protections of the ADA to "regarded as" individuals "because being perceived as disabled 'may prove just as disabling.'"[318]

The Third Circuit then looked to the Supreme Court's decision in *Arline* for guidance.[319] Although the *Arline* decision is mentioned in the ADA's legislative history, the *Williams* court also devoted a separate part of its analysis to this case.[320] As was previously mentioned, the *Arline* Court remanded the case to determine whether the employer could have reasonably accommodated the plaintiff, who was not "actually" disabled.[321] The plaintiff suffered from tuberculosis, and the Court determined that the Rehabilitation Act obligated the employer to accommodate her disability.[322] The Third Circuit reasoned that, because the ADA and Rehabilitation Act play the same role, and because "the ADA must be read 'to grant at least as much protection as provided by . . . the Rehabilitation Act,'"[323] "regarded as" plaintiffs are entitled to reasonable accommodation under the ADA.[324]

Finally, the court addressed the windfall argument.[325] This theory posits that requiring accommodations in "regarded as" cases results in a windfall to employees who, although they do not suffer from a substantially limiting impairment, are treated as though they do.[326] According to employers, this interpretation of the ADA places these "regarded as" employees in a better position than those employees who might have had the same condition but were not regarded as having substantially limiting impairments, and that both groups should be treated similarly.[327] Like the Eastern District of New York in

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[317] *Id.* (citing H.R. REP. NO. 101-485, pt. 3 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453).

[318] *Id.*

[319] *Id.* at 775.

[320] *Williams*, 380 F.3d at 775.

[321] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288–89 (1987).

[322] *Id.* at 289 n.19.

[323] *Williams*, 380 F.3d at 775 (quoting Bragdon v. Abbott, 534 U.S. 624, 632 (1998)). *See also supra* note 43 and accompanying text.

[324] *Williams*, 380 F.3d at 775.

[325] *Id.* at 775–76.

[326] *Id.*

[327] *Id.*

Jacques v. DiMarzio, Inc.,[328] the Third Circuit rejected this argument, noting that individuals regarded as disabled are not situated similarly to those who are not regarded as disabled. The court noted:

> The employee whose limitations are perceived accurately gets to work, while [the plaintiff whose limitations are not perceived correctly] is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA.[329]

The court acknowledged that requiring accommodations *could* yield "bizarre results," but it was unwilling to ignore the ADA's language based on that possibility alone.[330] Thus, the Third Circuit became one of the circuits that concluded that accommodations are required in "regarded as" cases.[331]

D. The Fifth Circuit

Although the United States Court of Appeals for the Fifth Circuit has never issued a detailed analysis of this particular issue, it is clear that this circuit does not require employers to accommodate individuals who are regarded as disabled.[332]

The only Fifth Circuit opinion on this issue came in *Newberry v. East Texas State University*, where the court affirmed a jury verdict in favor of the defendant on the plaintiff's ADA claims.[333] The plaintiff, a tenured professor who was fired because of his performance and because of his inability to get along with his colleagues, appealed a jury verdict in favor of his former employer, arguing that the trial judge erred in not giving the requested "regarded as" jury instruction.[334] In addressing the plaintiff's "regarded as" claim, the court noted that the "regarded as" prong of the definition is concerned

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[328] 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

[329] *Williams*, 380 F.3d at 775–76.

[330] *Id.* at 774.

[331] Not surprisingly, since the *Williams* decision, courts within the Third Circuit have been following the rule that accommodations are required for individuals regarded as disabled under the ADA. *See* Taylor v. USF-Red Star Express, Inc., No. 03-2216, 2005 U.S. Dist. LEXIS 3600, at *11 (E.D. Pa. Mar. 8, 2005); *see also* Custer v. Penn State Geisinger Health Sys., No. 00-cv-1860, 2004 U.S. Dist. LEXIS 28953, at *15–19 (M.D. Pa. Dec. 27, 2004).

[332] Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998).

[333] *Id.* at 277. Prior to this opinion, the United States District Court for the Northern District of Texas had already concluded that accommodations are not required for individuals regarded as being disabled. Cannizzaro v. Neiman Marcus, Inc., 979 F. Supp. 465, 475 (N.D. Tex. 1997).

[334] *Newberry*, 161 F.3d at 277.

with categorization rather than with symptoms.[335] However, the court then noted, without any detailed explanation, that "an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment."[336] Thus, although the Fifth Circuit has expressed its opinion on this issue, it did so with no detailed explanation and in a case where this specific question was not the main focus.[337]

Since *Newberry*, the United States District Courts within the Fifth Circuit have also concluded that accommodations are not required in cases involving individuals "regarded as" disabled. For example, in *Matlock v. City of Dallas*,[338] the district court granted summary judgment against the hearing-impaired plaintiff on his failure to accommodate claim.[339] Even though the court concluded that summary judgment was inappropriate with respect to whether the plaintiff was regarded as disabled, the court did conclude that the plaintiff's accommodation claim based on a "regarded as" disability was appropriate for summary judgment.[340] The court gave little of its own explanation for such a decision, but rather relied on the Eighth Circuit's opinion in *Weber v. Strippit, Inc.*[341] and on the opinion in *Cannizzaro v. Neiman Marcus, Inc.*,[342] in which the Northern District of Texas noted that the duty to accommodate "arises only when the individual is disabled; no such duty arises when the individual merely is 'regarded as' being disabled as defined under the ADA."[343]

In another case from within the Fifth Circuit, *Price v. City of Terrell*,[344] a plaintiff who attempted to argue that she was entitled to an accommodation because she was regarded as having a disability was unable to convince the court that the ADA required an accommodation. The plaintiff in *Price* suffered from depression and argued that her employer regarded her as being substantially limited in a major

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[335] *Id.* at 279.

[336] *Id.* at 280.

[337] *Id.*

[338] No. 3:97-CV-2735-D, 1999 U.S. Dist. LEXIS 17953 (N.D. Tex. Nov. 12, 1999).

[339] *Id.* at *1.

[340] *Id.* at *17.

[341] 186 F.3d 907 (8th Cir. 1999).

[342] 979 F. Supp. 465 (N.D. Tex. 1997).

[343] *Id.* at 475 (citing Howard v. Widnall, EEOC Doc. No. 01931095, 1994 WL 747979, at *5 (EEOC May 12, 1994); EEOC, ADA CASE STUDY TRAINING: TRAINER'S MANUAL, CASE STUDY 1, at 6 (1996)).

[344] No. 3 99-CV-0269-D, 2000 U.S. Dist. LEXIS 18588 (N.D. Tex. Dec. 20, 2000).

life activity.[345] After the court first rejected her actual disability claim, it went on to address her "regarded as" claim.[346] The court first determined that there was no genuine issue of material fact as to whether the plaintiff's employer regarded her as disabled, and that summary judgment was appropriate on that basis.[347] The court then bolstered its decision by noting that even if there was a question of fact regarding this issue, "regarded as" plaintiffs are not entitled to accommodations.[348] The court gave no independent analysis of the issue, but rather relied on *Weber* and on *Cannizzaro*.[349]

Thus, it is clear that "regarded as" plaintiffs are not entitled to accommodations within the Fifth Circuit. This is also the case with the circuit discussed next, the Sixth Circuit.

E. The Sixth Circuit

The Sixth Circuit has also determined that accommodations are not required for individuals regarded as disabled.[350] Although the court never specifically addressed the issue with a detailed analysis, it has made clear, by relying on the EEOC's position, that it believes "regarded as" plaintiffs are not entitled to accommodations.[351]

The United States Court of Appeals for the Sixth Circuit addressed this issue in *Workman v. Frito-Lay, Inc.*,[352] in which the plaintiff brought several ADA and parallel state law claims after she was terminated by her employer.[353] She alleged that she was terminated as a result of her disability and that she was retaliated against for filing a charge with the EEOC.[354] After a jury decided in favor of the plaintiff with respect to the issue of liability, the case was appealed to the Sixth Circuit.[355] After first addressing the jury instructions, the court went

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[345] *Id.* at *5–6, *10.

[346] *Id.* at *11–13.

[347] *Id.* at *15.

[348] *Id.* at *15–16.

[349] *Id.*; *see also* Reeves v. City of Dallas, No. 3:00-CV-1406-D, 2001 U.S. Dist. LEXIS 19285, at *12 (N.D. Tex. Nov. 21, 2001) (following *Cannizzaro* and concluding that plaintiffs who are regarded as having disabilities are not entitled to reasonable accommodations under the ADA).

[350] Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999).

[351] *Id.*

[352] *Id.* at 460.

[353] *Id.* at 464.

