

# The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?

SARAH J. PARROT\*

*The debate continues as to whether employers are required by the Americans with Disabilities Act (“ADA”) to provide reasonable accommodation for employees who they regard as disabled. The issue, which was recently rekindled after the Tenth and Eleventh Circuits joined the debate, has created a significant split among the federal circuit courts. The Fifth, Sixth, Eighth, and Ninth Circuits have held that employers have no duty to accommodate employees regarded as disabled. The primary basis for their position is that such a rule prevents the “bizarre” result of requiring employers to accommodate disabilities that do not in fact exist. However, the First, Third, Tenth, and Eleventh Circuits have held that employers must accommodate perceived disabilities. In determining that a duty to accommodate is consistent with the ADA’s plain language and its purpose of eradicating disability-based discrimination, these courts have also suggested that their rule facilitates a practical employer-employee relationship, one which helps to disabuse employers of mistaken perceptions. This Note contends that employers should be required to provide reasonable accommodation for employees regarded as disabled, and that liability for failure to accommodate should be imposed in most cases. In accordance with the plain language and purposes of the ADA, a case-by-case approach best achieves the ADA’s basic purposes of eliminating disability-based discrimination and promoting equal opportunity for individuals with disabilities.*

## I. INTRODUCTION

More than fifteen years ago, Congress passed the Americans with Disabilities Act of 1990 (“ADA”).<sup>1</sup> Between 1990 and 1994, the provisions of Title I, which pertain to employment discrimination, were implemented.<sup>2</sup>

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\* J.D., Moritz College of Law, The Ohio State University (expected 2007); M.A., The Ohio State University (2000); B.A., The Ohio State University (1997). I would like to thank my husband, Jason Lewis, and my parents, Roger and Barbara Parrot, for their constant love and support.

<sup>1</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

<sup>2</sup> See 42 U.S.C. § 12112(a) (2000) (“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,

The objective of Congress for Title I was to form a “comprehensive national mandate” to eradicate disability discrimination in the employment setting.<sup>3</sup> Because individuals with disabilities comprise one of the largest segments of the U.S. population, the protections afforded by Title I are of vital importance to many Americans.<sup>4</sup> A disturbing statistic is that a mere third of individuals with disabilities who are qualified to work are able to secure employment.<sup>5</sup>

The advent of the ADA was marked by the high expectations of disability rights activists and the apprehensions of employers.<sup>6</sup> However, with the judicial opinions that soon issued, both the drafters and backers of Title I were alarmed because its provisions were not interpreted by the federal judiciary as anticipated.<sup>7</sup> By the mid-1990s, disability rights scholars

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employee compensation, job training, and other terms, conditions, and privileges of employment.”). The ADA took effect in 1992. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337 (“This title [42 U.S.C. §§ 12111–12117] shall become effective 24 months after the date of enactment.”). Initially, Title I applied to employers of twenty-five or more employees. 42 U.S.C. § 12111(5) (2000). In 1994, the coverage of Title I was expanded to employers of fifteen or more employees. *Id.*

<sup>3</sup> 42 U.S.C. § 12101(b)(1) (2000); *see* S. REP. NO. 101-116, at 2 (1989) (describing the ADA’s purpose). The ADA was also implemented to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” “ensure that the Federal Government plays a central role in enforcing the standards established,” and “invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b)(2)–(4) (2000).

<sup>4</sup> Sheryl Young, Editorial, *A Barrier for People with Disabilities—Access to a Job*, S.F. CHRON., Oct. 3, 2005, at B7 (“54 million have at least one disability, according to the U.S. Census” and reminding that “[a] career is often considered a defining element to an individual’s identity.”).

<sup>5</sup> RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 19* (2005) (noting further that, even if individuals with disabilities are successful in finding employment, they are often hired in low-level positions and are precluded from advancement); Young, *supra* note 4, at B7 (“The National Organization on Disability reports that only 32 percent of people with disabilities, ages 18–64, who can work are employed, compared to 81 percent of their counterparts without a disability.”).

<sup>6</sup> *See generally* Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 93 (2000) (“tell[ing] the story” of the definition of “disability” under the ADA).

<sup>7</sup> *See id.* at 139; Linda Hamilton Krieger, *Introduction to BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 1*, 5–6 (Linda Hamilton Krieger ed., 2003); *Group Seeks Changes in Disability Act*, N.Y. TIMES, Nov. 30, 2004, at A16 (reporting that the National Council on Disability has proposed changes to the ADA in light of U.S. Supreme Court decisions that purportedly have reduced the status of individuals with

began to identify and criticize the judiciary's "backlash" against the ADA.<sup>8</sup> The drafters and other commentators perceived a movement within the judiciary to narrow the scope of the ADA, particularly in regard to the fundamental issue of which individuals qualify as disabled and are thus entitled to protection under the statute.<sup>9</sup> The results of empirical studies of

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disabilities "to that of second-class citizens"); Andrew Mollison, *Law Protecting Disabled Faces Revision: Council Urges Changes, but Advocates Are Wary*, ATLANTA J.-CONST., Dec. 19, 2004, at A7 (stating that the National Council on Disability reported that "many Americans with disabilities feel that a series of negative court decisions is reducing their status to second-class citizens, a status that the ADA was supposed to remedy forever").

<sup>8</sup> Krieger, *supra* note 7, at 5-6; see also Scott Carlson, *Working Disabled*, CHI. TRIB., Dec. 9, 1999, at 7 ("Critics, including plaintiff attorneys, say the narrowing of the [ADA] will make it harder for disabled workers to turn to the courts for help in challenging unfair employers."). The enactment of the ADA prompted a public backlash as well. COLKER, *supra* note 5, at 6-7 (noting that the media's criticism of the ADA resulted in the erroneous belief that it created a windfall for plaintiffs).

<sup>9</sup> See COLKER, *supra* note 5, at 7-8; Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 439 (1997) ("[L]ines of cases have developed . . . that take a much more restrictive stance toward the protection afforded by . . . the ADA."); Cynthia Estlund, *The Supreme Court's Labor and Employment Cases of the 2001-2002 Term*, 18 LAB. LAW. 291, 309 (2002) ("The [U.S. Supreme] Court is narrowing the scope of the ADA one provision at a time and constructing a statute that does less for disabled individuals and puts less of a burden on employers than the ADA's congressional proponents appear to have envisioned."); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 109 (1997) ("[W]hat was once touted as 'the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act,' has become increasingly narrowed to the point where it is in danger of becoming ineffective."); Arlene B. Mayerson, *Restoring Regard for the "Regarded as" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 587 (1997) ("A disturbing trend developing in case law is the narrowing construction of the definition of disability which thereby deprives qualified individuals of the opportunity to prove that they have been discriminated against in violation of the ADA."); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 273 (2000) ("[C]ourts have interpreted 'disability' and conceptualized 'discrimination' in ways that exclude most people with psychiatric disabilities from the protections of the ADA."); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 321 (2000) ("[T]he Court drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination.") (citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)).

cases involving Title I indicated that most plaintiffs alleging employment discrimination were not successful, and that the judiciary tended to interpret Title I in a narrowing manner.<sup>10</sup> Critics began to argue that the ADA encourages trivial litigation and allows individuals with minor or even no physical or mental impairments to hassle their employers.<sup>11</sup>

The implementation of Title I and the litigation that followed have both resulted in widespread controversy. More than fifteen years after enactment,

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The U.S. Supreme Court's narrowing interpretations of the ADA can be attributed, at least in part, to the Court's zealous textual approach to statutory interpretation. COLKER, *supra* note 5, at 8 ("When the ADA's statutory language has necessarily embodied some ambiguity, a majority of the Court has refused to fill the gaps by inquiring into evidence of Congress's intentions."); Estlund, *supra*, at 306-07 ("[T]he commitment to textualism among at least a majority of the current Court tends to preclude both a resort to the ADA's rich legislative history and deference to the administering agency, and to foster an almost obsessive focus on the complicated and open-textured text itself.").

<sup>10</sup> See Comm'n on Mental & Physical Disability, Am. Bar Ass'n, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 404-05 (1998) (reporting that plaintiffs in ADA discrimination cases prevail only about eight percent of the time and stating that judicial opinions increasingly indicated that "the Act's definition of disability was much more restrictive than those who drafted and supported the ADA had thought it would be"); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999) (finding that defendants in ADA discrimination cases prevail more than ninety-three percent and eighty-four percent of the time at the trial and appellate levels, respectively); Carlson, *supra* note 8, at 7 ("More than half of all ADA claims filed with the EEOC result in findings of 'no reasonable cause.'").

The ADA requires that plaintiffs establish that they are members of the protected class (that is, individuals with disabilities) before the jury can determine whether unlawful disability-based discrimination has occurred. See 42 U.S.C. § 12112(a) (2000). Frequently, employers are successful in arguing that their employees do not have a disability that is within the definition of the statute; thus, employers tend to prevail at the summary judgment stage. COLKER, *supra* note 5, at 18.

<sup>11</sup> See *Litigating the Americans with Disabilities Act: Hearing Before the Subcomm. on Rural Enterprise, Agriculture, & Technology of the H. Comm. on Small Business*, 108th Cong. 1-2 (2003). Some employers and their supporters have contended that Title I offers employees an unwarranted release from basic work rules and that the courts have interpreted the statute too expansively. See WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 114-15 (1997); Walter Olson, *Under the ADA, We May All Be Disabled*, WALL ST. J., May 17, 1999, at A27. This is in contrast to most disability-rights activists, who have asserted that the federal judiciary has interpreted Title I too narrowly as a means of disposing of discrimination claims at the point of summary judgment. See generally Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 399 (2000); Burgdorf, *supra* note 9, at 536; Colker, *supra* note 10, at 99-100; Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417, 434-35 (2003).

the ADA's protections against employment discrimination are still scrutinized by the courts; the issues of which individuals qualify for the protections of the ADA and how disabilities in the workplace can and should be accommodated are still litigated. In particular, there is an ongoing debate as to whether employers are required by the ADA to provide reasonable accommodation for employees who they regard as disabled. This issue has created a significant split among the federal circuit courts.<sup>12</sup>

Because Congress realized that misperceptions regarding individuals with disabilities pervaded beyond individuals with actual impairments,<sup>13</sup> Title I was drafted to protect employees who are erroneously regarded as disabled, as well as those with actual disabilities.<sup>14</sup> As a result, the same basic protection against employment discrimination is afforded to employees with perceived disabilities as those with actual ones.<sup>15</sup> However, as the courts have recognized, the issues of whether and to what extent employees

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<sup>12</sup> The First, Third, Tenth, and Eleventh Circuits have determined that the ADA requires reasonable accommodation of employees with perceived disabilities, while the Fifth, Sixth, Eighth, and Ninth Circuits have held that it does not. *See D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005); *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772–76 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 915–17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (assuming, without expressly holding, that the ADA requires reasonable accommodation of perceived disabilities).

<sup>13</sup> *See* S. REP. NO. 101-116, at 7 (1989); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at II-10 (1992) ("Such protection is necessary, because, as the Supreme Court has stated and the Congress has reiterated, 'society's myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments.'") (quoting *Sch. Bd. v. Arline*, 480 U.S. 273, 284 (1987)).

<sup>14</sup> *See* 42 U.S.C. § 12102(2)(C) (2000); Mayerson, *supra* note 9, at 588 ("Congress realized that the definition of disability must be broad enough to encompass not only those individuals with traditional disabilities, but also those individuals whose impairments were perceived to be disabling.").

