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IN THE EYE OF THE BEHOLDER: ISSUES OF  
DISTRIBUTIVE AND CORRECTIVE JUSTICE IN  
THE ADA'S EMPLOYMENT PROTECTION  
FOR PERSONS REGARDED AS  
DISABLED

JOHN M. VANDE WALLE\*

INTRODUCTION

Unlike other federal statutes protecting persons from employment discrimination on the basis of race, sex, color, national origin, religion, or age,<sup>1</sup> the Americans with Disabilities Act ("ADA")<sup>2</sup> protects persons from employment discrimination on the basis of a characteristic that not all persons possess. The ADA's protection is reserved for complaining employees who can prove that they are persons with a disability. They must show that they have a physical or mental impairment that substantially limits a major life activity.<sup>3</sup> Also, unlike other federal employment discrimination statutes, the ADA imposes an affirmative duty on an employer to expend time, effort, and funds to make reasonable accommodation for the disability of an otherwise qualified disabled individual.<sup>4</sup> Put another way, the ADA identifies a criterion (the possession of a disability) against which individuals are measured and requires a distribution of goods from the employer to individuals who meet that criterion.

In this way, the ADA is consistent with the concept of distributive justice. Distributive justice requires that the equitable distribution of goods as between parties be made on the basis of some external criterion measuring the relative merit of the parties.<sup>5</sup> Only if the employee meets the external definition of a person with a disabil-

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-e17 (1994 & Supp. I 1996), makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1994 & Supp. I 1996), prohibits job discrimination on the basis of age.

2. 42 U.S.C. §§ 12101-213 (1994 & Supp. I 1996).

3. *See id.* § 12102(2)(A).

4. *See id.* §§ 12111(8)-(9), 12112(a).

5. *See infra* notes 224-25 and accompanying text for a more detailed discussion of distributive justice.

ity does the employer's duty of reasonable accommodation begin; only then does the employer's adverse behavior toward the employee violate the ADA. The other federal employment discrimination statutes seem more consistent with the concept of corrective justice<sup>6</sup> because they prohibit the employer from basing any employment action on prohibited factors that all persons possess.<sup>7</sup> Corrective justice concerns itself with the equity of interactions between parties without reference to any external criterion that measures the relative worth of the parties.<sup>8</sup> The only concern is whether one party has inflicted an unjust loss on the other. In the employment discrimination context, if one of the prohibited characteristics motivated the employer in taking an adverse employment action, then she has committed a transactional moral wrong against the employee.

If the ADA truly is a distributive justice statute, why does its definition of persons with a disability encompass persons who are merely regarded as—rather than actually—disabled?<sup>9</sup> These people, it would seem, do not deserve the distributive justice dispensed by the statute because they do not meet the external criterion of being a person with a disability. Therefore, they must come under the protection of the statute for some other reason. The ADA's protection of those regarded as disabled seems more consistent with concepts of corrective justice. This provision concentrates on the dynamics of the interaction between the employer and the employee. It seeks to make a determination about the defendant employer's behavior, asking if it was wrong or unjust. It does not concentrate on a plaintiff employee's status as a person deserving assistance.

Whereas to be actually disabled a person must suffer from a physical or mental impairment that substantially limits a major life activity such as breathing, walking, seeing, or working,<sup>10</sup> to be regarded as disabled requires that an employer *perceive* that the person has some impairment that *as perceived* would substantially limit a major life ac-

6. See *infra* notes 226-30 and accompanying text for a more detailed discussion of corrective justice.

7. The ADEA, 29 U.S.C. § 631(a), protects only employees who are at least forty years of age. It does not prohibit discrimination based on age for employees under forty. See *id.* This is arguably an external criterion by which the employee is measured. However, the ADEA still does not seem consistent with distributive justice because it imposes no affirmative duty on the employer to accommodate the older employee.

8. See *infra* notes 226-30 and accompanying text for a more detailed discussion of corrective justice.

9. See 42 U.S.C. § 12102(2)(C).

10. See *id.* § 12102(2)(A); 29 C.F.R. § 1630.2(h)(2)(i) (1997).

tivity of that person.<sup>11</sup> In the first instance, the ADA protects the employee because she meets the definition of a disabled person. In the second instance, the statute protects the employee because it condemns the employer's behavior.

The tension produced by the differing rationales of distributive and corrective justice helps to explain why the "regarded as" portion of the ADA's definition of a disabled person presents difficulties when the perceived impairment is alleged to limit substantially the major life activity of working. This is because the particular skills, training, and abilities of the plaintiff employee are central to the determination of whether the employee's ability to work is substantially limited.<sup>12</sup> The focus of the inquiry shifts away from the behavior of the employer toward the employee, and the corrective justice rationale breaks down. Thus, though an employer might engage in identical behavior toward two different employees based on the perception that each was identically impaired, the ADA might protect one employee and not the other depending on their particular abilities.