[354] *Id.*

[355] *Id.* at 464–65.

on to address the jury's verdict, which involved an analysis of whether a plaintiff regarded as disabled is entitled to an accommodation.[356]

This issue arose in the context of whether the jury was correct in determining that the plaintiff had a disability, and the court concluded that the jury could have concluded that she had an actual disability as a result of her irritable bowel syndrome.[357] The court then addressed whether the jury could have concluded that the plaintiff was regarded as disabled.[358] The court concluded that the jury could have reached that conclusion, but the court also noted that under this prong of the "disability" definition, "the defendant correctly contend[ed] that a finding on this basis would obviate the [c]ompany's obligation to reasonably accommodate [the plaintiff]."[359] The court relied on the EEOC Training Manual and on 29 C.F.R. § 1630.2(*l*)(1)–(3) for this proposition.[360]

Thus, although the specific issue of whether "regarded as" plaintiffs are entitled to accommodations under the ADA was not the specific issue addressed by the Sixth Circuit in *Workman*, the court used the opportunity to express its view that such accommodations are not necessary.[361] Since this decision, courts have interpreted *Workman* as standing for the proposition that accommodations are not required in these "regarded as" cases.[362]

F. The Seventh Circuit

The United States Court of Appeals for the Seventh Circuit is another court that has not decided this particular issue. On at least two occasions, the court has had the opportunity to answer the issue, but it has specifically declined to do so.[363] As a result of the Seventh Circuit's failure to answer this question, the district courts within the Seventh Circuit have come to different conclusions.

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[356] *Workman*, 165 F.3d at 467.

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] *Id.* (citing EEOC Training Manual; 29 C.F.R. § 1630.2(*l*)(1)–(3) (2005)); *see supra* note 5 for these regulations.

[361] *Id.*

[362] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004).

[363] *See, e.g.*, Cigan v. Chippewa Falls Sch. Dist., 388 F.3d 331 (7th Cir. 2004); Mack v. Great Dane Trailers, 308 F.3d 776 (7th Cir. 2002).

The most recent opportunity the Seventh Circuit had to resolve this issue was in *Cigan v. Chippewa Falls School District*.[364] In this case, the plaintiff sued her employer, claiming constructive discharge and an ADA violation.[365] Specifically, the plaintiff alleged that the school failed to accommodate her several ailments and forced her into retirement; the trial court granted summary judgment in favor of the employer, and the Seventh Circuit affirmed.[366] After first rejecting the plaintiff's constructive discharge claim, the court addressed the issues surrounding her "regarded as" claim.[367] The plaintiff argued that because her former employer made some efforts to accommodate her, that proved that it regarded her as disabled.[368] The Seventh Circuit rejected this argument and determined that the employer did not regard the plaintiff as disabled.[369] The court then addressed the issue discussed in this Article, but stopped short of answering it: "Because the record would not permit a reasonable trier of fact to conclude that the school district regarded [the plaintiff] as 'disabled,' we need not decide whether the ADA requires an employer to accommodate the demands of a person who is regarded as disabled but lacks an actual disability."[370] The court then noted the conflict among several of the circuits on this issue.[371] The court next observed:

> Being regarded as disabled is a form of disability under the statute and thus could in principle trigger a duty to accommodate, but *what* must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee? Suppose an employer wrongly believed that anyone who needs glasses is disabled under the ADA. Nearsighted employees at that firm might be "regarded as disabled," but it is hard to imagine that, despite *Sutton* . . . the employer would have to afford them the sort of accommodations appropriate to a genuine disability. The extent to which employers' errors in appreciating the extent of their workers' real disabilities create obligations to accommodate can be left for another day, however, when the answer could make a difference.[372]

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[364] 388 F.3d 331 (7th Cir. 2004).

[365] *Id.* at 332.

[366] *Id.* at 332, 336.

[367] *Id.* at 332–34.

[368] *Id.*

[369] *Id.* at 335.

[370] *Cigan*, 388 F.3d at 335.

[371] *Id.*

[372] *Id.* at 335–36 (citing Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding that correctable eye problems are not actually disabling)).

One of the problems with the lack of a definitive response from the Seventh Circuit is that courts within that jurisdiction have reached opposite conclusions with respect to this issue. Although most courts within the Seventh Circuit believe that such accommodations are *not* required, at least one court has determined that they are.

The Southern District of Indiana, in *Miller v. Heritage Products, Inc.*,[373] was confronted with this issue, and it decided to follow the reasoning of the First Circuit in *Katz v. City Metal Co.*[374] and the Eastern District of New York in *Jacques v. DiMarzio, Inc.*[375] In *Miller*, the plaintiff first convinced the court that there was a genuine issue of material fact with respect to whether his employer regarded him as disabled, and then the court addressed whether that fact, if true, would require the employer to provide an accommodation.[376] The defendant argued that the ADA does not require an accommodation for an individual who is not actually disabled.[377] The defendant relied on opinions from the Eighth and Ninth Circuits,[378] but as previously noted, the court decided to follow the reasoning from the First Circuit and from the Eastern District of New York.[379] Specifically, the court found the *Katz* and *Jacques* opinions "more persuasive" than the opinions in *Weber v. Strippit, Inc.*[380] and *Kaplan v. City of North Las Vegas*,[381] and therefore agreed that accommodations are required in "regarded as" cases.[382]

Several other courts within the Seventh Circuit have reached the opposite conclusion.[383] One of these opinions comes from the Northern District of Illinois in *Ammons-Lewis v. Metropolitan Water Rec-*

[373] No. 1:02-cv-1345-DFH, 2004 U.S. Dist. LEXIS 8531 (S.D. Ind. Apr. 21, 2004).

[374] 87 F.3d 26, 33 (1st Cir. 1996).

[375] 200 F. Supp. 2d 151, 163 (E.D.N.Y. 2002).

[376] *Miller*, 2004 U.S. Dist. LEXIS 8531, at *26–27.

[377] *Id.* at *27–28.

[378] Specifically, the defendant relied on *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999), and on *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

[379] *Miller*, 2004 U.S. Dist. LEXIS 8531, at *26–28 (relying on *Katz*, 87 F.3d at 33; *Jacques*, 200 F. Supp. 2d at 163).

[380] 186 F.3d 907 (8th Cir. 1999).

[381] 323 F.3d 1226 (9th Cir. 2003).

[382] *Miller*, 2004 U.S. Dist. LEXIS 8531, at *26–28.

[383] See *Cebertowicz v. Motorola, Inc.*, 178 F. Supp. 2d 949, 953 (N.D. Ill. 2001), and *Ross v. Matthews Employment*, No. 00 C 1420, 2000 U.S. Dist. LEXIS 16554, at *13 (N.D. Ill. Oct. 24, 2000), for the proposition that accommodations are not required for individuals regarded as disabled.

lamation District.[384] The plaintiff in *Ammons-Lewis* brought a multi-count complaint, which included a failure to accommodate claim.[385] After holding that a jury could have concluded that the plaintiff's employer did regard her as disabled, the court addressed whether such a finding would require an employer to accommodate a "regarded as" disability.[386] The court acknowledged that the Seventh Circuit had not yet answered this question, and the employer, relying on opinions from the Fifth, Sixth, Eighth, and Ninth Circuits, and from district court opinions from within the Seventh Circuit, argued that no such duty exists.[387] The court noted that all of these opinions rested on the belief that an impaired but non-disabled person who is regarded as disabled by his employer should not be treated more favorably than another impaired person who is not regarded as disabled.[388] The court then quoted the Eighth Circuit's opinion in *Weber*, which noted that such unequal treatment of similarly-situated individuals is not possibly what the ADA was meant to encourage.[389]

The court in *Ammons-Lewis* acknowledged the authority holding that accommodations are required in these cases,[390] and recognized the concerns behind those cases: that employers' attitudes can limit employees just as much as actual impairments, and that the ADA should protect employees against these misperceptions.[391] However, in concluding that no accommodation was required, the court distinguished the facts before it from the facts in the cases requiring accommodations and reasoned that it would "make no sense to impose a legally enforceable requirement for [the defendant] to accommodate [the plaintiff's] non-existent ADA disability."[392]

Thus, without a clear statement on this issue from the United States Court of Appeals for the Seventh Circuit, district courts within that jurisdiction will continue to reach conflicting results. This is not, however, the case within the Eighth Circuit, where it is crystal clear that accommodations are not required in cases involving individuals regarded as disabled.

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[384] No. 03 C 0885, 2004 U.S. Dist. LEXIS 21917 (N.D. Ill. Nov. 1, 2004).
[385] *Id.* at *1–2.
[386] *Id.* at *13–14.
[387] *Id.* at *13–16.
[388] *Id.* at *14–15.
[389] *Id.* (quoting Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999)).
[390] *Ammons-Lewis*, 2004 U.S. Dist. LEXIS 21917, at *15.
[391] *Id.* at *15–16.
[392] *Id.* at *16.

G. The Eighth Circuit

The Eighth Circuit has definitively concluded that individuals who are regarded as disabled are not entitled to accommodations under the ADA.[393] In fact, *Weber v. Strippit, Inc.* is one of the most often-cited cases for this proposition, and it has formed the basis for several other courts' decisions not to allow accommodations in these cases.