<sup>15</sup> *See* 42 U.S.C. §§ 12102(2), 12112(a) (2000); *see also Smaw v. Va. Dep't of State Police*, 862 F. Supp. 1469, 1472 (E.D. Va. 1994) (stating that claims brought by employees regarded as disabled are "commonly referred to as 'perceived disability' cases"); Armond Budish, *Disability Laws Extend Protection to Workers Without Disabilities*, CLEV. PLAIN DEALER, Feb. 14, 2004, at E9 ("[Y]ou do not have to be disabled to gain the protection of the federal . . . laws against discrimination.").

regarded as disabled are entitled to the ADA's specific substantive protections are not entirely clear.<sup>16</sup>

This Note evaluates both sides of this ongoing judicial debate, which was recently ignited again after the Tenth and Eleventh Circuits decided the issue of whether the ADA requires employers to provide reasonable accommodation to employees regarded as disabled. Part II reviews the general statutory histories of both the ADA and its precursor—the Rehabilitation Act of 1973. Part III explains the relevant provisions of Title I of the ADA. Part IV considers in detail the key opposing cases of the Third and Eighth Circuits as well as the recent cases of the Tenth and Eleventh Circuits. Finally, Part V asserts the argument that employers should be obligated to provide reasonable accommodation to employees regarded as disabled, and that liability for failure to do so should be imposed, in most cases, in accord with the plain language and purposes of the ADA.

## II. STATUTORY HISTORY

Long before the enactment of the ADA, the Rehabilitation Act of 1973 (“Rehabilitation Act”) was introduced as another momentous disability rights statute.<sup>17</sup> As a critical precursor to the ADA,<sup>18</sup> Title V of the Rehabilitation Act prohibits discrimination based on disability in activities and programs

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<sup>16</sup> See *Deane v. Pocono Med. Ctr.*, 7 Am. Disabilities Cas. (BNA) 198, 199 (3d Cir. 1997) (“[T]he extent to which individuals who are merely ‘regarded as’ disabled are entitled to be treated as though they are actually disabled was left far from clear.”); Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. & EMP. L.J. 345, 348 (1996) (“[T]he legal principles pertaining to perceived disabilities have been described as ‘elusive, at best.’”) (quoting *Fourco Glass Co. v. W. Va. Human Rights Comm’n*, 383 S.E.2d 64, 66 n.\* (W. Va. 1989)); see also COLKER, *supra* note 5, at 112 (“The Supreme Court has narrowly construed [the regarded as] prong of the definition, and the lower courts have used it sparingly.”).

<sup>17</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.). The provisions of the Rehabilitation Act of 1973 that relate to employment are codified at 29 U.S.C. §§ 705, 791–794e (2000). See ROBERT L. BURGDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 39–43, 584–89 (1995).

<sup>18</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (noting that “[t]he ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973”); Chai R. Feldblum, *Antidiscrimination Requirements of the ADA, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS* 37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (recounting how the substantive requirements of the ADA were borrowed from Section 504 of the Rehabilitation Act of 1973).

receiving financial assistance from the federal government.<sup>19</sup> The Rehabilitation Act is cited in the ADA, which states that “[e]xcept as otherwise provided in this chapter, nothing in this chapter 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.”<sup>20</sup> Thus, comprehension of the Rehabilitation Act and its purposes facilitates a proper understanding and analysis of the ADA.<sup>21</sup>

### A. *The Rehabilitation Act of 1973*

The basic purpose behind Section 504 of the Rehabilitation Act is to prohibit employment discrimination toward individuals with disabilities.<sup>22</sup> Specifically, as it was first enacted, Section 504 prohibited employment discrimination toward an “otherwise qualified handicapped individual” in federally funded activities and programs.<sup>23</sup> In 1974, Congress broadened the definition of “handicapped individual” to include any individual “who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”<sup>24</sup>

This revision signaled “Congress’ concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from ‘archaic attitudes and laws,’” as well as from “the fact that the American people are simply unfamiliar with and insensitive to

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<sup>19</sup> 29 U.S.C. §§ 705, 791–794e (2000); see BURG DORF, *supra* note 17, at 36–37.

<sup>20</sup> 42 U.S.C. § 12201(a) (2000); see *Bragdon*, 524 U.S. at 631–32 (citing and abiding by its mandate).

<sup>21</sup> See *Bragdon*, 524 U.S. at 632 (noting that the ADA must be construed “to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”).

<sup>22</sup> BURG DORF, *supra* note 17, at 39. The amendments of 1992 replaced the term “handicap” with “disability,” which was in accord with the language used in the ADA as just enacted. *Id.* at 17, 584.

<sup>23</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794(a) (2000)); see BURG DORF, *supra* note 17, at 39.

<sup>24</sup> Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 705(20)(B) (2000)); see *Sch. Bd. v. Arline*, 480 U.S. 273, 278–79 (1987); BURG DORF, *supra* note 17, at 128. The interpretive guidance of the Equal Employment Opportunity Commission (“EEOC”) pertaining to the ADA acknowledges that Congress adopted the definition of “disability” from the Rehabilitation Act’s definition of “handicapped individual” and, “[b]y so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term ‘disability’ as used in the ADA.” 29 C.F.R. pt. 1630 app. (2005).

the difficulties [facing] individuals with handicaps.”<sup>25</sup> With this more expansive definition, Congress also aimed to bar discrimination against both individuals with actual disabilities and those who are regarded as disabled.<sup>26</sup> Congress implemented its objectives primarily by requiring that employers provide reasonable accommodation to employees with disabilities.<sup>27</sup> The purposes and implementing regulations of the Rehabilitation Act are reflected in its descendant, the ADA.

### B. *The Americans with Disabilities Act of 1990*

Because of problems caused by the Rehabilitation Act’s statutory language, insufficient enforcement mechanisms, limited scope of coverage, and inconsistent judicial interpretations, disability rights activists, legal scholars, and the National Council on the Handicapped encouraged Congress to enact comprehensive legislation prohibiting discrimination against individuals with disabilities.<sup>28</sup> In 1978, Congress had amended the Rehabilitation Act to require the formation of the National Council on the Handicapped, which was to exist within the Department of Health,

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<sup>25</sup> Sch. Bd. v. Arline, 480 U.S. 273, 279 (1987) (quoting S. REP. NO. 93-1297, at 50 (1974)).

<sup>26</sup> *Id.* (quoting Se. Cmty. Coll. v. Davis, 442 U.S. 397, 405–06 n.6 (1979)). In 1977, regulations of the Department of Health and Human Services defined clearly the term “physical impairment” from Section 504 to encompass “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss” that affects one or more bodily systems. 45 C.F.R. § 84.3(j)(2)(i) (2005); see *Arline*, 480 U.S. at 280. “Major life activities” were defined as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 45 C.F.R. § 84.3(j)(2)(ii) (2005); see *Arline*, 480 U.S. at 280. The definitions provided by these regulations were relied upon by the judiciary in interpreting the meaning of “regarded as” disabled. See *Arline*, 480 U.S. at 280–83. According to Section 504, employees regarded as disabled are those who are perceived by their employers to have an impairment that limits one or more major life activities and who are within the reach of the regulation’s other definitions. See *Arline*, 480 U.S. at 278–280.

<sup>27</sup> 45 C.F.R. § 84.3(l)(1) (2005); see *Arline*, 480 U.S. at 287–88 n.17.

<sup>28</sup> BURG DORF, *supra* note 17, at 44–45; see, e.g., Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81, 85, 116 (“Although section 504 coverage is quite narrow as expressly codified, courts have limited its coverage even further” and recommending that “it is now time for broad legislation . . . to protect the handicapped from private employment discrimination.”); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 997 (1984) (contending that the Rehabilitation Act’s impact in promoting and expanding employment opportunities for individuals with disabilities has been “less than spectacular”).



Education, and Welfare.<sup>29</sup> In 1986, in a compulsory report to Congress and the President,<sup>30</sup> the Council recommended that “Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.”<sup>31</sup> The Council’s landmark report introduced for the first time both the concept and actual title of the ADA.<sup>32</sup> A bill based on the Council’s recommendation was drafted and first introduced to Congress in 1988.<sup>33</sup>

Following much debate and many revisions, Congress passed the ADA by a wide margin in 1990.<sup>34</sup> One of the principal drafters of the ADA has stated that “[t]he ADA has the broadest scope of coverage of any single civil rights measure enacted to date,” extending its disability-based anti-

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<sup>29</sup> See Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 400, 92 Stat. 2955, 2977 (codified as amended at 29 U.S.C. § 780 (2000)); Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 389 (1991). The Council was reestablished in 1984 as an independent federal agency with a focus on national disability policy and evaluation of all laws and programs impacting individuals with disabilities. Rehabilitation Amendments of 1984, Pub. L. No. 98-221, §§ 141–142, 98 Stat. 17, 26–28 (codified as amended at 29 U.S.C. § 780 (2000)); Weicker, *supra*, at 389–90. The Council is now known as the National Council on Disability. See 29 U.S.C. § 780 (2000).

<sup>30</sup> Rehabilitation Amendments of 1984, Pub. L. No. 98-221, § 142, 98 Stat. 17, 28 (codified as amended at 29 U.S.C. § 780 (2000)).

<sup>31</sup> NAT’L COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES 18 (1986); BURGDORF, *supra* note 17, at 45; Weicker, *supra* note 29, at 390. The Council’s report consisted of forty-five legislative recommendations “to enhance the productivity and quality of life of Americans with disabilities,” which were “received with considerable excitement in the disability community and received warm responses from the President and members of Congress.” BURGDORF, *supra* note 17, at 45.

<sup>32</sup> See NAT’L COUNCIL ON THE HANDICAPPED, *supra* note 31, at 18; BURGDORF, *supra* note 17, at 45 (“The Council even suggested a name for the proposed statute—the Americans with Disabilities Act.”); Weicker, *supra* note 29, at 390.

<sup>33</sup> S. 2345, 100th Cong. (1988); H.R. 4498, 100th Cong. (1988); BURGDORF, *supra* note 17, at 45–46 (commenting that the Council’s impatience with the slow legislative response prompted it to draft and publish its own bill, which was introduced, with only a few changes, in the Senate on April 28, 1988 and in the House of Representatives on April 29, 1988); Weicker, *supra* note 29, at 391.

<sup>34</sup> BURGDORF, *supra* note 17, at 47; Weicker, *supra* note 29, at 391. The House approved of the ADA by a vote of 377 to 28; the vote was 91 to 6 in the Senate. BURGDORF, *supra* note 17, at 47.

discrimination provisions to all employers.<sup>35</sup> The ADA's express purposes are "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>36</sup> Further, it states that "individuals with disabilities . . . have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."<sup>37</sup>

The ADA clearly reflects the intention of Congress to further the integration of individuals with disabilities into society through the elimination of disability-based discrimination, as well as a recognition that discrimination based on "stereotypic assumptions" impedes that

<sup>35</sup> BURGENDORF, *supra* note 17, at 53; *see also* 42 U.S.C. §§ 12101(b)(4), 12111(2) (2000); Weicker, *supra* note 29, at 390–91 (describing Professor Burgdorf's considerable role in the development of the ADA).