This note will argue that when the major life activity of working is implicated in a claim of perceived disability discrimination, the distributive justice goals of the ADA should prevail. In individual claims of discrimination, it is proper for the results to vary depending on the abilities of the plaintiffs despite identical actions and motivations on the part of the employer.

Part II of this note discusses the statutory basis for including persons regarded as disabled in the definition of persons with disabilities. Part III surveys the current status of case law on perceived disabilities<sup>13</sup> with special emphasis on cases that implicate the major life activity of working. Part IV clarifies the meanings of distributive and corrective justice as used in this note and explores the issues of distributive and corrective justice in the ADA. It argues that, unlike Title VII and the Age Discrimination in Employment Act ("ADEA") that are based primarily in corrective justice, the ADA is based primarily in distributive justice. Part IV goes on, however, to characterize protection for persons regarded as disabled as an element of the ADA that is based in corrective justice and to explore why persons regarded

11. See 42 U.S.C. § 12102(2)(C).

12. See 29 C.F.R. § 1630.2(j)(3)(i); see also *infra* notes 142-47 and accompanying text.

13. Throughout the literature and case law on the ADA, the words regarded and perceived are both used in the context of protection for persons regarded as disabled. See, e.g., *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997) (using both words). Thus, a regarded as disabled claim is a perceived disability claim.

as disabled are included in the statute. Finally, Part V describes the conflict between the goals of distributive and corrective justice that occurs when the plaintiff's perceived impairment could substantially limit only the major life activity of working. It argues that distributive justice must control the result and that protecting some plaintiffs and not others from identical discriminatory actions by an employer is the correct result under the ADA's protection for persons regarded as disabled.

## II. THE STATUTORY BASIS FOR THE ADA'S EMPLOYMENT PROTECTION FOR INDIVIDUALS "REGARDED AS" DISABLED

The ADA makes it illegal for covered employers<sup>14</sup> to "discriminate [in employment] against a qualified individual with a disability because of the [individual's] disability . . ." <sup>15</sup> A statute protecting individuals with disabilities against employment discrimination presents a special difficulty not encountered in statutes prohibiting employment discrimination based on other characteristics such as race, color, religion, sex, national origin, and age.<sup>16</sup> One's membership in these protected classes is generally readily discernable.<sup>17</sup> And the concepts underlying these other classes do not require extended statutory definitions. Disability, however, is not a personal characteristic with a fixed meaning like sex or race. Not everyone has a disability. Individuals with disabilities must encompass a wide variety of physical and mental impairments. Whereas we might all readily agree that a quadriplegic or schizophrenic is disabled, we may not readily

14. The ADA covers employers "engaged in an industry affecting commerce . . . [having] 15 or more employees for each working day in each of 20 or more calendar weeks." 42 U.S.C. § 12111(5)(A).

15. *Id.* § 12112(a).

16. See 2 U.S.C. § 1311(a) (Supp. II 1996) for a listing of classes protected from employment discrimination by federal law.

17. One can imagine situations in which membership in a particular class within these categories (race, sex, national origin, religion, and age) might be hard to discern. What race is a person of mixed race? What sex is a hermaphrodite? There might be sets of beliefs that one party would characterize as a religion but the other would not. One might appear to be older or younger than one's age. But generally, one is of one sex or the other; is or is not forty or over; is or is not a member of a particular religion; is or is not of a particular national origin. See 136 CONG. REC. 11,457-58 (1990) (reprinting testimony of attorney Ronald A. Lindsay before the Republican Study Committee on the ADA introduced into the record by Rep. Delay). Even persons of mixed race may allege discrimination on the basis of their mixed race or color. See *Ross v. Fort Wayne Bd. of Pub. Safety*, 590 F. Supp. 299, 302 (N.D. Ind. 1983) (involving a plaintiff of mixed racial heritage who appeared black). *But cf.* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (denying transsexuals protection under Title VII as transsexuals, but allowing that they may be protected as members of their newly assigned sex).

agree that a person with a less obvious, or lesser, physical or mental impairment is disabled. Disability requires a statutory definition.

The ADA states: "The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>18</sup> The first prong of the definition defines disability in broad terms to fit the many different kinds of disabilities that individuals have. This avoids the injustice that a finite list of qualifying disabilities would cause through inevitable underinclusiveness.<sup>19</sup> A case-by-case analysis<sup>20</sup> of the individual will show whether her particular physical or mental impairment constitutes a disability by investigating the nature and extent of the limitations the impairment imposes on the life activities of that individual.