As was indicated earlier, the Eighth Circuit was the first to *squarely* address this issue.[394] In *Weber*, the plaintiff brought suit under the ADA, the ADEA, and state law.[395] The essence of the plaintiff's ADA claim was that his former employer terminated him as a result of his heart disease, which had limited his ability to work.[396] After he indicated that he was unable to accept an intra-company transfer as a result of his work limitations, the plaintiff was terminated.[397] After the plaintiff presented his case at trial, the court granted the defendant's motion for judgment as a matter of law on the plaintiff's "actual disability" claim.[398] With respect to his remaining claims of age discrimination and discrimination based on a "regarded as" disability, the jury returned a defense verdict.[399]

On appeal, the plaintiff raised several issues in addition to the question of whether individuals regarded as having disabilities are entitled to accommodations. After briefly addressing those other issues, the Eighth Circuit finally addressed the issue of whether individuals regarded as having disabilities are entitled to accommodations under the ADA. The court began by acknowledging that the district court had ruled that the ADA does not require employers to accommodate individuals regarded as having disabilities.[400] The court then went on to identify the three elements an ADA plaintiff must establish to prevail on such a claim.[401] Of central importance to this Article is the second element of that prima facie case—that the plaintiff was a "qualified individual." The court started its analysis of this issue by reciting the ADA's definition of that term and acknowledging that this determination involves a two-prong test, asking: (1) whether the

393 *Weber*, 186 F.3d at 917.
394 *Id.* at 916–17.
395 *Id.* at 910.
396 *Id.*
397 *Id.*
398 *Id.*
399 *Weber*, 186 F.3d at 910.
400 *Id.* at 915–16.
401 *Id.* at 916.

individual has the requisite skill, experience, and education required of the position, and (2) whether the individual can perform the essential functions of the position either with or without a reasonable accommodation.[402]

The Eighth Circuit first addressed the issue of accommodations.[403] The court noted that this is an easier issue to conceptualize in cases involving actual disabilities.[404] The court noted that providing accommodations in actual disability cases was "perfectly consistent with the ADA's goal of protecting individuals with disabling impairments who nonetheless can, with reasonable efforts on the part of their employers, perform the essential functions of their jobs."[405]

The Eighth Circuit then opined that the reasonable accommodation requirement "makes considerably less sense in the perceived disability context."[406] Believing that a reading of the plain language of the ADA would require employers to accommodate these individuals, the Eighth Circuit reasoned that such a reading of the statute would yield "bizarre results," and thus the court was free to ignore the statute's plain language.[407] The court gave the following explanation why such a strict following of the ADA would lead to "bizarre results":

> Assume, for instance, that [the plaintiff's] heart condition prevented him from relocating to Akron but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate [him] without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive [the plaintiff's] heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate [the plaintiff's] condition by, for instance, delaying his relocation to Akron. Although [the plaintiff's] impairment is no more severe in this example than in the first, [the plaintiff] would now be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.[408]

The court acknowledged the split in authority on this issue, citing *Katz v. City Metal Co.* from the First Circuit and *Deane v. Pocono*

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[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *Weber*, 186 F.3d at 910.

[406] *Id.*

[407] *Id.*; *see* Royal Foods Co., v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001) (noting that courts must look beyond the plain language of a statute if following the plain language would yield an absurd result).

[408] *Weber*, 186 F.3d at 916.

Medical Center from the Third Circuit.[409] After setting forth the rationales of the First and Third Circuits, the Eighth Circuit concluded that the *Deane* court's suggestion that accommodations are not required for perceived disabilities was more sound.[410] The court acknowledged the concerns regarding healthy employees potentially forcing employers to provide changes in the workplace "under the guise of 'reasonable accommodations'" and the possibility that such an interpretation of the ADA would provide a "windfall for legitimate 'regarded as' disabled employees" who would be entitled to accommodations not available to similarly situated employees.[411] After acknowledging these concerns, which were raised by the court in *Deane*, the court concluded that the ADA could not "reasonably have been intended to create a disparity in treatment among impaired but nondisabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees."[412] The Eighth Circuit then held that "regarded as" individuals were not entitled to accommodations,[413] and in doing so, became the first United States Court of Appeals to make that determination when directly confronted with the issue.[414]

H. The Ninth Circuit

Although usually an employee-friendly court, the United States Court of Appeals for the Ninth Circuit has also concluded that individuals "regarded as" disabled are not entitled to accommodations.[415] Four years after the Eighth Circuit's opinion in *Weber v. Strippit, Inc.*, the Ninth Circuit was faced with the issue of reasonable accommodations for individuals "regarded as" having disabilities and agreed with

[409] *Id.* at 916–17.

[410] *See id.* at 917.

[411] *Id.*

[412] *Id.*

[413] *Id.*

[414] Not surprisingly, since the Eighth Circuit's opinion in *Weber*, the district courts within that circuit have concluded that accommodations are not required for individuals regarded as disabled. *See* Bishop v. Nu-Way Service States, Inc., 340 F. Supp. 2d 1008, 1014 (E.D. Mo. 2004); Nichols v. ABB DE, Inc., 324 F. Supp. 2d 1036, 1044–45 (E.D. Mo. 2004); Habib-Stevens v. Trans States Airlines, Inc., 229 F. Supp. 2d 945, 947 (E.D. Mo. 2002).

[415] Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231–33 (9th Cir. 2003).

the Eighth Circuit's conclusion that no accommodations are required in these cases.[416]

The plaintiff in *Kaplan v. City of North Las Vegas* worked as a deputy marshal, a job which required him to use his hands while engaging in several physical activities on the job, including use of firearms and engaging in combative situations with inmates.[417] During a training exercise, the plaintiff injured his wrist and thumb and was unable to perform several of these physical tasks.[418] The plaintiff received a light duty assignment for a period, but he was eventually terminated when his employer determined that he would not be able to perform his job functions.[419] As a result, the plaintiff filed suit under the ADA.[420] After concluding that the plaintiff did not suffer from a disability, the district court granted summary judgment in favor of the defendant.[421] However, the Ninth Circuit concluded that the plaintiff had raised a genuine issue of material fact with respect to whether the defendant regarded him as having a disability.[422] On remand, the district court once again granted summary judgment, concluding that the plaintiff was not a "qualified individual with a disability."[423] The plaintiff appealed again, and this time the Ninth Circuit addressed the accommodation issue.

The Ninth Circuit first addressed whether the plaintiff could have performed the essential functions of his position without an ac-

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[416] *Id.* Prior to the Ninth Circuit's opinion in *Kaplan*, at least two district courts within the Ninth Circuit concluded that the ADA does not require accommodations for individuals regarded as having a disability. As was discussed earlier, in *Fontanilla v. City and County of San Francisco*, No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919 (N.D. Cal. Feb. 28, 2001), the United States District Court for the Northern District of California reasoned that because the ADA's text was ambiguous with respect to this issue, a review of both the EEOC regulations and guidelines, and the ADA's legislative history, was appropriate. *Id.* at *48–49. After analyzing those tools of statutory interpretation, the court concluded that accommodations were not required. *Id.* at *50–53. Although the United States Court of Appeals for the Ninth Circuit reached the same ultimate conclusion that accommodations are not required in these cases, as will be discussed in this section, it reached that conclusion based on different reasoning. Also prior to the Ninth Circuit's opinion in *Kaplan* was *Deppe v. United Airlines*, No. C 96-3916 JCS, 2001 U.S. Dist LEXIS 11569, at *13–16 (N.D. Cal. July 29, 2001), where the court decided to follow the several circuits that had previously decided that accommodations are not required in cases involving individuals who are regarded as disabled.

[417] *Kaplan*, 323 F.3d at 1227–28.

[418] *Id.* at 1228.

[419] *Id.* at 1228–29.

[420] *See id.* at 1229.

[421] *Id.*

[422] *Id.* at 1231.

[423] *Kaplan*, 323 F.3d at 1231.

commodation.[424] Agreeing with the district court, the Ninth Circuit concluded that the plaintiff did not satisfy his burden of showing that he could have performed those essential functions.[425] The court then addressed whether the plaintiff was entitled to an accommodation.[426] In addressing this issue, the court acknowledged that different courts had reached conflicting conclusions on this point.[427] The court also acknowledged that at the time of the opinion, the weight of authority favored the employer's position that accommodations were not required in "regarded as" cases.[428] After making these preliminary observations, the court started its own analysis.

The court began with the ADA's plain language.[429] After first acknowledging that the plain language would result in an employer having to accommodate a "regarded as" disability, the court then decided to ignore the ADA's plain language. Relying extensively on *Weber v. Strippit, Inc.*,[430] the Ninth Circuit agreed with the Eighth Circuit that requiring employers to accommodate "regarded as" disabilities was not what Congress intended and would result in bizarre outcomes.[431]

The court relied heavily on policy reasons and upon "what if" justifications for its decision; specifically, the court determined that requiring employers to provide accommodations for individuals regarded as having disabilities would: (a) encourage employees to allow their employers to treat them as disabled even if they were not, which would be a "perverse and troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly indicative of the individual ability'" of these individuals; (b) discourage individuals regarded as having disabilities from informing and educating their employers of their actual capabilities and thus discourage employers from seeing these employees' abilities; (c) force employers to spend

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[424] *Id.* at 1230–31.

[425] *Id.* at 1231.