<sup>36</sup> 42 U.S.C. § 12101(b)(1)–(2) (2000). Congress also stated several findings to provide a factual foundation for the ADA. *See* 42 U.S.C. § 12101(a) (2000). The importance of these findings in interpreting the provisions of the ADA has been often recognized. *See, e.g.,* Sutton v. United Air Lines, Inc., 527 U.S. 471, 494 (1999) (Ginsburg J., concurring) (stating that the ADA's legislative findings provide the "strongest clues to Congress' perception of the domain of the Americans with Disabilities Act"); Bagenstos, *supra* note 11, at 419 ("[T]he congressional findings . . . serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned.").

The congressional findings include:

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

. . . .

(3) discrimination against individuals with disabilities persists in such critical areas as employment . . . ;

. . . .

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a)(1), (3), (9) (2000).

<sup>37</sup> 42 U.S.C. § 12101(a)(7) (2000).

integration.<sup>38</sup> More specifically, in relation to Title I of the ADA, Congress intended to give individuals with disabilities a forum for claims of employment discrimination, while also deterring discrimination against individuals with disabilities in general and fostering their integration into the employment setting.<sup>39</sup> Additionally, the ADA encompasses the principles of anti-discrimination that were instituted by Congress with the enactment of the Rehabilitation Act, as the ADA explicitly provides at least as much protection to individuals with disabilities as is afforded by the Rehabilitation Act.<sup>40</sup>

### III. THE RELEVANT PROVISIONS OF THE ADA

The ADA's prohibition against disability-based employment discrimination states 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."<sup>41</sup> Although this provision may seem sufficiently clear, its terminology is much more complicated than it generally appears.<sup>42</sup> The courts, of course, have interpreted the language of this provision in order to apply the statute to actual cases, including those in which employees regarded as disabled have argued that employers are required to provide reasonable accommodation.<sup>43</sup> Thus, before these particular cases can be thoroughly considered, it is important to understand the key terms.

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<sup>38</sup> *Id.*; see, e.g., Elizabeth Clark Morin, Note, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189, 194–95 (1990) (“[D]iscrimination . . . persists and prevents individuals with disabilities from becoming self-sufficient and fully integrated citizens.”).

<sup>39</sup> See Timothy J. McFarlin, Comment, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees “Regarded as” Disabled*, 49 ST. LOUIS U. L.J. 927, 935 n.53 (2005); John M. Vande Walle, Note and Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 933–34 (1998).

<sup>40</sup> See 1 GARY PHELAN & JANET BOND ARTERTON, *DISABILITY DISCRIMINATION IN THE WORKPLACE* 1–9 (2004).

<sup>41</sup> 42 U.S.C. § 12112(a) (2000).

<sup>42</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 13, at II-1 (“[T]o know whether a person is covered by the employment provisions of the ADA can be more complicated” than under other statutes that prohibit employment discrimination).

<sup>43</sup> See, e.g., *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235–36 (11th Cir. 2005).

### A. "Disability"

In enacting the ADA, Congress stated in its findings that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."<sup>44</sup> Scholars have commented that the courts have used that figure as grounds to restrict the scope of the ADA's coverage; however, Congress cited the number as a mere minimum to convey that a considerable and growing segment of society is disabled and that many individuals would be protected by the ADA.<sup>45</sup> One of the ways in which the courts have limited the ADA's scope is by concluding, in many cases, that its three-prong definition of "disability" does not encompass the plaintiffs before the bench.<sup>46</sup> The ADA's definition of "disability" requires "(A) a physical or mental impairment that substantially limits one or more . . . major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>47</sup>

Despite the courts' narrowing interpretations, the ADA's definition appears far-reaching. The first prong of the definition addresses what the courts have commonly referred to as an "actual disability" and includes individuals with psychological and cognitive impairments, as well as physical ones.<sup>48</sup> Individuals without an actual disability are categorized within the second or third prongs if they either have a record of such a disability,<sup>49</sup> or are mistakenly regarded as having such a disability.<sup>50</sup> Thus,

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<sup>44</sup> 42 U.S.C. § 12101(a)(1) (2000).

<sup>45</sup> See, e.g., COLKER, *supra* note 5, at 17. Colker argues that the courts "have ignored that Congress recited that this figure was *growing*, and that a purpose of the ADA is to 'provide a clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* (quoting 42 U.S.C. § 12101(b)(1) (2000)).

<sup>46</sup> Kay Schriener & Richard K. Scotch, *The ADA and the Meaning of Disability*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 172 (Linda Hamilton Krieger ed., 2003) (stating that, "[q]uite unexpectedly, courts have applied narrow interpretations of the definition" of disability under the ADA); see also Locke, *supra* note 9, at 109.

<sup>47</sup> 42 U.S.C. § 12102(2) (2000).

<sup>48</sup> See 42 U.S.C. § 12102(2)(A) (2000); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 762–66 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (addressing "whether an individual is actually disabled within the meaning of the ADA").

<sup>49</sup> See 42 U.S.C. § 12102(2)(B) (2000). Under the second prong, individuals with a record documenting a prior impairment that substantially limited a major life activity (e.g., cancer survivors) are covered by the ADA. See S. REP. NO. 101-116, at 23 (1989); *BURGDORF*, *supra* note 17, at 151. Thus, employers who discriminate against such individuals because of these records, perhaps assuming that the impairment might return, violate the ADA. Individuals who have been misclassified as having a substantially

each of the three prongs represents an independent meaning of the term “disability” as defined by the ADA.

The ADA does not define “disability” beyond the three prongs. However, the Equal Employment Opportunity Commission (“EEOC”) has issued both implementing regulations<sup>51</sup> and interpretive guidance,<sup>52</sup> which expand on the ADA’s definitions. In regard to the ADA’s definition of “disability,” the EEOC’s characterization of a “[p]hysical or mental impairment” is broad, encompassing many physiological and mental disorders and conditions, without regard to whether or not they impact the life of the individual.<sup>53</sup> However, “physical, psychological, environmental, cultural and economic characteristics,” as well as “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact,” are not within the definition.<sup>54</sup>

The EEOC has also elaborated on the ADA’s requirement that the physical or mental impairment must “substantially limit[] one or more of the

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limiting impairment (e.g., individuals who are misclassified as having a learning disability) are also protected by the statute. *See* 29 C.F.R. § 1630.2(k) (2005); S. REP. NO. 101-116, at 23 (1989); BURGDORF, *supra* note 17, at 151.

<sup>50</sup> *See* 42 U.S.C. § 12102(2)(C) (2000). The third prong, in particular, has been narrowly construed by the courts and unsuccessfully used by plaintiffs. COLKER, *supra* note 5, at 112–13 (“The ‘regarded as’ disabled prong of the ADA has been relatively ineffective in protecting individuals with disabilities.”); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 129 (Linda Hamilton Krieger ed., 2003) (“[T]he narrow understanding of disability that excludes mitigated conditions under the first prong will often also exclude them under the third prong.”) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999)).

<sup>51</sup> *See* 29 C.F.R. pt. 1630 (2005). As the U.S. Supreme Court has noted, the ADA does not expressly authorize the EEOC to issue regulations interpreting its definitions. *Sutton*, 527 U.S. at 479. Nevertheless, the courts have often appreciated and relied on the value of such regulations in interpreting the ADA’s definition of “disability.” *See, e.g., Williams*, 380 F.3d at 762 n.7; *Weber v. Strippit, Inc.*, 186 F.3d 907, 912–13 (8th Cir. 1999).

<sup>52</sup> *See* 29 C.F.R. pt. 1630 app. (2005).

<sup>53</sup> 29 C.F.R. § 1630.2(h)(1)–(2) (2005) (defining “[p]hysical or mental impairment” as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems” or “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities”). These regulations were directly influenced by the definition of “impairment” in the Rehabilitation Act’s regulations. *See* 45 C.F.R. § 84.3(j)(2)(i)(A)–(B) (2005).

<sup>54</sup> 29 C.F.R. pt. 1630 app. (2005). Therefore, physical characteristics (e.g., old age and left-handedness), personality traits (e.g., quick temper and poor judgment), and short-term conditions (e.g., pregnancy, broken bones, and the common cold) are not physical or mental impairments.

major life activities.”<sup>55</sup> According to the EEOC, an impairment substantially limits a major life activity if the individual is 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 [the] 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.”<sup>56</sup> Additionally, a determination of whether an impairment is substantially limiting must take into consideration mitigating measures, such as medication and corrective devices.<sup>57</sup>

### B. “Regarded as” Disabled

To qualify for the protection of the ADA as an employee regarded as disabled under the third prong, the employer must perceive that the employee has an impairment that substantially limits a major life activity.<sup>58</sup> Essentially, the employer must believe, albeit mistakenly, that the employee has an actual disability. An individual is “regarded as” disabled if the individual “[h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation,” “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 “is treated by a covered entity as having a substantially limiting

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<sup>55</sup> 42 U.S.C. § 12102(2) (2000).

<sup>56</sup> 29 C.F.R. § 1630.2(j)(1)(i)–(ii) (2005). The EEOC further counsels that the “nature and severity,” “duration or expected duration,” and “permanent or long term impact, or the expected permanent or long term impact” of the impairment should be considered in determining whether it is substantially limiting. 29 C.F.R. § 1630.2(j)(2)(i)–(iii) (2005).

Major life activities include “those basic activities that the average person in the general population can perform with little or no difficulty,” including “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. pt. 1630 app. (2005); 29 C.F.R. § 1630.2(i) (2005). This list is not exhaustive; the courts have determined that other activities similar to those enumerated are also major life activities. *See, e.g.,* Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (human reproduction); *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 762–63 (3d Cir. 2004) (working).

<sup>57</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999) (determining that individuals with weak visual acuity, a condition that would otherwise qualify as a substantially limiting impairment, are not covered by the ADA if the condition can be corrected through mitigating measures, such as corrective eyewear).

<sup>58</sup> 42 U.S.C. § 12102(2) (2000).

impairment.”<sup>59</sup> Although the boundaries separating these three categories are not always clear, they share a common feature; in each category, an individual who does not have a condition that amounts to an actual disability is treated as having such a disability.<sup>60</sup> The three categories reflect a recognition that employer misperceptions can lead to discrimination in a variety of circumstances.

### C. “Qualified Individual”

Even if an individual is actually disabled or regarded as disabled within the meaning of the ADA, the individual must still be found “qualified” to be granted its protection.<sup>61</sup> In bringing an employment discrimination claim, plaintiffs must establish that they meet the ADA’s definition of “qualified individual.”<sup>62</sup> This requirement represents an attempt by Congress to ensure that the ADA not be interpreted to require the employment of individuals with disabilities that truly and completely inhibit their job performance to such an extent that they do not satisfy the legitimate qualifications of the job.<sup>63</sup> Thus, the qualified individual requirement is a shield that protects employers who refuse to employ individuals with disabilities who are unable to perform the essential functions of the job.

The ADA defines a “qualified individual” as one “who, with or without reasonable accommodation, can perform the essential functions of the

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<sup>59</sup> 29 C.F.R. § 1630.2(l)(1)–(3) (2005). An example of the first situation would be a case involving discrimination against an employee with controlled high blood pressure or, in the second situation, against an employee with prominent facial scarring; for the third situation, an example would be discrimination against an employee who is rumored to have AIDS but who does not in fact have the disease. See 29 C.F.R. pt. 1630 app. (2005). The definition of “regarded as” was derived from the Rehabilitation Act’s regulations. See 45 C.F.R. § 84.3(j)(2)(iv)(A)–(C) (2005). One scholar has commented that the categories “may serve to overcomplicate what is not, in fact, an inherently complex statutory concept.” BURG DORF, *supra* note 17, at 154.