The second prong of the definition ensures that a person with a history of disability (one who was formerly classified or misclassified as disabled) may not be discriminated against.<sup>21</sup> For example, a person who was blind for many years but has regained normal sight would be a person with a history of disability. A person formerly misclassified as learning disabled would also fall under this prong of the definition.<sup>22</sup>

Finally, the third, "regarded as" prong covers three kinds of situations: 1) where an individual has a physical or mental impairment that does not actually substantially limit a major life activity, but the employer believes it does;<sup>23</sup> 2) where an individual has "an impairment which is only substantially limiting because of the attitudes of others

18. 42 U.S.C. § 12102(2). The definition comes from the Vocational Rehabilitation Act. See 29 U.S.C. § 706(8)(B) (1994) (amended in 1974, Pub. L. No. 93-516, 88 Stat. 1617, 1619). The Rehabilitation Act prohibits employment discrimination on the basis of disability under federal grants and programs. See *id.* § 794. Because of the similarity between the two statutes, cases interpreting the Rehabilitation Act serve as authorities for interpreting the ADA. See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995). From this point, footnotes will indicate if a case discussed in this note is brought under the Rehabilitation Act rather than the ADA.

19. See 29 C.F.R. app. pt. 1630.2(j) (1997) ("The ADA . . . do[es] not attempt [to create] a 'laundry list' of impairments that are 'disabilities'.")

20. See *Ennis v. National Ass'n of Bus. and Educ. Radio*, 53 F.3d 55, 59-60 (4th Cir. 1995) ("[T]he plain language of the [definition] requires that a finding of disability be made on an individual[-by]-individual basis."); *Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 26 (1st Cir. 1993) ("[E]ach case [under the Rehabilitation Act] must be determined on its own facts.")

21. See 29 C.F.R. § 1630.2(k) (1997).

22. See *id.* app. pt. 1630.2(k).

23. See *id.* § 1630.2(l)(1).

toward the impairment;"<sup>24</sup> and 3) where an individual has "no impairment at all but is regarded by the employer . . . as having a substantially limiting impairment."<sup>25</sup> The first instance would include "an employee [with] controlled high blood pressure that . . . an employer reassigns . . . to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack."<sup>26</sup> The second instance would include an employee with "a prominent facial scar or disfigurement . . . [whom] an employer discriminates against . . . because of the negative reactions of customers . . . ."<sup>27</sup> The third instance would include an employee erroneously rumored to be infected with Human Immunodeficiency Virus (HIV) who was fired because the employer believed he was infected.<sup>28</sup>

There are two concepts that are important to understanding who is a person with a disability: "major life activity" and "substantial limitation." "'Major life activit[y]' means [a] function[ ] such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>29</sup> A major life activity is substantially limited if an individual is:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>30</sup>

The major life activity of working is the last activity that should be considered and should be considered only if no other major life activity is implicated.<sup>31</sup>

Case law under the "regarded as" prong is relatively scarce.<sup>32</sup> What case law does exist shows that it can be difficult for a plaintiff to

24. *Id.* app. pt. 1630.2(l); *see id.* § 1630.2(l)(2).

25. *Id.* app. pt. 1630.2(l); *see id.* § 1630.2(l)(3).

26. *Id.* app. pt. 1630.2(l).

27. *Id.*

28. *See id.*

29. *Id.* § 1630.2(h)(2)(i).

30. *Id.* § 1630.2(j)(1).

31. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT TITLE I TECHNICAL ASSISTANCE MANUAL § I-2.2(a)(iii) (1992).

32. *See* *Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 22 (1st Cir. 1993) ("[D]ecisional law involving . . . perceived disabilities . . . is hen's-teeth rare.") (interpreting the similar definition of disability found in regulations under the Rehabilitation Act, 45 C.F.R. § 84.3(j)(2) (1997)).

prove that his employer perceived him as disabled. It is a simple matter to prove one's race, sex, color, religion, national origin, or age. But proving that one is disabled—substantially limited in a major life activity—is a task in itself. And analyzing the “regarded as” prong adds another layer of complexity to an already complicated issue.

### III. THE CURRENT STATE OF CASE LAW INVOLVING EMPLOYMENT PROTECTION FOR INDIVIDUALS REGARDED AS DISABLED: PROVING MEMBERSHIP IN THE PROTECTED CLASS

The burden of proof is on the plaintiff when bringing a charge of employment discrimination under the ADA.<sup>33</sup> The threshold inquiry in any such charge is whether the plaintiff is a member of the protected class—an individual with a disability.<sup>34</sup> The particular concern here is the plaintiff's burden of proving membership in the protected class in the absence of actual disability or a record of disability. To prove that an employer regards him as disabled, a plaintiff must prove that his employer regarded him as having an impairment that substantially limits one or more major life activities.<sup>35</sup> Thus, the plaintiff's burden of proof includes establishing both that 1) the employer per-