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] *Kaplan*, 323 F.3d at 1231–32. The court relied on the following proposition for beginning its analysis with the statute's language: "'It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting Carson Harbor Vil., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))) (alteration in original). Despite citing this "elementary" principle, as will be seen shortly, the court decided to ignore the statute's plain language. *Id.* at 1232.

[430] 186 F.3d 907 (8th Cir. 1999).

[431] *Kaplan*, 323 F.3d at 1232–33 (citing *Weber*, 186 F.3d at 917).

money unnecessarily rather than use that money to provide accommodations to those individuals who actually needed them; and (d) provide a windfall for "regarded as" individuals.[432]

After giving these justifications for holding that accommodations are not required for "regarded as" individuals, the court acknowledged that this was not an "easy question" in light of the ADA's plain language; but it did, nonetheless, agree with the Eighth Circuit's position in *Weber*.[433] Thus, the United States Court of Appeals for the Ninth Circuit became another court to reject the argument that the ADA required accommodations for "regarded as" plaintiffs.

I. The Tenth Circuit

One of the most recent decisions on this particular issue from a United States Court of Appeals came from the Tenth Circuit in *Kelly v. Metallics West, Inc.*[434] In *Kelly*, the Tenth Circuit became the third circuit court to determine that accommodations *are* required in cases involving individuals who are "regarded as" disabled.[435] And, since the *Kelly* and *Williams v. Philadelphia Housing Authority Police Department* decisions, the Eleventh Circuit has also joined the trend of requiring accommodations for individuals regarded as disabled.[436]

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[432] *Id.* at 1232 (quoting 42 U.S.C. § 12101(a)(7)). The court relied on the Third Circuit's dicta in *Taylor v. Pathmark Stores Inc.*, 177 F.3d 180, 196 (3d Cir. 1999), for the windfall argument. *Kaplan*, 323 F.3d at 1232.

[433] *Kaplan*, 323 F.3d at 1232–33. Since the Ninth Circuit's opinion in *Kaplan*, several district courts within the Ninth Circuit have concluded that accommodations are not required in cases involving individuals who are regarded as disabled. Whitehall v. City of Santa Rosa, No. C 03-3186 SBA, 2004 U.S. Dist. LEXIS 21453, at *9 (N.D. Cal. Oct. 19, 2004); Bass v. County of Butte, No. CIV-S-02-2443 DFL/GGH, 2004 U.S. Dist. LEXIS 17191, at *16 (E.D. Cal. Aug. 4, 2004).

[434] 410 F.3d 670 (10th Cir. 2005). Prior to this opinion, a district court within the Tenth Circuit had addressed this issue. Specifically, in *Powers v. Tweco Products, Inc.*, 206 F. Supp. 2d 1097, 1114 (D. Kan. 2002), the district court expressed its view that such accommodations are *not* required in cases involving individuals who are merely regarded as disabled.

[435] *See Kelly*, 410 F.3d at 676; *see also* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996).

[436] *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005); *see also Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 776.

In *Kelly*,[437] the plaintiff sued her former employer after it refused to allow her to bring oxygen to work and eventually terminated her employment.[438] The plaintiff brought a multi-count complaint, alleging ADA violations.[439] After a jury ruled in favor of the plaintiff, the employer appealed, raising the issue of whether an accommodation is required for individuals "regarded as" disabled.[440] After acknowledging the split of authority, the Tenth Circuit agreed with the First and Third Circuits and concluded that accommodations are required in cases involving individuals "regarded as" disabled.[441] The court concluded that "the plain language of the ADA's interlocking statutory definitions includes within the rubric of a 'qualified individual with a disability' protected by the ADA individuals (1) regarded as disabled, but (2) who, with reasonable accommodation, can perform the essential functions of the position that they hold."[442] The court then concluded that the plaintiff fit within that category of individuals.[443]

The court rejected the "bizarre results" reasoning of the Eighth and Ninth Circuits.[444] Reasoning that those courts' rationales "provide[d] no basis for denying validity to a reasonable accommodation claim,"[445] and highlighting its "fail[ure] to understand" the *Weber* and *Kaplan* concerns,[446] the Tenth Circuit rejected the argument that allowing accommodations would "'do nothing to encourage . . . employees to educate employers of their capabilities' or to 'encourage the employers to see their employees' talents clearly.'"[447] The Tenth Circuit agreed with the Third Circuit in *Williams* about the real concern: that allowing stereotypic assumptions in "regarded as" cases

[437] Prior to the *Kelly* opinion, the Tenth Circuit had tangentially discussed this issue in *McKenzie v. Dovala*, 242 F.3d 967, 975–76 (10th Cir. 2001), in which the court addressed whether a plaintiff who was regarded as disabled made out a prima facie case under the ADA based on her employer's failure to accommodate her. The defendant in *Kelly* argued that *McKenzie* did not directly address this specific issue, and relied on *Kaplan*, 323 F.3d at 1231–32, *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999), *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999), and *Newberry v. East Texas State University*, 161 F.3d 276, 280 (5th Cir. 1998), for the proposition that such accommodations were not required. *Kelly*, 410 F.3d at 675.

[438] *Kelly*, 410 F.3d at 672–73.

[439] *Id.* at 673.

[440] *Id.* at 674.

[441] *Id.* at 675–76.

[442] *Id.* at 675.

[443] *Id.*

[444] *Kelly*, 410 F.3d at 675–76.

[445] *See id.* at 676.

[446] *Id.*

[447] *Id.* (quoting Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003)) (alteration in original).

would essentially force an employee whose limitations are incorrectly perceived to be "sent home unpaid."[448] The court concluded:

> That is to say, an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.
>
> An additional concern arises regarding the use of the phrase "reasonable accommodation." Can it be inherently "unreasonable" to accommodate an employee who is only regarded as disabled? Congress does not appear to have thought so, for its definition of "reasonable accommodation" makes no distinction between employees who are actually disabled and those who are merely regarded as disabled.[449]

The Tenth Circuit therefore joined the First and Third Circuits in concluding that accommodations are available to individuals regarded as disabled under the ADA.

J. The Eleventh Circuit

The most recent United States Court of Appeals to address this issue is the United States Court of Appeals for the Eleventh Circuit. Although this court has traditionally been pro-employer in its employment-related decisions, it decided to join the current trend of finding that accommodations are required for individuals who are regarded as disabled when it decided *D'Angelo v. ConAgra Foods, Inc.*[450] Prior to *D'Angelo*, the Eleventh Circuit had hinted that such accommodations were required, but never affirmatively made that point.[451]

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[448] *Id.*

[449] *Id.*

[450] 422 F.3d 1220 (11th Cir. 2005).

[451] For example, in an earlier, non-employment case involving a provision of the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 706, 794 (2002), the Eleventh Circuit suggested that perhaps individuals who are regarded as disabled are entitled to accommodations. Harris v. Thigpen, 941 F.2d 1495, 1525–27 (11th Cir. 1991) (commenting that HIV-positive prisoners who were regarded as being "handicapped" under the Rehabilitation Act might be entitled to reasonable accommodations). After *Harris*, in a Rehabilitation Act case from a district court within the Eleventh Circuit, *Mitchell v. Crowell*, 966 F. Supp. 1071, 1080 n.9 (N.D. Ala. 1996), the court specifically declined to answer the question of whether these individuals are entitled to accommodations, despite acknowledging that in *Harris*, the Eleventh Circuit suggested that accommodations are required. More recently, the Eleventh Circuit hinted that accommodations are required in cases involving individuals regarded as disabled.

In *D'Angelo*, the plaintiff sued her former employer under the ADA and under the analogous state law after the employer fired her as a result of her vertigo.[452] The plaintiff alleged that she was both actually disabled and regarded as disabled, but the trial court granted the defendant's motion for summary judgment on both claims.[453] The district court determined that the plaintiff did not suffer from an actual disability because her impairment did not substantially limit her ability to work, and that even though there was a genuine issue of material fact with respect to whether her former employer regarded her as disabled, the ADA did not require accommodations for individuals regarded as disabled.[454] The district court determined that even if the ADA did require such accommodations, the plaintiff could not have performed the essential functions of her job with such an accommodation.[455]

After first agreeing with the district court on the plaintiff's actual disability claim, the Eleventh Circuit addressed the plaintiff's "regarded as" claim.[456] Agreeing that there was a genuine issue of fact with respect to whether the plaintiff was regarded as disabled, the court then determined that there was a genuine issue of material fact with respect to whether certain aspects of the plaintiff's job were "essential functions."[457] After addressing those two preliminary issues, the court addressed the issue that is the focus of this Article.[458]

The Eleventh Circuit first acknowledged that the lower court believed accommodations were not required in "regarded as" cases,[459] and it then identified the split of authority on the issue.[460] Although

Roberts v. Rayonier, Inc., 135 F. App'x 351, 357 (11th Cir. 2005) (noting that as part of an ADA retaliation claim, plaintiff must establish that "he had a reasonable belief that he was disabled or regarded as disabled and thus entitled to an accommodation"). The *Roberts* opinion did not affirmatively state that "regarded as" plaintiffs are, in fact, entitled to accommodations but merely stated that a plaintiff can base an ADA retaliation claim on a belief that such an accommodation is required. *Id.* (outlining the elements of a prima facie retaliation claim under the ADA).