<sup>60</sup> BURG DORF, *supra* note 17, at 152.

<sup>61</sup> See 42 U.S.C. § 12112(a) (2005).

<sup>62</sup> See, e.g., *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 768 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999).

<sup>63</sup> BURG DORF, *supra* note 17, at 185, 189 (stating that Congress decided to implement the ADA’s qualified individual requirement “principally to allay fear of the unknown among lawmakers . . . and the business community”). The commonly cited example of this concern is that employers “should not have to hire a blind bus driver.” *Id.* at 185.

employment position that such individual holds or desires.”<sup>64</sup> Further, the ADA instructs that “consideration shall be given to the employer’s judgment as to what functions of a job are essential.”<sup>65</sup> The courts have employed a two-pronged inquiry, as suggested by the EEOC, to determine whether an individual is covered by the definition.<sup>66</sup> As a first step, courts have determined whether the plaintiff is able to comply with “the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires.”<sup>67</sup> Generally, these requirements must be “job-related for the position in question” and “consistent with business necessity.”<sup>68</sup> The first step is used to dismiss those cases in which the plaintiffs have failed to show that they meet the legitimate qualifications of the job, regardless of the status of their disability. As a second step, the courts have decided whether the individual, “with or without reasonable accommodation, can perform the essential functions of the employment position.”<sup>69</sup> Individuals with disabilities who are able to comply with qualifications that are job-related and consistent with business necessity, either with or without reasonable accommodation, are qualified individuals

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<sup>64</sup> 42 U.S.C. § 12111(8) (2000). The EEOC defines “essential functions” as “the fundamental job duties of the employment position the individual with a disability holds or desires” and “marginal functions of the position” are specifically excluded. 29 C.F.R. § 1630.2(n)(1) (2005). The EEOC further advises that a function may be considered essential for various reasons. 29 C.F.R. § 1630.2(n)(2) (2005). A function may be considered essential if the position exists only so that the function can be performed; there is a limited number of employees who are able to perform the function; or the function may be highly specialized, requiring particular expertise or ability. 29 C.F.R. § 1630.2(n)(2)(i)–(iii) (2005). The essential nature of a function can be established through various types of evidence. *See* 29 C.F.R. § 1630.2(n)(3)(i)–(vii) (2005) (providing a non-exhaustive list of relevant factors).

<sup>65</sup> 42 U.S.C. § 12111(8) (2000); *see also* BURGDORF, *supra* note 17, at 209 (concluding that the requirement “is designed to prevent employers from including, among the required job functions, additional activities that are marginal or tangential to the goals sought in the workplace that may unjustifiably limit the employment opportunities of people with disabilities”).

<sup>66</sup> *See, e.g.,* Sch. Bd. v. Arline, 480 U.S. 273, 287–88 n.17 (1987) (applying the analogous provisions of the Rehabilitation Act); *Weber*, 186 F.3d at 916; *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998).

<sup>67</sup> 29 C.F.R. § 1630.2(m) (2005); *see, e.g., Weber*, 186 F.3d at 916 (quoting *Deane*, 142 F.3d at 145).

<sup>68</sup> 42 U.S.C. § 12112(b)(6) (2000); 29 C.F.R. § 1630.10 (2005).

<sup>69</sup> 42 U.S.C. § 12111(8) (2000); 29 C.F.R. § 1630.2(m) (2005); *see also Weber*, 186 F.3d at 916 (quoting *Deane*, 142 F.3d at 145).



within the meaning of the ADA.<sup>70</sup> Thus, this assessment at the second step is the core of the qualified individual inquiry.

#### D. "Reasonable Accommodation"

Even if employees are unable to perform the essential functions of their positions, they may still bring an employment discrimination claim in some circumstances. If an employee is able to perform the essential functions of the job with reasonable accommodation provided by the employer, that employee is a qualified individual and thus is entitled to the protections afforded by the ADA.<sup>71</sup> Employers who do not supply reasonable accommodation for qualified individuals with known physical or mental impairments are in violation of the anti-discrimination provisions of the ADA.<sup>72</sup> Accordingly, the ADA requires that employers offer reasonable accommodation to employees with disabilities so that they are able to perform the essential functions of their employment positions.<sup>73</sup>

Reasonable accommodation may take many forms, depending on the situation of the particular employee.<sup>74</sup> The ADA states that reasonable accommodation may include "making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities," as well as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."<sup>75</sup> In addition, several other examples of reasonable accommodations are enumerated in the

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<sup>70</sup> See BURGDORF, *supra* note 17, at 223 (quoting S. REP. NO. 101-116, at 37-38 (1989)).

<sup>71</sup> See 42 U.S.C. § 12111(8) (2000).

<sup>72</sup> See 42 U.S.C. § 12112(b)(5)(A) (2000). However, there is an exception for undue hardship. See *infra* note 78.

<sup>73</sup> See 42 U.S.C. §§ 12111(8), 12112(b)(5)(A) (2000); see also BURGDORF, *supra* note 17, at 179 ("The obligation to provide reasonable accommodation is intended to allow otherwise qualified people to take full part in employment opportunities by modifying the work environment to a reasonable extent.").

<sup>74</sup> See S. REP. NO. 101-116, at 31 (1989) (stating that reasonable accommodation entails a "fact-specific case-by-case approach").

<sup>75</sup> 42 U.S.C. § 12111(9)(A)-(B) (2000); see also 29 C.F.R. § 1630.2(o)(2)(i)-(ii) (2005). The EEOC regulations identify three categories of reasonable accommodation including modifications or adjustments to a job application process, to the work environment, and to enable employees with disabilities "to enjoy equal benefits and privileges of employment." 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (2005).

EEOC regulations.<sup>76</sup> However, the obligation of employers to provide reasonable accommodation to employees with disabilities is not unlimited.<sup>77</sup> The ADA restricts the scope of the obligation by imposing a known limitations prerequisite and an undue hardship limit.<sup>78</sup> In cases when reasonable accommodation is in fact required, it is “best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.”<sup>79</sup>

#### IV. THE STATE OF THE FEDERAL CIRCUIT COURT SPLIT

The above-mentioned complexities of the ADA’s interlocking statutory definitions have been particularly evident in relation to the issue of reasonable accommodation for employees regarded as disabled. The ADA prohibits discrimination against employees who may not actually be disabled, but who are mistakenly perceived as disabled by their employers.<sup>80</sup> Employers may either falsely assume that employees have disabilities that they do not in fact have, or misinterpret an employee’s existing, non-limiting impairment as significantly limiting.<sup>81</sup> Although the plain language of the

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<sup>76</sup> See 29 C.F.R. pt. 1630 app. (2005) (describing other types of reasonable accommodation, including “permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces,” as well as “[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips”).

<sup>77</sup> BURG DORF, *supra* note 17, at 308.

<sup>78</sup> See 42 U.S.C. § 12112(b)(5)(A) (2000) (stating that the failure to provide reasonable accommodation for the “known physical or mental limitations” of a qualified individual with a disability constitutes discrimination unless the employer can show that the accommodation would impose an “undue hardship”). Employers are not expected to accommodate disabilities of which they are not aware. 29 C.F.R. pt. 1630 app. (2005). Undue hardship is defined as “an action requiring significant difficulty or expense.” 42 U.S.C. § 12111(10)(A) (2000). Relevant factors to be considered in making an undue hardship determination are specified by the ADA. See 42 U.S.C. § 12111(10)(B)(i)–(iv) (2000).

<sup>79</sup> 29 C.F.R. pt. 1630 app. (2005).

<sup>80</sup> See 42 U.S.C. § 12102(2)(C) (2000).

<sup>81</sup> See 29 C.F.R. § 1630.2(1)(1)–(3) (2005). Specifically, the regulations state that an individual who is regarded as disabled:

(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;

(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

statute seems to indicate that employers must reasonably accommodate employees who are regarded as disabled, the federal circuit courts are divided as to whether the ADA does in fact require reasonable accommodation in such circumstances. The Fifth, Sixth, Eighth, and Ninth Circuits have held that employers are not required to offer reasonable accommodation to employees regarded as disabled.<sup>82</sup> These courts have mainly argued that this avoids the bizarre results of requiring employers to accommodate disabilities that may not even exist.

Conversely, the First, Third, Tenth, and Eleventh Circuits have determined that employers must provide reasonable accommodation to employees who are regarded as disabled.<sup>83</sup> These courts have argued that this is consistent with both the plain language of the ADA and its purpose of eradicating disability-based discrimination. The Tenth and Eleventh Circuits decided the issue in 2005.<sup>84</sup> Although the circuit split is now even, the U.S. Supreme Court has thus far declined to weigh in on the issue; the Court denied certiorari in the divergent Third and Eighth Circuit cases.<sup>85</sup> Prior to 2005, the Third and Eighth Circuits had issued the most comprehensive opinions for their opposing interpretations of the ADA. The Tenth and Eleventh Circuits have now considered the issue in depth as well. The analysis of these four courts will be examined in presenting both sides of the

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(3) Has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment.

*Id.*

<sup>82</sup> See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003); *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); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

<sup>83</sup> See *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (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, 772–76 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (assuming, without expressly holding, that the ADA requires reasonable accommodation of perceived disabilities).

The Second, Fourth, and Seventh Circuits have raised this issue but left it unresolved. See *Betts v. Rector of the Univ. of Va.*, 145 F. App'x 7, 15 (4th Cir. 2005); *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335–36 (7th Cir. 2004); *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 64 (2d Cir. 2003). The Second Circuit has even gone so far as to suggest that “[i]t is not at all clear that a reasonable accommodation can ever be required in a ‘regarded as’ case.” *Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 104 n.3 (2d Cir. 2003).

<sup>84</sup> *D'Angelo*, 422 F.3d at 1235; *Kelly*, 410 F.3d at 676.

<sup>85</sup> *Phila. Hous. Auth. v. Williams*, 544 U.S. 961 (2005); *Weber v. Strippit, Inc.*, 528 U.S. 1078 (2000). The Court also denied certiorari in the Ninth Circuit case. *Kaplan v. City of N. Las Vegas*, 540 U.S. 1049 (2003).

issue of whether employers must provide reasonable accommodation to employees who are regarded as disabled.

*A. Eighth Circuit: The ADA Does Not Require Reasonable Accommodation of Employees Regarded as Disabled*

In 1999, in the case of *Weber v. Strippit, Inc.*, the Eighth Circuit held that employers are not required to provide reasonable accommodation to employees regarded as disabled.<sup>86</sup> David Weber, an employee of a manufacturing company known as Strippit, was allegedly terminated when he was unable to relocate to another state due to heart disease and other related conditions.<sup>87</sup> In his suit against Strippit, Weber claimed that the alleged termination was based on both his actual disability and his perceived disability, in violation of the ADA.<sup>88</sup> The district court granted Strippit's motion for judgment as a matter of law on Weber's actual disability claim but allowed the perceived disability claim to proceed.<sup>89</sup> The jury returned a unanimous verdict in favor of Strippit and Weber appealed.<sup>90</sup> The Eighth

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<sup>86</sup> *Weber*, 186 F.3d at 910.

<sup>87</sup> *Id.* Weber was hired in 1990 by Strippit, a manufacturer of machinery and tools, as an international sales manager, a position which enabled him to work from his home in Minnesota. *Id.* Three years later, Weber suffered and was hospitalized for a major heart attack; subsequently, he returned to the hospital on several occasions, seeking treatment for heart disease, anxiety, hypertension, and other related conditions. *Id.* During this time, Weber continued to perform his job responsibilities. *Id.* However, Strippit ordered Weber either to relocate to its headquarters in New York or to stay in Minnesota in a lower-salaried position. *Id.* Weber's physician advised him to remain in Minnesota for at least six more months before relocating to New York. *Id.* After Weber informed Strippit of this recommendation, Strippit refused to grant him this time and Weber was terminated. *Id.*

<sup>88</sup> *Id.* Plaintiffs filing ADA claims will often try to prove both that they have an actual disability and that their employers regarded them as disabled. If these plaintiffs are unable to satisfy the demanding statutory requirements for establishing an actual disability, they may then choose to utilize the regarded as disabled prong of the ADA. See WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT: AN OVERVIEW FOR LAWYERS 137 (2000) (advising that lawyers "[p]lead disability and perceived disability in the alternative"). The Third Circuit noted that this approach is not inherently contradictory, as a jury could find that the employee had either an actual or a perceived disability. *Williams*, 380 F.3d at 766-67 n.10. Other causes of action were also asserted by Weber. See *Weber*, 186 F.3d at 910.

<sup>89</sup> *Weber*, 186 F.3d at 910.

<sup>90</sup> *Id.*

Circuit affirmed the district court's denial of Weber's actual disability claim.<sup>91</sup>

In evaluating Weber's perceived disability claim, the Eighth Circuit considered whether the district court's jury instruction on this issue was flawed.<sup>92</sup> The Eighth Circuit observed that the ADA includes employees regarded as disabled within its definition of "disability."<sup>93</sup> However, the court found that reasonable accommodation "makes considerably less sense in the perceived disability context."<sup>94</sup> The court predicted that assessing liability for failure to accommodate employees regarded as disabled would cause "bizarre results."<sup>95</sup>

Additionally, the Eighth Circuit reviewed two earlier decisions of the First and Third Circuits, which had contrary outcomes.<sup>96</sup> The Eighth Circuit was persuaded by the Third Circuit's arguments against accommodation.<sup>97</sup>

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<sup>91</sup> *Id.* at 914. The Eighth Circuit acknowledged that Weber's heart condition constituted an impairment; however, the court concluded that his condition only moderately impaired him and did not substantially limit him in a major life activity as required under the ADA. *Id.* at 913–14. The EEOC regulations define 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).

<sup>92</sup> *Weber*, 186 F.3d at 914. Weber argued that the perceived disability instruction was more similar to an actual disability instruction. *Id.*

<sup>93</sup> *See id.* at 914–15.

<sup>94</sup> *Id.* at 916 (explaining that the requirement of reasonable accommodation is "easily applied in a case of an actual disability").

<sup>95</sup> *Id.* For example, in Weber's case, his heart disease prevented his relocation to New York but the court found that it did not substantially limit a major life activity; therefore, Strippit was entitled to terminate his employment without acquiring liability under the ADA. *Id.* In contrast, if Strippit assumed falsely that Weber's heart disease substantially limited a major life activity, Strippit would be obligated to offer reasonable accommodation (e.g., permitting a delay of Weber's relocation to New York as recommended by his physician). *Id.* Although Weber's condition is the same in both scenarios, in the second, he would be entitled to reasonable accommodation "for a non-disabling impairment that no similarly situated employees would enjoy." *Id.*

<sup>96</sup> *Id.* at 916–17 (citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998); *Katz v. City Metal Co.*, 87 F.3d 26, 29 (1st Cir. 1996)).

<sup>97</sup> Although the Third Circuit addressed the issue of whether employers must accommodate employees regarded as disabled and argued against reasonable accommodation of perceived disabilities, the case was decided on other grounds. *Weber*, 186 F.3d at 917 (citing *Deane*, 142 F.3d at 148–49 n.12). In that case, Deane, who was employed as a nurse, tore the cartilage in her wrist and missed nearly a year of work. *Deane*, 142 F.3d at 141. Deane's physician recommended light duty and a restriction on her lifting more than fifteen to twenty pounds. *Id.* Pocono Medical Center, Deane's employer, determined that it could not accommodate her in any other available position and terminated her employment. *Id.* Deane filed a suit, claiming that Pocono regarded her

The Third Circuit was concerned that reasonable accommodation of employees regarded as disabled would “permit healthy employees to, through litigation (or the threat of litigation), demand changes in their work environments under the guise of ‘reasonable accommodations’ for disabilities based upon misperceptions.”<sup>98</sup> Further, it would “create a windfall for legitimate ‘regarded as’ disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions.”<sup>99</sup> The Eighth Circuit concluded that Congress, in enacting the ADA, could not have intended to cause disparate treatment between employees whose impairments are correctly assessed and those whose are not.<sup>100</sup> The Eighth Circuit held that the district court’s jury instruction was not flawed and that employees regarded as disabled are not entitled to reasonable accommodation.<sup>101</sup>

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as disabled and failed to provide reasonable accommodation. *Id.* at 141–42. Although it briefly addressed the issue of reasonable accommodation for employees regarded as disabled, the Third Circuit chose to “express no position on the accommodation issue.” *Id.* at 148–49 n.12. However, in 2004, the Third Circuit determined that employees regarded as disabled are entitled to reasonable accommodation. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 772–76 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>98</sup> *Weber*, 186 F.3d at 917 (quoting *Deane*, 142 F.3d at 149 n.12).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* The U.S. Supreme Court denied *Weber*’s petition for certiorari without comment. *Weber v. Strippit, Inc.*, 528 U.S. 1078 (2000). For articles that endorse the Eighth Circuit’s conclusion that reasonable accommodation should never be required for perceived disabilities, see Padmaja Chivukula, *Is Ignorance Bliss? A Pennsylvania Employer’s Obligation to Provide Reasonable Accommodation to Employees It Regards as “Disabled” After Buskirk v. Apollo Metals, Inc.*, 41 DUQ. L. REV. 541, 564 (2003) (“The only ‘accommodation’ that a ‘regarded as’ disabled employee requires or is entitled to under the ADA is their [sic] employer’s education.”); Allen Dudley, Comment, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for “Regarded as” Disabled Individuals*, 7 GEO. MASON L. REV. 389, 417 (1999) (“For those individuals merely ‘regarded as’ disabled, the only true reasonable accommodation that Congress foresaw is tolerance and understanding.”); Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 267–68 (2004) (“[C]ourts that have found no accommodation right for ‘regarded as’ disabled plaintiffs have the better argument.”); James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 39 (2005) (“Persons without actual disabling impairments do not need accommodations to perform a job; rather, they need an injunction that prevents or repairs the injury of employers relying on irrelevant factors.”).

### B. Third Circuit: The ADA Requires Reasonable Accommodation of Employees Regarded as Disabled

As the Eighth Circuit discussed in *Weber*, the Third Circuit had suggested in 1998 that employees regarded as disabled are not entitled to reasonable accommodation, although the court did not decide the issue.<sup>102</sup> In 2004, however, the Third Circuit held that such employees are in fact entitled to reasonable accommodation.<sup>103</sup> The case concerned the termination of a police officer who was diagnosed with depression.<sup>104</sup> In his suit against the Philadelphia Housing Authority (“PHA”), Edward Williams claimed that his termination violated the ADA’s prohibition against employment discrimination based on both actual and perceived disability theories.<sup>105</sup> The district court granted summary judgment in favor of PHA and Williams subsequently appealed.<sup>106</sup> Addressing first the claim of discrimination based on actual disability, the Third Circuit ultimately found that a reasonable jury

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<sup>102</sup> *Weber*, 186 F.3d at 917; see also *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998).

<sup>103</sup> *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 776 (3d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

<sup>104</sup> *Id.* at 756–58. After twenty-four years of employment as a police officer with the Philadelphia Housing Authority (“PHA”), Edward Williams was confronted by a superior officer concerning “his fractious interactions with other employees.” *Id.* at 756. Williams shouted and made several threats; as an immediate result, he was suspended without pay. *Id.* Williams was later directed to return to work in the radio room of the department but instead began to call in sick on a daily basis. *Id.* Williams was then ordered to complete a psychological examination with PHA’s psychologist, who ultimately recommended that Williams should receive psychological treatment for depression and stress management. *Id.* at 756–57. Further, the psychologist advised that Williams should be assigned to alternate temporary duties and should not be permitted to carry a weapon for a three-month period. *Id.*

Williams requested temporary assignment to the radio room, to which PHA did not respond. *Id.* The evidence on this issue was in conflict. It suggested that PHA failed to respond because it believed that Williams could not work with armed police officers in the radio room due to his condition and the potential access to firearms. *Id.* at 766. However, the evidence also included a report issued by PHA’s psychologist, stating that Williams could be permitted to work around firearms. *Id.* at 757. PHA asked Williams to file for a medical leave of absence because he had exhausted all of his other leave time. *Id.* at 758. When Williams failed to respond to this request, PHA terminated his employment. *Id.*

<sup>105</sup> *Id.* at 762. Other causes of action were also asserted. See *id.* at 758.

<sup>106</sup> *Id.* at 758.

would not be precluded from arriving at a finding of actual disability.<sup>107</sup> Regarding the perceived disability claim, the court stated that “the record is clear that PHA perceived Williams as being unable to have *access* to firearms and to be *around others* carrying firearms.”<sup>108</sup> However, PHA’s psychologist recommended a limitation only on his ability to carry a firearm.<sup>109</sup> Williams asserted that PHA mistakenly believed that he had an additional limitation preventing him from being near firearms and thus regarded him as disabled.<sup>110</sup> In conjunction with its analysis of the actual disability claim, the Third Circuit found that this additional limitation as perceived by PHA restricted the positions that Williams could perform in law enforcement and that a reasonable jury could find that PHA perceived Williams as being substantially limited in the major life activity of working.<sup>111</sup> The court found a material dispute of fact as to whether Williams was actually or regarded as disabled and a qualified individual under the ADA.<sup>112</sup>

Thus, the Third Circuit reached the issue of whether employees regarded as disabled are entitled to reasonable accommodation under the ADA.<sup>113</sup> First, the court began its analysis with a review of existing precedent, remarking that the First Circuit had determined that an employee regarded as

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<sup>107</sup> *Id.* at 761–64. Williams argued that PHA discriminated against him because of a mental impairment (major depression), which substantially limited him in the major life activity of working. *Id.* at 762.

<sup>108</sup> *Id.* at 766.

<sup>109</sup> *Williams*, 380 F.3d at 757, 766.

<sup>110</sup> *Id.* at 766. Williams argued that PHA regarded him as having a far greater limitation than the actual limitation presented by his mental impairment (i.e., the inability to be around firearms in general versus the inability to carry his own). *Id.* at 766–67.

<sup>111</sup> *Id.* at 766–67. The EEOC has addressed the major life activity of working directly in the regulations. It has stated that, in this context, “[t]he term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.” 29 C.F.R. § 1630.2(j)(3)(i) (2005). Further, “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” *Id.* There are other factors that may also be considered. *See* 29 C.F.R. § 1630.2(j)(3)(ii) (2005); *see also* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (noting that the regulations suggest that, to qualify as substantially limited in the major life activity of working, “one must be precluded from more than one type of job, a specialized job, or a particular job of choice”).

<sup>112</sup> *Williams*, 380 F.3d at 768, 770.