[452] *D'Angelo*, 422 F.3d at 1221–22.

[453] *Id.*

[454] *Id.* at 1224.

[455] *Id.*

[456] *Id.* at 1226–28.

[457] *Id.* at 1229 n.5, 1234.

[458] *D'Angelo*, 422 F.3d at 1235.

[459] *Id.* at 1234.

[460] *Id.* at 1235. The Eleventh Circuit pointed out that the Third Circuit had concluded that accommodations are required, while the Fifth, Sixth, Eighth, and Ninth Circuits had concluded that accommodations were not required. *Id.* The court also noted that the First Circuit had tangentially addressed the issue and assumed that accommodations were required. *Id.* The Eleventh Circuit did not cite to the most

the court cited more authority for the proposition that accommodations are not required in these cases, it agreed with the Third Circuit's analysis in *Williams* and concluded that accommodations are required.[461] The court focused on the ADA's plain language, the Supreme Court's decision in *School Board of Nassau County v. Arline*,[462] the ADA's legislative history, and a rejection of the arguments in *Weber v. Strippit, Inc.* and *Kaplan v. City of North Las Vegas*.[463]

The court began its analysis with the ADA's plain language.[464] After reviewing the ADA's definitions of "disability," "qualified individual with a disability," and "discrimination," along with the Act's substantive prohibition against discrimination, the court concluded that "the statute's prohibition on discrimination applies equally to all statutorily defined disabilities,"[465] and that "[t]he text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not."[466] The Eleventh Circuit also noted that the ADA's plain language compelled the court to conclude that its terms require employers to provide accommodations for individuals they regard as disabled.[467]

After addressing the plain language argument, the Eleventh Circuit noted that the conclusion it reached was consistent with both *Arline* and the congressional intent behind the ADA.[468] The court quoted *Arline*'s analysis regarding the purpose of recognizing "regarded as" disabilities,[469] and noted its approval of the Third Circuit's reasoning in *Williams v. Philadelphia Housing Authority Police Department*[470] that the Supreme Court's decisions in *Arline* and *Bragdon v. Abbott*[471] compelled the conclusion that accommodations are required

recent opinion on the issue, which was from the Tenth Circuit. S*ee* Kelly v. Metallics W., Inc., 410 F.3d 670 (10th Cir. 2005).

[461] *D'Angelo*, 422 F.3d at 1235 (agreeing with *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 776 (3d Cir. 2004), that the ADA requires accommodations in "regarded as" cases).

[462] 480 U.S. 273 (1987).

[463] *D'Angelo*, 422 F.3d at 1235–39.

[464] *Id.* at 1235.

[465] *Id.* at 1235–36.

[466] *Id.* at 1236. *See also supra* notes 3, 4, 22 (providing the ADA's definitions of "discrimination," "disability," and "qualified individual with a disability").

[467] *D'Angelo*, 422 F.3d at 1236.

[468] *Id.* at 1236–38.

[469] *Id.* at 1236–37 (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284–85 (1987)).

[470] 380 F.3d 751, 775 (3d Cir. 2004).

[471] 524 U.S. 624 (1998).

for individuals regarded as disabled.[472] When the court next focused on the ADA's legislative history, it noted that Congress provided at least as much protection in the ADA as it did in the Rehabilitation Act, and that because the Rehabilitation Act required accommodations in these circumstances, there was "no principled basis" to conclude that the ADA did not provide similar protections.[473]

The court then attacked the reasoning used by the courts that had reached the opposite conclusion.[474] After quoting the passage from *Weber* regarding the possible anomalous results that requiring accommodations might yield,[475] the Eleventh Circuit noted that "'courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.'"[476] Citing additional authority regarding the courts' role in a system based on a separation of powers, the court observed:

> Thus, as a court, we are not free to question the efficacy of legislation that Congress validly enacted. Within constitutional limits, Congress *may* "improvidently" elect to legislate what the Ninth Circuit has characterized as a "windfall" for employees regarded as disabled, or may "compel employers to waste resources" that, in our sister Circuit's judgment, "would be better spent assisting those persons who are actually disabled." We do not think that these judgements and the complex legislative calibrations that underlie them are for us to make. Quite simply, we are without authority to pass judgment on the wisdom of a congressional enactment.[477]

Continuing its assault on the Ninth and Eighth Circuits, the court also disagreed with the Ninth Circuit's statement that "[t]he absence of a stated distinction [between the three alternative prongs of the 'disability' definition] . . . is not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations."[478] The court noted that applying the plain language in this type of case was not "one of those rare cases" where

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[472] *D'Angelo*, 422 F.3d at 1236–37. The *D'Angelo* court relied on *Bragdon*, 524 U.S. at 631–32, for the proposition that courts should interpret the ADA in a manner similar to the way courts interpret the Rehabilitation Act.

[473] *D'Angelo*, 422 F.3d at 1236–37.

[474] *Id.* at 1237–38.

[475] *Id.* (quoting Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999)).

[476] *Id.* (quoting *In re* Jove Eng'g, Inc., v. IRS, 92 F.3d 1539, 1552 (11th Cir. 1996)).

[477] *Id.* at 1238 (quoting Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003)).

[478] *Id.* (quoting *Kaplan,* 323 F.3d at 1232) (second and third alterations in original).

applying a statute's plain language would produce a result that was "demonstrably at odds" with Congress's intent.[479]

The *D'Angelo* court next took aim at the Eighth Circuit's reasoning in *Weber*.[480] First, it concluded that the *Weber* court was incorrect when it labeled "regarded as" employees as "impaired but non-disabled" because, according to the ADA, people who were regarded as disabled were, in fact, disabled.[481] Thus, the Eighth Circuit's characterization of these individuals as "non-disabled" was incorrect.[482] Next, the *D'Angelo* court borrowed the argument from *Jacques v. DiMarzio, Inc.*[483] that an employee who is regarded as disabled by his employer is not similarly situated to an employee who is not regarded as disabled (even if both have the same medical condition), and thus it is an acceptable reading of the ADA to require accommodations for the person whom the employer regards as disabled while the individual who is not so regarded would not receive an accommodation.[484] Relying on the Third Circuit in *Williams*, the court then noted that "'the employee whose limitations are perceived accurately gets to work, while [the plaintiff whose limitations are not perceived correctly] is sent home unpaid.'"[485]

Therefore, based on the ADA's plain language, the Supreme Court's *Arline* decision, the ADA's legislative history, and the rejection of the reasoning of the Eighth and Ninth Circuits, the Eleventh Circuit joined the First, Third, and Tenth Circuits in holding that accommodations are required for individuals regarded as disabled.[486] As did the Third Circuit, the Eleventh Circuit noted that there might be some situations in which this rule could yield "bizarre results," but that the possibility of such an outcome did not warrant an "across-the-board refusal" to require accommodations in "regarded as" cases.[487]

As this section of the Article has made clear, there is a split of authority over whether individuals who are regarded as disabled are entitled to accommodations. Although many courts still agree that ac-

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[479] *D'Angelo*, 422 F.3d at 1238–39.

[480] *Id.* at 1239.

[481] *Id.*

[482] *Id.*

[483] 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

[484] *D'Angelo*, 422 F.3d at 1239 (citing *Jacques*, 200 F. Supp. 2d at 170).

[485] *Id.* (quoting Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004)) (alteration in original).

[486] *Id.* As was mentioned earlier, the First Circuit also requires accommodations for individuals regarded as disabled, although that court never *directly* addressed that issue.

[487] *Id.*

commodations are not required, the next section of this Article will argue that this position is incorrect, and that requiring accommodations in these cases is the better approach. Alternatively, courts could use a case-by-case approach for deciding this issue, and not strictly adhere to a bright-line rule that either requires or denies accommodations in "regarded as" cases.

V. WHY "YES" IS A BETTER ANSWER, AND A POSSIBLE ALTERNATIVE TO A BRIGHT-LINE RULE

There are several reasons why the courts that have concluded that individuals regarded as disabled are entitled to accommodations are correct. This section of the Article will highlight the reasons why accommodations should be required in "regarded as" cases,[488] and it will also suggest an alternative option. That alternative option would use a multi-factor, case-by-case analysis, which occurs in several other areas involving the ADA.[489] Regardless of whether the courts adopt a rule that requires accommodations in "regarded as" cases or a rule that uses a case-by-case approach, an across-the-board refusal to provide accommodations deprives many capable individuals of working, which is something Congress did not intend.

A. Putting the Issue in Perspective

Before addressing why courts should not deny accommodations to "regarded as" plaintiffs and suggesting a possible alternative, there are two issues courts and employers must keep in mind. First, they must realize how difficult a burden it is for an employee to prove that she was regarded as disabled under the ADA. Second, they must realize that even if an employee is able to jump this hurdle and prove

[488] Although several of these justifications will echo the ones mentioned in Section II of this Article, not all of those justifications will be repeated. Additionally, some of the justifications in this Section were not specifically mentioned in that Section. Finally, although I have not devoted a separate section of this Article to addressing each of the reasons courts have used when deciding that accommodations are *not* required in "regarded as" cases, the pro-employer arguments made in Section III of this Article will be addressed and dismissed throughout this Section of the Article.