<sup>113</sup> *Id.* at 772–73.



disabled is entitled to reasonable accommodation<sup>114</sup> and that the “better-reasoned” district court decisions had arrived at the same conclusion.<sup>115</sup> The Third Circuit acknowledged that the Eighth and Ninth Circuits had argued that requiring reasonable accommodation for employees regarded as disabled would trigger “bizarre results.”<sup>116</sup> Perceiving that “a literal reading of the Act will not produce such results” in most cases, the Third Circuit declined to reach this conclusion and chose instead to focus on the plain language of the ADA.<sup>117</sup> The court easily determined that the plain language makes no distinctions in reasonable accommodation for actually disabled and regarded as disabled employees.<sup>118</sup>

Further, the Third Circuit addressed a few legal and practical considerations. The court reviewed the legislative history of the ADA and found that the intentions of Congress were in accord with the language of the statute.<sup>119</sup> Addressing the objective of the regarded as disabled provision of the ADA, the court quoted the acknowledgement of Congress that the “myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.”<sup>120</sup> The Third Circuit found the wisdom of this observation evident in the case before it; the court explained that Williams would have been eligible for a temporary assignment

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<sup>114</sup> *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (assuming without expressly holding that the ADA requires reasonable accommodation of perceived disabilities).

<sup>115</sup> *Williams*, 380 F.3d at 773 (citing *Lorinz v. Turner Constr. Co.*, No. 00-CV-6123SJ, 2004 WL 1196699, at \*8 n.7 (E.D.N.Y. May 25, 2004); *Miller v. Heritage Prod., Inc.*, No. 1:02-CV-1345-DFH, 2004 WL 1087370, at \*10 (S.D. Ind. Apr. 21, 2004); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 163–71 (E.D.N.Y. 2002); *Jewell v. Reid’s Confectionary Co.*, 172 F. Supp. 2d 212, 218–19 (D. Me. 2001)). The Third Circuit acknowledged that, in particular, it was persuaded by and thus utilized the analysis of the district court in *Jacques. Id.*

<sup>116</sup> *See id.* at 773–74; *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003). The decision of the Ninth Circuit follows the analysis and holding of *Weber*. *See id.* (“We find this reasoning [in *Weber*] persuasive and agree with the Eighth Circuit’s analysis and holding.”).

<sup>117</sup> *Williams*, 380 F.3d at 773–74 (stating that there may be situations that lead to “bizarre results” but that there is “no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text”). The Third Circuit did not elaborate on its belief that most cases would not lead to “bizarre results.”

<sup>118</sup> *Id.* at 774.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting *Sch. Bd. v. Arline*, 480 U.S. 273, 284 (1987)); *see also* H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

in PHA's radio room but for PHA's misperception that Williams could not be near firearms due to his mental impairment.<sup>121</sup>

Additionally, the Third Circuit addressed the U.S. Supreme Court's decision in *School Board v. Arline*, which involved a terminated employee with a contagious but not substantially limiting form of tuberculosis.<sup>122</sup> The Court determined that the employee qualified under the regarded as disabled provision of the Rehabilitation Act.<sup>123</sup> The Third Circuit argued that the regarded as disabled sections of the Rehabilitation Act and the ADA share a "virtually identical role" in their respective statutory schemes and cited the "well-established" rule that the ADA must be interpreted to "grant at least as much protection as provided by . . . the Rehabilitation Act."<sup>124</sup> Accordingly, the Third Circuit reached the "inescapable" conclusion that employees regarded as disabled, such as Williams, are entitled to reasonable accommodation under the ADA.<sup>125</sup>

### *C. The Circuit Split Evens: Recent Case Rulings Require Reasonable Accommodation*

In 2005, the Tenth and Eleventh Circuits also resolved the issue of whether an employee regarded as disabled is entitled to reasonable accommodation under the ADA.<sup>126</sup> Both courts sided with the Third Circuit, concluding that the plain language of the ADA requires employers to provide reasonable accommodation for employees who are regarded as disabled.<sup>127</sup>

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<sup>121</sup> *Williams*, 380 F.3d at 774.

<sup>122</sup> *Id.* at 775; see *Arline*, 480 U.S. at 273. The Third Circuit noted that neither the Eighth Circuit in *Weber* nor the Ninth Circuit in *Kaplan* referred to the U.S. Supreme Court's ruling in *Arline*. *Williams*, 380 F.3d at 775.

<sup>123</sup> *Williams*, 380 F.3d at 775. The case was remanded to the district court for a determination of whether the employer could have provided reasonable accommodation. *Id.*

<sup>124</sup> *Id.* (quoting *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998)). The Third Circuit also pointed out that "Congress specifically endorsed the *Arline* approach in crafting the 'regarded as' prong of the ADA's definition of 'disability.'" *Id.*

<sup>125</sup> *Id.* at 775-76. The U.S. Supreme Court denied PHA's petition for certiorari without comment. *Phila. Hous. Auth. v. Williams*, 544 U.S. 961 (2005).

<sup>126</sup> See *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005); *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005).

<sup>127</sup> See *D'Angelo*, 422 F.3d at 1235; *Kelly*, 410 F.3d at 676.

### 1. D'Angelo v. ConAgra Foods, Inc.

ConAgra Foods, Inc. ("ConAgra") terminated Cris D'Angelo upon learning that her physician had diagnosed her with vertigo and thus advised her to avoid monitoring items on moving conveyor belts.<sup>128</sup> D'Angelo filed a complaint against ConAgra, alleging that her termination violated the ADA based on both actual and perceived disability theories.<sup>129</sup> The district court granted ConAgra's motion for summary judgment.<sup>130</sup> Regarding the perceived disability claim, the court determined that employees regarded as disabled are not entitled to reasonable accommodation under the ADA.<sup>131</sup>

In regard to her perceived disability claim, D'Angelo had argued that her vertigo condition was a physical impairment that did not substantially limit her in the major life activity of working, but was regarded by ConAgra as such a limitation.<sup>132</sup> In evaluating this claim, the Eleventh Circuit considered

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<sup>128</sup> *D'Angelo*, 422 F.3d at 1222–24. D'Angelo was diagnosed with vertigo in 1998. *Id.* at 1222. She was treated by a physician who prescribed medication, which D'Angelo did not take because her condition began to improve. *Id.* at 1223. Shortly thereafter, D'Angelo began employment with ConAgra Foods in a seafood processing plant. *Id.* at 1222–23. D'Angelo was promoted twice, ultimately to the position of product transporter in 2000. *Id.* at 1222. In this position, D'Angelo packed boxes with shrimp, transported the boxes around the plant, and performed various other responsibilities. *Id.* She was later transferred to the fish division, where she continued to work as a product transporter and complete other tasks as required. *Id.*

D'Angelo did not mention her vertigo when she was hired by ConAgra Foods. *Id.* at 1223. After a few months on the job, D'Angelo began to suffer from her vertigo while spreading seafood or monitoring boxes on moving conveyor belts. *Id.* D'Angelo informed her supervisor that the conveyor belt caused her to feel sick and dizzy. *Id.* Upon the supervisor's request for documentation, D'Angelo submitted a copy of her prescription and a note from her physician, stating that she should avoid monitoring objects on moving conveyor belts because of her vertigo. *Id.* Officials at ConAgra Foods determined that there were no available positions that would not require D'Angelo to look at moving equipment such as conveyor belts and terminated her as a result. *Id.* at 1223–24. The letter of termination stated that the officials had been unaware of D'Angelo's condition and that her position as a product transporter required work on moving conveyor belts as an integral part of the position. *Id.* at 1224.

<sup>129</sup> *Id.* at 1224. Specifically, D'Angelo alleged that she was not offered reasonable accommodation in the form of an exemption from work involving conveyor belts. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* Even if she were entitled to reasonable accommodation, the court found that D'Angelo was not a "qualified individual," because she could not have performed the essential function of working on a conveyor belt. *Id.* The district court also found that D'Angelo was not actually disabled because her vertigo condition was not a substantial limitation in the major life activity of working. *Id.*

<sup>132</sup> *Id.* at 1227–28 (citing 29 C.F.R. § 1630.2(1) (2005)).

first whether D'Angelo was a "qualified individual."<sup>133</sup> The district court had found that D'Angelo was not a qualified individual because working on conveyor belts was an essential function of her position as a product transporter and one that D'Angelo was unable to perform even with reasonable accommodation.<sup>134</sup> The Eleventh Circuit disagreed and found that there was a genuine issue of material fact as to whether working on conveyor belts was an essential function of the position.<sup>135</sup>

Thus, the Eleventh Circuit reached the question of whether employers are required by the ADA to provide reasonable accommodation to employees regarded as disabled. The court noted that it was considering an "issue of first impression" and one that had created a split among the other circuits.<sup>136</sup> Based on a review of the plain language of the ADA, the Eleventh Circuit joined the Third Circuit in holding that employees regarded as disabled are entitled to reasonable accommodation under the ADA.<sup>137</sup> The court stated that "the statute's prohibition on discrimination applies equally to all statutorily defined disabilities" 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."<sup>138</sup>

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<sup>133</sup> *Id.* at 1230 (citing 42 U.S.C. § 12111(8) (2000); *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1305 (11th Cir. 2000); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997)).

<sup>134</sup> *D'Angelo*, 422 F.3d at 1234. The Eleventh Circuit affirmed the district court's denial of D'Angelo's claim of actual disability. *Id.* at 1227. The Eleventh Circuit concluded that D'Angelo's vertigo condition did not qualify as an actual disability under the ADA because it did not substantially limit any major life activity. *Id.* Specifically, the court noted that D'Angelo failed to show that she was unable to work in a broad class of jobs. *Id.* (citing *Sutton v. United Air Lines*, 527 U.S. 471, 491 (1999)). The court stated that the EEOC regulations indicate that, to qualify as substantially limited in the major life activity of working, one must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2005)). Further, D'Angelo's proven ability to satisfactorily work at ConAgra for three years contradicted any argument that her vertigo substantially limited the major life activity of working. *Id.*

<sup>135</sup> *Id.* at 1229–34 (citing 42 U.S.C. § 12111(8) (2000); *Davis*, 205 F.3d at 1305; *Holbrook*, 112 F.3d at 1526; 29 C.F.R. § 1630.2(n)(1)–(3) (2005)).

<sup>136</sup> *Id.* at 1235.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1235–36 (citing 42 U.S.C. §§ 12102(2)(A)–(C), 12111(8), 12112(a)–(b) (2000)). The court observed that "the statute plainly prohibits 'not making reasonable accommodations' for any qualified individual with a disability, including one who is disabled in the regarded-as sense no less than one who is disabled in the actual-

The Eleventh Circuit pointed out that this literal reading of the ADA is also consistent with the U.S. Supreme Court's interpretation of the Rehabilitation Act in *Arline* and its subsequent decision in *Bragdon v. Abbott*, construing "the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."<sup>139</sup> Because the Rehabilitation Act requires employers to provide reasonable accommodation to employees regarded as disabled, the court found that the "more expansive" ADA must require no less of employers.<sup>140</sup>

As the Eleventh Circuit noted, the Eighth and Ninth Circuits reached the opposite conclusion and held that "requiring employers to accommodate individuals they merely regard as disabled would produce anomalous results that Congress could not have intended."<sup>141</sup> However, the Eleventh Circuit reasoned that it was "not free to question the efficacy of legislation that Congress validly enacted," even if it could "craft a hypothetical that produces a result [it] might find anomalous."<sup>142</sup> Also, the court questioned whether the results of its statutory interpretation would be as "bizarre" as anticipated by the Eighth and Ninth Circuits.<sup>143</sup>

The Eleventh Circuit first rejected the Eighth Circuit's concern that the plain meaning might produce a disparity among impaired but non-disabled employees, because it "fails to appreciate" that employees regarded as disabled are in fact disabled within the meaning of the statute.<sup>144</sup> Further, the Eleventh Circuit pointed out that "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."<sup>145</sup>

The Eleventh Circuit agreed with the Third Circuit that there may be some situations which lead to "bizarre results."<sup>146</sup> However, in light of the

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impairment or the record-of-such-an-impairment sense." *Id.* at 1236; *see also Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 774 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>139</sup> *D'Angelo*, 422 F.3d at 1237 (citing 29 U.S.C. §§ 701-718 (2000); *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998); *Sch. Bd. v. Arline*, 480 U.S. 273 (1987)).

<sup>140</sup> *Id.* The court also cited the legislative history of the ADA. *See S. REP. NO. 101-116*, at 2 (1989).

<sup>141</sup> *D'Angelo*, 422 F.3d at 1237 (citing *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)).

<sup>142</sup> *Id.* at 1238.

<sup>143</sup> *Id.* at 1239.

<sup>144</sup> *Id.* (citing *Weber*, 186 F.3d at 917).

<sup>145</sup> *Id.* (citing *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002)).

<sup>146</sup> *Id.* (citing *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 774 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005)).

text of the statute and the lack of any contrary expression of congressional intent, the court held that employees regarded as disabled are entitled to reasonable accommodation under the ADA.<sup>147</sup>

## 2. Kelly v. Metallics West, Inc.

Just prior to the Eleventh Circuit's conclusion, the Tenth Circuit also decided that the plain language of the ADA requires employers to provide reasonable accommodation for employees who are regarded as disabled.<sup>148</sup> The case concerned a customer service supervisor, Beverly Kelly, who brought suit against her former employer, Metallics West, Inc., for refusing to allow her to return to work with supplemental oxygen and terminating her employment in retaliation for requesting the accommodation of returning to work with supplemental oxygen.<sup>149</sup>

The district court determined that Kelly was not actually disabled because her need for supplemental oxygen was only temporary and her condition could be improved with the use of portable oxygen.<sup>150</sup> However,

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<sup>147</sup> *D'Angelo*, 422 F.3d at 1239.

<sup>148</sup> *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 675 (10th Cir. 2005).

<sup>149</sup> *Id.* at 671. In April 1996, Kelly began her employment with Metallics West as a receptionist. *Id.* After three years, she was promoted to the position of customer service supervisor. *Id.* at 671–72. In May 2000, Kelly was hospitalized because of a blood clot or pulmonary embolism in her lung. *Id.* at 672. Kelly was released from the hospital on supplemental oxygen. *Id.* After attempting to function at work without the supplemental oxygen and finding it too difficult, Kelly obtained a note from her physician, which stated that Kelly required the assistance of supplemental oxygen at work. *Id.*

At the trial, Kelly testified that the Chairman of the Board of Metallics West, Michael Mola, did not want her to use supplemental oxygen at work and instead encouraged her to file for short-term disability, which she did. *Id.* After a brief absence, Kelly attempted to return to work without oxygen but suffered from the same difficulty as before. *Id.* Kelly told Mola that her doctor prescribed the use of supplemental oxygen at work and again Mola refused to allow it. *Id.* Later that same day, Mola wrote a letter to Kelly, stating that Metallics West intended to hire a replacement for her position and that Kelly might return to another position if her health improved. *Id.* at 673. Kelly again applied for and received short-term disability benefits. *Id.* After these benefits expired, Kelly did not return to work but instead brought claims against Metallics West for discrimination and retaliation under the ADA. *Id.*

<sup>150</sup> *Id.* at 673. There was no dispute that Kelly was capable of performing the essential functions of her position with the aid of supplemental oxygen. *Id.* at 672. In fact, Kelly's physician testified that supplemental oxygen enabled Kelly to "do all of life's major activities." *Id.* at 673 n.4. Thus, Kelly was not actually disabled, because her physical impairment was mitigated by corrective measures. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83, 488–89 (1999) (finding that "[a] person whose physical or mental impairment is corrected by medication or other measures does not

the case proceeded to trial based on the theory that Metallics West had regarded Kelly as disabled and terminated her employment because of the perceived disability.<sup>151</sup> Metallics West moved for judgment as a matter of law, arguing that employers are not obligated under the ADA to provide reasonable accommodation to employees regarded as disabled.<sup>152</sup> The district court denied Metallic West's motion and the jury returned a verdict in favor of Kelly.<sup>153</sup>

Reviewing the denial of Metallic West's motion, the Tenth Circuit reached the issue of whether employers are required under the ADA to provide reasonable accommodation to employees regarded as disabled.<sup>154</sup> The court readily sided with the Third Circuit based on the plain language of the statute.<sup>155</sup> Addressing the Eighth and Ninth Circuits' concern for "bizarre results," the court dismissed it, stating that "[t]his rationale provides no basis for denying validity to a reasonable accommodation claim."<sup>156</sup> Requiring accommodation in this context "encourages employers to become more enlightened about their employees' capabilities, while protecting employees

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have an impairment that presently 'substantially limits' a major life activity" and holding that "disability under the [ADA] is to be determined with reference to corrective measures").

<sup>151</sup> *Kelly*, 410 F.3d at 673.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 673–74. The district court insisted that the case did not reach the jury on a failure to accommodate theory but that failure to accommodate was relevant to Kelly's claim that Metallics West regarded her as disabled. *Id.* at 674. Despite this statement, the court's instructions authorized the jury to return a verdict in favor of Kelly on a failure to accommodate theory. *Id.* For example, the court instructed that one form of discrimination is "not making a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual who is regarded as disabled." *Id.* at 674–75.

<sup>154</sup> *Id.* at 675. The Tenth Circuit recognized that the jury possibly returned a verdict in favor of Kelly on a failure to accommodate theory. *Id.* Accordingly, the court stated that it was necessary to determine whether this theory was supported in the law. *Id.* The court noted that, in an earlier case, it had held that an employee regarded as disabled had established a prima facie case of discrimination based on her employer's alleged failure to accommodate her perceived disability. *Id.* (citing *McKenzie v. Dovala*, 242 F.3d 967, 975 (10th Cir. 2001)).

<sup>155</sup> *Id.* The court found that the plain language of the statute includes within the definition of a "qualified individual with a disability" those individuals who are regarded as disabled and who can perform the essential functions of the job with reasonable accommodation. *Id.* Further, the court noted that reasonable accommodation includes "acquisition or modification of equipment or devices," such as the supplemental oxygen that Kelly requested. *Id.* at 676 (citing 42 U.S.C. § 12111(9) (2000)).

<sup>156</sup> *Id.* at 675–76 (citing *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)).

from employers whose attitudes remain mired in prejudice.”<sup>157</sup> Finally, the court noted that the statutory definition of “reasonable accommodation” does not distinguish between employees who are actually disabled and those who are regarded as disabled.<sup>158</sup> The court found no reason to depart from the plain language of the ADA and concluded that employers must reasonably accommodate employees regarded as disabled.<sup>159</sup>

## V. A REASONABLE APPROACH TO REASONABLE ACCOMMODATION

The federal circuit split has emerged over the course of the last ten years. In 1996, the First Circuit assumed that employees regarded as disabled are entitled to reasonable accommodation under the ADA; however, the court offered no analysis for its determination.<sup>160</sup> The Fifth, Sixth, Eighth, and Ninth Circuits later reached the opposite result, flatly refusing to require that employers provide reasonable accommodation to employees regarded as disabled.<sup>161</sup> Of those four courts, only the Eighth and Ninth Circuits explained their reasoning, both stating that requiring reasonable accommodation in the case of perceived disabilities would lead to “bizarre results.”<sup>162</sup> In 2004, the Third Circuit rejected this trend and held that employees regarded as disabled are entitled to reasonable accommodation; it reached this decision based largely on the plain meaning of the statute and in light of its purposes.<sup>163</sup> As of 2005, the federal circuit split is even. The Tenth and Eleventh Circuits were persuaded by the reasoning of the Third

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<sup>157</sup> *Kelly*, 410 F.3d at 676. The court argued that employers who are disinclined to abandon stereotypic assumptions must be ready to accommodate the false limitations crafted by their own flawed perceptions of their employees’ abilities. *Id.*

<sup>158</sup> *Id.* (citing 42 U.S.C. § 12111(9) (2000)). Because Congress made no such distinction between actual and perceived disabilities, the court inferred that Congress did not deem reasonable accommodation of employees regarded as disabled to be “inherently unreasonable.” *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (assuming, without expressly holding, that the ADA requires reasonable accommodation of perceived disabilities).

<sup>161</sup> *See Kaplan*, 323 F.3d at 1231–33; *Weber*, 186 F.3d at 916–17; *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

<sup>162</sup> *See Kaplan*, 323 F.3d at 1231–33; *Weber*, 186 F.3d at 916–17.

<sup>163</sup> *See Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 772–76 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).



Circuit and reached the same conclusion—that employees regarded as disabled are entitled to reasonable accommodation.<sup>164</sup>

### A. *The Courts Should Adopt the Approach of the Third Circuit*

The Third, Tenth, and Eleventh Circuits have all recently held that employees who are regarded as disabled by their employers are entitled to reasonable accommodation under the ADA.<sup>165</sup> The analysis of the Third Circuit, which was the first to explain its conclusion, exemplifies the approach that the courts should adopt in determining whether an employer must provide an employee regarded as disabled with reasonable accommodation.<sup>166</sup> Appropriately, in beginning its analysis, the Third Circuit turned first to the statutory language of the ADA and rightly decided that the text makes no distinction between the provision of reasonable accommodation for employees with actual disabilities and employees who are regarded as disabled.<sup>167</sup> Further, the Third Circuit determined that the intentions of Congress are best served by such an interpretation.<sup>168</sup> The court noted that “the ADA was written to protect one who is ‘disabled’ by virtue of being ‘regarded as’ disabled in the same way as one who is ‘disabled’ by virtue of being ‘actually disabled,’ because being perceived as disabled ‘may prove just as disabling.’”<sup>169</sup>

Additionally, the Third Circuit argued that the U.S. Supreme Court’s decision in *Arline* requires reasonable accommodation for employees regarded as disabled.<sup>170</sup> In that case, the U.S. Supreme Court determined that employees regarded as disabled are entitled to relief under the Rehabilitation Act.<sup>171</sup> The Court remanded the case, directing the district court to consider

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<sup>164</sup> See *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005); *Kelly*, 410 F.3d at 676. Three other circuits have referred to the issue but have not resolved it. See *Betts v. Rector of the Univ. of Va.*, 145 F. App’x 7, 15 (4th Cir. 2005); *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335–36 (7th Cir. 2004); *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 64 (2d Cir. 2003).

<sup>165</sup> *D’Angelo*, 422 F.3d at 1235; *Kelly*, 410 F.3d at 676; *Williams*, 380 F.3d at 776. The First Circuit had earlier reached this conclusion but did not explain its reasoning. See *Katz*, 87 F.3d at 33 (assuming without expressly holding that the ADA requires reasonable accommodation of perceived disabilities).

<sup>166</sup> See *Williams*, 380 F.3d at 772–76.

<sup>167</sup> *Id.* at 774.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (citing H.R. REP. NO. 101-485, pt. 3, at 30 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453).

<sup>170</sup> *Id.* at 775 (citing *Sch. Bd. v. Arline*, 480 U.S. 273, 289 n.19 (1987)).