[489] For example, the determination of whether an individual has a disability is made on a case-by-case basis. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). Also, whether an accommodation is reasonable is determined on a case-by-case basis. Kennedy v. Dresser Rand Co., 193 F.3d 120, 122 (2d Cir. 1999). Also, prior to *Sutton*, one court used a case-by-case analysis to determine whether mitigating measures should be used in determining whether an individual suffers from a disability. Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 470–71 (5th Cir. 1998).

that she was regarded as disabled, she will only be entitled to a *reasonable* accommodation, not to one that would cause any type of undue hardship.[490] Thus, if courts decide to require employers to accommodate individuals regarded as disabled, this will not impact a tremendous number of plaintiffs, as very few will be able to demonstrate that their employers regarded them as having a disability. And, for the plaintiffs who are able to prove this, this will require employers to provide an accommodation only if it does not pose an undue hardship. Therefore, any concern that such a pro-plaintiff determination by the Supreme Court would be a fatal blow to employers is unwarranted. On the other hand, it will help individuals who, because of their employers' misperceptions, are facing disadvantages in the workplace, which is something the ADA was meant to eliminate.[491]

1. The High Burden of Proving a "Regarded As" Disability

One very important consideration courts should keep in mind when addressing this issue is that a plaintiff has a very high burden to prove that she was regarded as having a disability. First, according to the ADA's definition of "disability," the plaintiff must prove that her employer regarded her as having a physical or mental impairment that "substantially limited" her in a "major life activity."[492] According to the Code of Federal Regulations, "substantially limits" means either "[u]nable to perform a major life activity that the average person in the general population can perform;" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity."[493] Also according the Code of Federal Regulations, "major life activities" include activities "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[494]

With the Supreme Court's recent pronouncements on the ADA's disability definition, a plaintiff faces an uphill battle when trying to prove a disability under any prong of the ADA, including the

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[490] *See supra* note 3.

[491] 42 U.S.C. § 12101(a)(2) (2000).

[492] *Id.* § 12102(2).

[493] 29 C.F.R. § 1630.2(j) (2005).

[494] *Id.* § 1630.2(i).

"regarded as" prong.[495] With respect to whether a ruling that accommodations are required in cases involving individuals regarded as disabled would have a negative effect on employers, courts must keep in mind that the likelihood that a plaintiff would even be able to prove that she was regarded as having a disability is very small, and thus such a ruling is not likely to have a substantial effect on employers' bottom lines.

2. The Requirement That the Accommodation Be Reasonable

Another issue courts must keep in mind is that even if they decide that the ADA does require accommodations for individuals regarded as disabled, this does not mean that these employees will be entitled to any accommodation they desire. The ADA requires only accommodations that are *reasonable*; any accommodation that would pose an undue hardship on an employer, such as one that puts a financial strain on an employer or disrupts the efficient operation of an employer's business, is not going to be required.[496] Therefore, any employer fears that requiring accommodations in "regarded as" cases would have severe financial or efficiency consequences are simply unfounded. And, because most accommodations in "regarded as" cases would involve little cost, and because the *employer* is the party that ultimately chooses the accommodation, concerns over the costs of accommodations should not exist.[497] Thus, because the number of

[495] Over the past few years, the Supreme Court has made it more difficult to prove a disability under the ADA. Specifically, several recent cases have all resulted in employer-friendly outcomes on this issue. *See* Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 197 (2002) (holding that when determining whether an individual is substantially limited in the ability to perform manual tasks, the court must look at those tasks that are central to everyday life, and commenting that there must be a "demanding standard" for a plaintiff to qualify as disabled); Albertson's, Inc., v. Kirkingburg, 527 U.S. 555, 565–66 (1999) (holding that a body's internal mechanisms that compensate for an individual's physical limitations must be evaluated when determining whether that individual suffers from a disability); Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999) (holding that mitigating measures must be taken into account when determining whether an individual suffers from a disability under the Act); *see also* Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 519 (1999) (following *Sutton* and concluding that mitigating measures must be considered when determining whether an individual suffers from a disability under the Act).

[496] When determining whether an accommodation will cause an undue hardship, courts are to consider issues such as the cost of the accommodation, the overall financial resources of the employer, the number of employees, the impact the accommodation would have on the employer's operation, and the impact on the employer's ability to conduct business. 29 C.F.R. § 1630.2(p)(2) (2005).

[497] In fact, according to at least one study, ADA accommodations cost little, if any, money. *See* Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act:*

plaintiffs who would be able to fit into the "regarded as" category is small, and because the ADA requires only accommodations that are reasonable, courts should realize that if they were to require accommodations in these cases, it would not be fatal for employers.

Despite these preliminary issues, courts still must determine what to do in these "regarded as" cases. And, as the next few sections of this Article will demonstrate, the better solution is to require accommodations in these cases or, at the very least, evaluate cases on a case-by-case basis, which is something courts do with several other ADA-related issues.[498]

B. Reasons For Requiring Accommodations in "Regarded As" Cases

As the next section of this Article will show, there are several reasons why courts should require accommodations in cases involving individuals "regarded as" having a disability. While some of these arguments have been made by some of the courts that reached this conclusion, none of those courts used all of these reasons to provide a comprehensive justification for requiring accommodations. These reasons include the ADA's plain language, the remedial purposes behind the ADA, furtherance of some of the ADA's most important goals, the idea that employers should not benefit by creating and following stereotypes the ADA was meant to eliminate, the Supreme Court's decision in *School Board of Nassau County v. Arline*,[499] and the legislative history behind the "regarded as" prong of the ADA.[500] As a

A Case Report on Sears, Roebuck and Co., 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 279 (1996) (concluding that 69% of the accommodations provided by Sears cost nothing; 28% of the accommodations cost less than $1000; only 3% of the accommodations cost over $1000; and that the average cost of an accommodation was $45.00). And, unlike accommodations such as some type of physical alteration to the premises or any type of special equipment needed for an *actually* disabled employee, most accommodations for plaintiffs who are regarded as disabled would most likely cost even less. With respect to the issue of which party makes the ultimate decision on which accommodation to provide, 29 C.F.R. app. § 1630.9 (2005) provides that "*the employer providing the accommodation has the ultimate discretion* to choose between effective accommodations, and *may choose the less expensive accommodation or the accommodation that is easier for it to provide*." *Id.* (emphasis added).

[498] *See supra* note 489.

[499] 480 U.S. 273 (1987).

[500] One justification for which this Article will not provide further analysis is the interactive process argument made by the courts in *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 168–69 (E.D.N.Y. 2002), and *Jewell v. Reid's Confectionary Co.*, 172 F. Supp. 2d 212, 218–19 (D. Me. 2001). Although this Article will not analyze this as a separate reason why accommodations should be required in "regarded as" cases, the arguments made by the courts in *Jacques* and *Jewell* do provide additional support for the proposition that accommodations should be required. In addition to the arguments made by those courts, it is important to keep in mind that this interactive

result of these concerns, courts should follow the First, Third, Tenth, and Eleventh Circuits and conclude that accommodations are required in "regarded as" cases.

1. The ADA's Plain Language

The first reason why accommodations should be required in these cases is the ADA's plain language. As several courts, including the Supreme Court,[501] have observed, this is the first place a court should look when interpreting a statute, and because the ADA's language does not distinguish between the three prongs of the disability definition, courts should apply this plain language.[502]

Although one court concluded that the ADA's plain language was not clear on this issue,[503] all courts favoring accommodations for plaintiffs regarded as disabled considered the language clear.[504] And, *perhaps even more telling*, several courts holding that accommodations are *not* required in these cases also conceded that the language is clear, and that the ADA does not distinguish between actual and "regarded as" disabilities on this issue.[505] Thus, the plain language ar-

process would give an employee the chance to dispel any misperceptions an employer might have about a "disability" and make it more likely that she will be able to remain as an employee. Also, even if the employee is unable to dispel the employer's misperception, it is important to note that an employer is *not* required to provide *any accommodation the employee requests*; it is only obligated to provide one that allows her to perform her essential functions and does not pose an undue hardship. *See* 29 C.F.R. app. § 1630.9 (2005) (noting that "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide"). *See also*, 42 U.S.C. § 12112(b)(5)(A) (stating that an accommodation may not pose an undue hardship on the employer). Therefore, any concern than an employee will be able to demand an accommodation an employer does not want to provide should not exist.

[501] Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (noting that the first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

[502] *See infra* Section II.A and the notes contained therein for authorities that stand for this proposition.

[503] Fontanilla v. City and County of S.F., No. C-96-3916 JCS, 2001 U.S. Dist. LEXIS 6919, at *48 (N.D. Cal. Feb. 28, 2001).

[504] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235–36 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675–76 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004); Lorinz v. Turner Constr. Co., No. 00 CV 6123SJ, 2004 U.S. Dist. LEXIS 28825, at *22–23 (E.D.N.Y. May 25, 2004); Miller v. Heritage Prods., Inc., No. 1:02-cv-1345-DFH, 2004 U.S. Dist. LEXIS 8531, *27–28 (S.D. Ind. Apr. 21, 2004); *Jacques*, 200 F. Supp. 2d at 166; *Jewell*, 172 F. Supp. 2d at 218–19.