<sup>171</sup> *Arline*, 480 U.S. at 279.

whether reasonable accommodation could have been provided by the employer.<sup>172</sup> The *Arline* decision suggests the Court's willingness, at least in 1987, to allow a district court to reach a factual determination as to whether reasonable accommodation should be afforded to an employee regarded as disabled. In a more recent case, the Court held that the ADA must be interpreted to afford as much protection as that offered by the Rehabilitation Act.<sup>173</sup> In light of both of these rulings, the Third Circuit's argument is particularly persuasive.

The Third Circuit, in essence, determined that providing reasonable accommodation for employees who are regarded as disabled is required based on the language of the statute and the Court's decision in *Arline*. Following the approach of the Third Circuit, the lower courts in the circuits that have not yet addressed the issue should require reasonable accommodation of employees regarded as disabled in most cases.<sup>174</sup> A case-by-case approach is consistent with the legislative history,<sup>175</sup> as well as the guidance issued by the EEOC, which advises that a "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs."<sup>176</sup>

### B. *The Courts Should Reject the "Bizarre Results" Argument of the Eighth Circuit*

Because the Eighth Circuit was concerned that requiring employers to provide reasonable accommodation to employees regarded as disabled would lead to "bizarre results," it held that reasonable accommodation is not required under the ADA.<sup>177</sup> The Eighth Circuit argued that the provision of

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<sup>172</sup> *Id.* at 288–89.

<sup>173</sup> *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

<sup>174</sup> For articles endorsing a case-by-case type of approach, see McFarlin, *supra* note 39, at 959 (stating that a "case-by-case approach will best achieve the ADA's primary, interrelated goals"); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 906 (2000) (arguing that reasonable accommodation of perceived disabilities is poorly served by an "all-or-nothing approach").

<sup>175</sup> See S. REP. NO. 101-116, at 31 (1989) (stating that reasonable accommodation entails a "fact-specific case-by-case approach").

<sup>176</sup> 29 C.F.R. pt. 1630 app. (2005).

<sup>177</sup> *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999); see also *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003) (agreeing with the reasoning of the Eighth Circuit). As an example, the Eighth Circuit, using the situation of the plaintiff in the case before it, considered two different hypothetical scenarios. See *Weber*, 186 F.3d at 916. For both scenarios, the court employed a factual pattern in which

reasonable accommodation for an employee with a perceived disability would create a windfall for the employee, because the employee would have the benefit of accommodation that other employees would not enjoy, including those who are similarly impaired but are not perceived as such.<sup>178</sup> Although employees with perceived disabilities would be accommodated and protected under the ADA, other employees who are similarly situated would not be protected and could even be lawfully terminated, merely because their employers did not perceive them as disabled. The Eighth Circuit argued that Congress could not have intended this disparity in treatment.<sup>179</sup>

Although this reasoning has persuaded some courts,<sup>180</sup> it is inherently flawed. Employees who are mistakenly regarded as disabled by their employers are not similarly situated to those employees whose abilities (or disabilities) are judged correctly. As the Third Circuit sagely noted, “[t]he employee whose limitations are perceived accurately gets to work, while [the employee whose limitations are misperceived] is sent home unpaid.”<sup>181</sup>

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Weber’s heart condition prevented him from relocating to another state but did not substantially limit any major life activity. *Id.* In its first hypothetical, the court assumed that Strippit did not perceive Weber’s impairment as substantially limiting. *Id.* Accordingly, the court noted that Strippit would be able to terminate Weber without exposing itself to liability under the ADA. *Id.*

In its second scenario, the court assumed that Strippit mistakenly perceived Weber’s heart condition as substantially limiting. *Id.* Consequently, Strippit would be required to provide reasonable accommodation in some way, such as by delaying Weber’s relocation. *Id.* Weber would be entitled to accommodation only in the second scenario, even though his impairment is no more severe in that case. *Id.* The court concluded that Weber would have the benefit of this accommodation “for a non-disabling impairment that no similarly situated employees would enjoy.” *Id.*; see *supra* note 87 for a summary of the actual facts of the case.

<sup>178</sup> *Weber*, 186 F.3d at 917 (citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998)).

<sup>179</sup> *Id.* (“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.”). For a sensible rejection of the Eighth Circuit’s argument, see Kelly Cahill Timmons, *Limiting “Limitations”: The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 343 (2005) (“The fact that those outside the protected class receive no protection should not be interpreted as reducing the protection received by those within the protected class.”).

<sup>180</sup> See, e.g., *Kaplan*, 323 F.3d at 1232.

<sup>181</sup> *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 775 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); see also *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (“[A]n employee who is simply impaired and an employee who is impaired and ‘regarded as’ disabled are not similarly situated since the ‘regarded

Discrimination based on the misperceptions of the employer is the precise type of discrimination that the regarded as disabled prong of the ADA was designed to prevent. It was intended to protect the employment opportunities of qualified individuals, including employees who are regarded as disabled, from those stereotypes and myths, which trigger an employer's misperception of an employee's disability.<sup>182</sup>

Although the Third Circuit conceded that there may be situations that might lead to "bizarre results," the court argued rightly that "the vast majority of cases" would not have such an outcome.<sup>183</sup> As a typical case, the court cited an example of a grocery cashier who is required to stand while on the job.<sup>184</sup> The cashier suffers from back pain that does not rise to the level of an actual disability.<sup>185</sup> The employer misperceives the condition as one that prevents the cashier from standing for more than an hour<sup>186</sup> and terminates

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as' disabled employee is subject to the stigma of the disabling and discriminatory attitudes of others.").

<sup>182</sup> See 29 C.F.R. pt. 1630 app. (2005).

<sup>183</sup> *Williams*, 380 F.3d at 774.

<sup>184</sup> *Id.* at 776 n.19.

<sup>185</sup> *Id.*

<sup>186</sup> At this stage, the employer should engage the employee in what is known as the "interactive process." *Jacques*, 200 F. Supp. 2d at 168 ("[T]he 'vast majority' of courts that have [addressed the issue] have held that employers have a mandatory obligation to engage in an interactive process with employees who may be in need of an accommodation for their disabilities.") (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002)). This requirement has been held to be "inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee." *Id.* (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999)). The legislative history supports the interactive process requirement. See S. REP. NO. 101-116, at 34 (1989) (describing a "problem-solving approach" in which "employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation"). The EEOC has issued a regulation, providing that "[t]o 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." 29 C.F.R. § 1630.2(o)(3) (2005). Further, the EEOC advises that the "process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.*

The interactive process requirement is yet another reason for finding employers liable when they fail to provide reasonable accommodation to employees regarded as disabled. The requirement encourages employers to discuss any perceived disabilities with their employees and thus to resolve any misperceptions that may result in an adverse employment decision, which in turn may lead to costly and time-consuming litigation. For an analysis of the interactive process requirement in the context of perceived disabilities, see Nicholas R. Frazier, Note, *In the Land Between Two Maps: Perceived Disabilities, Reasonable Accommodations, and Judicial Battles over the ADA*, 62 WASH. & LEE L. REV. 1759, 1793 (2005) ("[C]ourts can discourage the intentional or

the cashier for that reason.<sup>187</sup> If the employer regarded the condition as substantially limiting a major life activity, the employer might be required to provide reasonable accommodation by supplying the cashier with a stool.<sup>188</sup> This result would not be bizarre, but rather would be a fair and simple solution, while also perhaps disabusing the employer of its stereotypical misperceptions in the process.

In effect, the Third Circuit decided that the approach of the Eighth Circuit (that is, “an across-the-board refusal” to require reasonable accommodation for employees with perceived disabilities) is too broad and inappropriate in most situations, particularly in light of the plain meaning and purposes of the statute.<sup>189</sup> The Third Circuit’s assessment is correct and the lower courts in the circuits that have not yet addressed this issue should likewise reject the analysis of the Eighth Circuit. There is simply no basis for refusing in every case to require reasonable accommodation for employees with perceived disabilities. The text of the statute is clear.<sup>190</sup>

Further, those courts that have ignored the plain meaning of the statute have failed to identify any congressional findings, legislative history, or any other such materials in support of their “bizarre results” argument.<sup>191</sup> If a faithful statutory interpretation of the ADA treats differently those employees whose employers misperceive their disabilities, there is no indication that this effect is contrary to the plainly expressed intent of Congress. Additionally, because employees regarded as disabled are entitled to reasonable accommodation under the Rehabilitation Act, there is simply no justification to conclude that the more expansive ADA does not afford the same right.<sup>192</sup>

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unintentional maintenance of incorrect perceptions by placing a greater emphasis on the interactive process.”).

<sup>187</sup> *Williams*, 380 F.3d at 776 n.19.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 774 (concluding that there is “no basis for an across-the-board refusal”).

<sup>190</sup> Although it adopted the reasoning of the Eighth Circuit, the Ninth Circuit nevertheless admitted that the statutory language is clear. See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) (“On the face of the ADA, failure to provide reasonable accommodation to ‘an otherwise qualified individual with a disability’ constitutes discrimination” and “the ADA’s definition of ‘qualified individual with a disability’ does not differentiate between the three alternative prongs of the ‘disability’ definition.”). The Eighth Circuit did not even address the language of the statute in this context. See *Weber v. Strippit, Inc.*, 186 F.3d 907, 915–17 (8th Cir. 1999).

<sup>191</sup> See, e.g., *Kaplan*, 323 F.3d at 1231–33; *Weber*, 186 F.3d at 916–17.

<sup>192</sup> See 42 U.S.C. § 12201(a) (2000) (“Except as otherwise provided in this chapter, nothing in this chapter 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”); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (determining that the ADA must be construed “to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”).

## VI. CONCLUSION

A case-by-case approach, which would require reasonable accommodation for employees regarded as disabled in most cases, would best serve the ADA's basic purposes of attacking disability-based discrimination and promoting equal opportunity for individuals with disabilities. Although such a requirement may seem counterintuitive, and critics wonder how and even why an employer should accommodate a disability that may not even exist, the requirement makes sense in light of the underlying purposes of the ADA. In particular, the ADA is intended to ensure that stereotypes and myths about disabilities, even utterly mistaken ones, do not hinder the equal opportunities of qualified individuals to secure and sustain employment.

If an employer decides that an employee is disabled, that employer should respond consistently with that decision and in accord with the ADA by engaging the employee in an interactive process and by providing reasonable accommodation if necessary. If employers discuss their perceptions of their employees' abilities and limitations directly with their employees, employers can easily avoid any "bizarre results" caused by providing reasonable accommodation for an employee who is not actually disabled within the framework of the ADA. Even if the employer and employee fail to agree completely regarding any existing impairments, the interactive process may facilitate a mutually satisfactory arrangement for some form of reasonable accommodation that will enable the employee to perform the essential functions of the job. Employers and employees should utilize the interactive process to the fullest extent possible in order to avoid the hassle and cost of employment discrimination litigation that sometimes results when parties simply fail to communicate.

The ADA was enacted in part to protect employees from employers whose attitudes are shaped by prejudice; thus, the statute makes no distinction between employees who are actually disabled and those who are merely regarded as disabled. The ADA was intended, and should be interpreted, to protect employees regarded as disabled from adverse employment decisions that are made on the basis of stereotypic assumptions that do not truly reflect the abilities of an employee. Employers who fail to shed their stereotypic assumptions, including those assumptions that are entirely mistaken, must be prepared to accommodate any limitations that are imposed by their own flawed perceptions.