[505] Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).

gument provides solid support for requiring accommodations in these cases. And, as the Eleventh Circuit noted in *D'Angelo v. ConAgra Foods, Inc.*, courts are not free to ignore statutory language simply because they disagree with the outcome that language produces.[506]

Because it is a fundamental canon of statutory construction that the plain language is the starting point for interpreting a statute, and because the Supreme Court has routinely applied the ADA's plain language when interpreting this statute, the issue of accommodations for individuals regarded as disabled should be treated no differently.[507] And, in response to the "bizarre results" or "windfall" argument many courts advance to reject an application of the plain language, as the courts in *D'Angelo*, *Kelly v. Metallics West, Inc.*, *Williams v. Philadelphia Housing Authority Police Department*, and *Jacques v. DiMarzio, Inc.* have countered, it is not bizarre to provide an accommodation to someone who (1) is being treated differently because of a perceived disability, (2) would be able to perform the essential functions of her job with an accommodation, and (3) is certainly not receiving what some courts consider to be a windfall.[508]

Finally, even in cases in which a bizarre result *might* occur, which the Third Circuit in *Williams* and the Eleventh Circuit in *D'Angelo* acknowledged could occur, this bizarre result might just have to be the occasional cost an employer must pay to effectuate the remedial purposes of the ADA. Or, as will be explained later in this Article, perhaps the use of a case-by-case analysis of this issue would prevent such a bizarre result from happening, thus allaying any employer concerns over the issue. Nevertheless, because the ADA's plain language does not distinguish between actual disabilities and "regarded as" disabilities, courts should require accommodations in "regarded as" cases.[509]

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[506] *D'Angelo*, 422 F.3d at 1238.

[507] For example, the Supreme Court applied the ADA's plain language when reaching its decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). Admittedly, these cases involved the interpretation of different sections of the ADA; nonetheless, the Court did answer the relevant issues by applying the ADA's plain language.

[508] *D'Angelo*, 422 F.3d at 1237–39; *Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 774; *Jacques*, 200 F. Supp. 2d at 166.

[509] Also, because the ADA's plain language does not distinguish between actual disabilities and "regarded as" disabilities, there is no reason for courts to look at the EEOC's position on this issue, which favors denying accommodations in these cases. Hennepin County Med. Ctr. v. Shalala, 81 F.3d 743, 748 (8th Cir. 1996) (relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), for the proposition that a statute's plain language prevails over an agency interpretation of the statute). Also, because that agency interpretation is not found in a regulation, it is entitled to even less consideration. *Id.*

2. The ADA, as a Remedial Statute, Should Be Interpreted Broadly to Eliminate Discrimination in the Workplace and to Further the ADA's Purposes

Another reason why accommodations should be required in cases involving individuals regarded as disabled is that the ADA is a remedial statute, and as such, it should be interpreted broadly.[510] If courts were to give the ADA a broad interpretation, they would require accommodations in cases involving individuals who were regarded as disabled. Once again, however, the accommodation must be reasonable, and any accommodation that would place an undue hardship on an employer would not be required.[511] This reason for requiring accommodations in cases involving individuals regarded as disabled is not so unusual—it is a basic canon of statutory construction that remedial statutes should be interpreted broadly.[512]

With respect to the issue of policy, requiring employers to accommodate individuals regarded as disabled will allow more workers to remain in the workforce, something the ADA was certainly meant to encourage.[513] Although it might be unclear how to accommodate a "non-existent" disability, that issue becomes more clear once courts realize that many of these "regarded as" individuals *do have actual* physical impairments; it is just that these impairments are not "substantially limiting," a standard which is very hard to satisfy. Even though these individuals might not have actual disabilities (which is a very high standard), their employers, who perceive them as disabled because of some type of physical or mental impairment, could still

[510] Several courts, including the Supreme Court, have often commented that remedial statutes such as the ADA should be interpreted broadly. *See, e.g.*, Spector v. Norwegian Cruise Line, Ltd., 125 S. Ct. 2169, 2178 (2005) (noting that the ADA is a remedial statute designed to provide broad protection); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (noting that remedial statutes should be construed broadly); Steger v. Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000) (noting that the ADA is a remedial statute and should be interpreted broadly). Despite the fact that remedial statutes should be construed broadly, the Supreme Court has handed down several opinions that have narrowed, rather than expanded, the protections offered by the ADA. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 76 (2002) (holding that an employer is allowed to refuse to hire an individual if that individual poses a "direct threat" to self); U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393 (2002) (holding that an employer is not required to violate its seniority system to accommodate an employee requesting a reasonable accommodation); *see also supra* note 495.

[511] 42 U.S.C. § 12112(b)(5)(A) (2000).

[512] *Spector*, 125 S. Ct. at 2178 (noting that the ADA is a remedial statute designed to provide broad protection); *Tcherepnin,* 389 U.S. at 336 (noting that remedial statutes should be construed broadly); *Steger*, 228 F.3d at 894 (noting that the ADA is a remedial statute and should be interpreted broadly).

[513] *See* 42 U.S.C. § 12101(a) (2000).

provide an accommodation for their impairments that would allow them to be productive workers.

This interpretation, of course, would benefit employees and employers alike, as it would allow employees to remain in the workforce and would lighten the cost of doing business for employers who would possibly be forced to hire new employees.[514] This would also be consistent with Congress's primary goal when passing the ADA, that of eliminating disability discrimination in the workplace. As the court in *Jacques v. DiMarzio, Inc.* noted, "'failure to mandate reasonable accommodations would undermine the role the ADA plays in ferreting out disability discrimination in employment,'"[515] and as the plaintiff in *Deane v. Pocono Medical Center* observed, "the 'regarded as' prong of the disability definition is premised upon the reality that the perception of disability, socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough."[516] Thus, this is yet another reason accommodations should be required in "regarded as" cases.

3. When the Employer is Responsible for the Misperception, It Should Bear the Costs of Its Mistake

In cases involving individuals who are regarded as disabled, it is often the employer that causes the misperception. When, however, the employee is responsible for her employer's misperception, there is nothing wrong with *not* requiring an accommodation. This was noted in *Taylor v. Pathmark Stores, Inc.*,[517] in which the court, addressing a related issue, observed that employers can be held liable in "regarded as" cases unless the employer's perception is based on the employee's "unreasonable actions or omissions."[518]

However, in many cases, it is the employer that creates and does not correct its misperception, and fairness requires that because the employer in that scenario is at fault, it should be forced to accommodate the employee; courts should not allow employers to benefit by creating erroneous stereotypes about their employees. This sentiment was expressed in *Jewell v. Reid's Confectionary, Co.*,[519] in which the

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[514] According to at least one study, the average ADA accommodation cost Sears, Roebuck & Co. less than $50, while it cost the company between $1800 and $2400 to hire a new employee. *See* Blanck, *supra note* 497, at 283.

[515] 200 F. Supp. 2d 151, 167 (E.D.N.Y. 2002) (quoting Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998)).

[516] *Deane*, 142 F.3d at 148 n.12.

[517] 177 F.3d 180 (3d Cir. 1999).

[518] *Id.* at 193.

[519] 172 F. Supp. 2d 212 (D. Me. 2001).

court observed that because one purpose of the ADA was to punish employers for making stereotypic assumptions about employees and their abilities, not requiring accommodations in cases where employers make these erroneous assumptions would run counter to that goal.[520] A similar sentiment was also present in *Kelly v. Metallics West, Inc.*:

> [A]n employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.[521]

Additionally, the court in *Jacques* expressed similar concerns when it noted that "[c]ategorically denying reasonable accommodations to 'regarded as' plaintiffs would allow the prejudices and biases of others to impermissibly deny an impaired employee his or her job because of the mistaken perception that the employee suffers from an actual disability. This is the concern addressed by Congress, but ignored by *Weber*."[522] Finally, the plaintiff in *Deane* made the similar argument that "the 'regarded as' prong of the disability definition is premised upon the reality that the perception of disability, socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough."[523] Therefore, in those cases in which an employer refuses to shed its misperception of an employee's disability, it should be required to accommodate the employee.

As shown, several courts have expressed their view that when the employer is responsible for the misperception, it should not be allowed to escape ADA liability. And, also consistent with the ADA's goals, requiring accommodations would allow employees regarded as disabled to remain in the workplace, something Congress would certainly appreciate.

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[520] *Id.* at 219.

[521] Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005).

[522] Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 168 (E.D.N.Y. 2002).

[523] Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998).

4. The Supreme Court's Interpretation of the Rehabilitation Act in *Arline* and the ADA's Legislative History

As was mentioned earlier, and as is clear from the ADA, the protections afforded by the ADA are no weaker than those afforded by the Rehabilitation Act.[524] Because the Supreme Court has already expressed its view that individuals disabled under the other prongs of the disability definition in the Rehabilitation Act are entitled to accommodations, there is no reason why "regarded as" plaintiffs should be denied ADA protection. As the Court noted in *School Board of Nassau County v. Arline*:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[525]

This demonstrates that the Court was just as concerned with people regarded as having disabilities as it was with those who are actually disabled, and that people regarded as having disabilities did, in fact, need protection from disability discrimination. Thus, when an employee is treated unfavorably because of an employer's perception of a disability, the employee should be entitled to the same types of ADA protections, including reasonable accommodations.

This reasoning was adopted by several courts that have concluded accommodations are required in "regarded as" cases,[526] while the courts that ruled the other way have ignored the Supreme Court's words in *Arline*.[527] The fact remains, however, that when confronted with a similar issue, the Supreme Court suggested that employees regarded as disabled should be entitled to accommodations.

This fact was specifically noted by Congress when it was contemplating the ADA, as it made constant references to the *Arline* opinion when addressing the "regarded as" prong of the disability defini-

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[524] *See supra* note 43.

[525] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[526] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004); *Jacques*, 200 F. Supp. 2d at 166–68.

[527] For example, the Eighth Circuit in *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), never mentioned *Arline* in its opinion.

tion.[528] As such, courts should defer to the Supreme Court's opinion in *Arline* and the legislative history behind the ADA when interpreting the statute. Of course, because the ADA's language is clear, there really is no need to look past its plain language; nonetheless, if a court wishes to do so, Supreme Court precedent and the ADA's legislative history both support requiring accommodations in cases involving "regarded as" individuals.

Therefore, there are many reasons, both from a statutory interpretation standpoint and from a policy standpoint, why employers should be required to accommodate individuals they regard as disabled. Even if such a rule results in an occasional bizarre outcome, that might be necessary in order to assure that other people who need the ADA's protections do, in fact, receive them. However, if an across-the-board rule requiring accommodations is not adopted, another option is to adopt a rule that calls for a case-by-case determination of whether accommodations should be provided in "regarded as" cases.

C. Another Possible Option: A Case-by-Case Analysis

Instead of using a bright-line rule for deciding these cases, another possible option exists that would resolve most of the concerns of those who have a stake in this issue. This compromise would be to evaluate each individual on a case-by-case basis, with some individuals who are regarded as disabled being entitled to accommodations, and other such individuals not being entitled to accommodations. Although this might not seem consistent, courts have used case-by-case determinations when addressing other ADA issues, and using such an approach in this situation could allay the fears of employers and employees alike.[529]

In this analysis, one factor to be analyzed would be which party is at fault for the employer's perception that the employee is disabled. This issue was discussed in *Taylor v. Pathmark Stores, Inc.*, in which the court, on a related issue, indicated that an employer should not be held liable in "regarded as" cases when the employee's unreasonable actions or omissions caused the employer's misperception.[530] Under *Taylor*, if the employee is responsible for her employer's misperception, that would cut against requiring the employer to provide her with a reasonable accommodation. Using this as a factor against re-

[528] *D'Angelo*, 422 F.3d at 1236–37; *Williams*, 380 F.3d at 775; *Jacques*, 200 F. Supp. 2d at 166–68.

[529] *See supra* note 489.

[530] 177 F.3d 180, 193 (3d Cir. 1999).

quiring accommodations in "regarded as" cases would prevent employees from gaining any type of unfair advantage and would limit an employee's ability to use the ADA as a sword rather than as a shield. It would also encourage and possibly force employers to shed unfounded biases and stereotypes they hold about their employees, which is something the ADA was meant to encourage. Finally, using this factor would force the parties to actively engage in the interactive process of evaluating an employee's limitations and abilities to determine what accommodation would allow an employee to perform the essential functions of her position. This is consistent with what the interactive process was meant to address and would also allow more employees to continue working.

Another relevant factor courts could use would be to examine under which prong of the "regarded as" definition the employee fits.[531] If the employee suffers from no physical or mental impairment at all, this factor would cut against requiring an accommodation. In these cases, where there is absolutely nothing wrong with the employee, it is more likely that requiring an accommodation would be bizarre. Additionally, in a situation where an employee has no impairment, the perception could be remedied quite easily by a discussion between the employer, the employee, and perhaps a medical professional. However, in the more common scenario in which an employee does have a physical or mental impairment that might not rise to the level of a substantially limiting one, but does cause her employer to regard her as disabled, this factor would weigh in favor of requiring employers to accommodate the employee to the extent the employer thinks she would then be able to perform the essential functions of her job. This would allow employees to continue working and remain contributing members of the employer's workforce. As long as the accommodation would allow the employee to continue to work (and would not place an undue hardship on the employer), both the employee's and the employer's objectives would be met.

A third factor to evaluate would be the windfall/bizarre result issue raised by the courts in *Weber v. Strippit, Inc.*[532] and *Kaplan v. City of North Las Vegas.*[533] As the Third and Eleventh Circuits noted in *Williams v. Philadelphia Housing Authority Police Department*[534] and *D'Angelo v. ConAgra Foods, Inc.*,[535] respectively, such a bizarre result *could* occur

[531] *See supra* note 5.
[532] 186 F.3d 907, 916 (8th Cir. 1999).
[533] 323 F.3d 1226, 1232 (9th Cir. 2003).
[534] 380 F.3d 751, 774 (3d Cir. 2004).
[535] 422 F.3d 1220, 1227–28 (11th Cir. 2005).

in some cases; however, because it would not occur in all cases, this could be one more factor to consider when using this case-by-case approach. If providing an accommodation in that particular case would yield such a bizarre result, then that factor would cut against requiring the accommodation. However, as was the case in *D'Angelo*, *Kelly v. Metallics West, Inc.*, *Williams*, and *Jacques v. DiMarzio, Inc.*, when an accommodation would not yield such a bizarre result, that factor would weigh in favor of requiring the accommodation.

Finally, courts could evaluate the nature of the accommodation requested. As was indicated earlier, an employer is only required to provide a *reasonable* accommodation, and one that would not pose an undue hardship. One possible way to balance the interests of the parties in these cases would be to have a slightly higher standard for what constitutes a "reasonable accommodation" and a slightly lower standard for what constitutes an "undue hardship" in cases involving "regarded as" disabilities. Examining the nature of the accommodation would comfort employees by giving them the knowledge that there is not an absolute ban against accommodations in "regarded as" cases, and it would comfort employers by letting them know that no accommodation forced upon them would drastically affect their operations. Although this could be one factor in the analysis, the ADA's current reasonableness and undue hardship standards are adequate to address the competing interests of the parties to the employment relationship; therefore, this factor might not be a particularly necessary one.

Therefore, if courts are concerned that an across-the-board rule either requiring or denying accommodations in cases involving "regarded as" individuals would result in unjust outcomes, this case-by-case approach could be a sensible alternative. Although a bright-line rule allows for more predictability, as was previously addressed, there are several ADA issues that are decided on a case-by-case basis; therefore, this concern for predictability should not be a critical one. Regardless of the ultimate outcome, it is clear that the Supreme Court needs to resolve this issue, which has caused confusion among the various federal courts.

VI. CONCLUSION

As this Article made clear, there is a major split of authority on the issue of whether individuals who are regarded as disabled should receive accommodations under the ADA. While many courts still favor denying these accommodations, the three most recent United States Courts of Appeals to address this issue have ruled that accom-

modations are required in "regarded as" cases. Unless and until the Supreme Court and/or all of the remaining United States Courts of Appeals decide this issue, confusion will continue to exist for those courts within the several jurisdictions that have not reached a definitive answer.

Although there are several reasons for and against requiring accommodations in cases involving individuals regarded as disabled, those courts holding that accommodations are required have the better arguments. The plain language of the statute, the broad remedial purpose of the ADA, the furtherance of the ADA's important goals, the ineffectiveness of a policy that rewards employers who create and follow faulty perceptions of their employees' capabilities, the interactive process involved in determining what accommodations an employer should provide to an employee,[536] the inaccuracy of the windfall argument, the Supreme Court's decision in *School Board of Nassau County v. Arline*,[537] and Congress's reliance on that opinion when drafting the ADA all favor requiring accommodations in these cases.

However, as an alternative to this bright-line rule of requiring accommodations in "regarded as" cases, and as is the case with many ADA issues, courts could use a case-by-case approach when resolving this issue. This approach would consider: (1) who is responsible for the employer's perception of the employee's "disability"; (2) into which prong of the "regarded as" definition the employee fits; (3) whether providing an accommodation in such a case would yield a bizarre result; and (4) the nature of the accommodation requested. This multi-factor test could be used to determine, on a case-by-case basis, whether accommodations should be provided in a particular "regarded as" case. This alternative analysis would allow courts to reach the "right" outcome in each case, without worrying about following a bright-line rule that would yield the "wrong" result in several cases. This would further Congress's goals of protecting those who need the ADA's protection and of providing a shield for those employees who are not trying to use the ADA as a sword.

[536] Although I did not devote a separate portion of Section V to this argument, the arguments made in Section II.C of this Article regarding the ADA's interactive process provide additional support for the conclusion that courts should require accommodations in "regarded as" cases.

[537] 480 U.S. 273 (1987).