As this note goes to press, the United States Supreme Court has recently issued its opinion in the case of *Bragdon v. Abbott*, No. 97-156 1998 WL332958 (U.S. June 25, 1998), one of its first cases dealing directly with the ADA. The case involved a dentist, Bragdon, who refused to fill the cavity of an asymptomatic HIV-positive woman, Abbott, in his office. *See id.* at \*4. Instead, he insisted that he treat her in a hospital. *See id.* Although this case involves Title III of the ADA (concerning discrimination in public accommodations), it has implications for cases brought under Title I of the ADA (concerning discrimination in employment). *See Disabilities: High Court Considers Whether HIV Infection Without Symptoms Is Covered Under ADA*, U.S.L.W. d2 (daily ed. Apr. 2, 1998). This is because the two titles share the three-pronged definition of person with a disability. *See* 42 U.S.C. § 12102(2) (1994).

Abbott included a “regarded as” argument in her brief, *see* Respondent's Brief at \*37-41, *Bragdon v. Abbott*, (U.S. 1998) (No. 97-156), *available in* 1998 WL 47514, and the amicus briefs for the United States and a group of Congressmen filed for respondent also put forward the “regarded as” argument. *See* Brief for the United States at \*11, 23 n.16, *Bragdon v. Abbott*, (U.S. 1998) (No. 97-156), *available in* 1998 WL 47255 (suggesting in a footnote that the case be remanded to the circuit court for consideration of the third prong claim if the Court rejects the first prong claim); Brief of Senators Harkin, Jeffords and Kennedy and of Representatives Hoyer, Owens and Waxman at \*13-23, *Bragdon v. Abbott*, (U.S. 1998) (No. 97-156), *available in* 1998 WL 52258. However, the Court found it unnecessary to discuss the “regarded as” argument because it found Abbott's HIV infection to be an actual disability. *See Bragdon*, 1998 WL332958, at \*5.

33. *See, e.g., Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995).

34. *See, e.g., Runnebaum*, 123 F.3d at 164-65. After proving membership in the class, plaintiff must go on to prove “that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he has suffered adverse employment action because of his disability.” *Benson*, 62 F.3d at 1112.

35. *See MacDonald v. Delta Air Lines, Inc.* 94 F.3d 1437, 1443 (10th Cir. 1996); *see also* 42 U.S.C. § 12102(2) (1994).



ceived that the plaintiff had a mental or physical impairment and 2) the impairment, as perceived, would limit one or more major life activities.<sup>36</sup> It is important to note that *as perceived* means *with the qualities the employer thinks the impairment has*.

Both of these aspects of proving membership in the protected class are potentially problematic for the plaintiff. The first aspect may be difficult to prove if the plaintiff has no actual impairment. And even if a plaintiff proves that the employer perceives an impairment, the plaintiff must also prove that the impairment, as perceived, would substantially limit a major life activity.

### A. *Proving that the Employer Perceives an Impairment*

If the plaintiff cannot prove that the employer perceived any impairment at all, the plaintiff will fail to establish membership in the protected class. However, the standards for finding an impairment are so broad and open-ended<sup>37</sup> that defendants are unlikely to challenge that they perceived some sort of impairment in the plaintiff. Furthermore, the completely unimpaired plaintiffs hypothesized by the regulations<sup>38</sup> do not appear with any frequency in the fact patterns found in appellate court decisions. In most reported cases, the parties do not even dispute that the employer perceived the plaintiff as having a mental or physical impairment.<sup>39</sup> This seems to be in large part due to the greater difficulty of proving that the perceived impairment can meet the substantially limiting test.

Regulations promulgated under the ADA define a "physical or mental impairment" as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive,

36. See *Cook*, 10 F.3d at 22-23; *Chandler v. City of Dallas*, 2 F.3d 1385, 1391-92 (5th Cir. 1993); *Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580 (N.D. Ala. 1996).

37. See *Cook*, 10 F.3d at 22-23 (characterizing the identical language in regulations promulgated under the Rehabilitation Act found at 45 C.F.R. § 84.3(j)(2)).

38. See 29 C.F.R. app. pt. 1630.2(l)(3) (1997).

39. A review of "regarded as" cases from the second half of 1997 as reported in Westlaw's federal labor and employment law database reveals that defendants do not normally dispute that they perceived an impairment. Search of Westlaw, FLB-CS database (April 18, 1998) (search for "perceived" or "regarded" and "A.D.A." in the "SY, DI" fields restricted to cases with dates after June 30, 1997 and before Jan. 1, 1998). This search returned 53 cases. Of these, 16 are irrelevant either because the case does not actually concern a "regarded as" claim, the procedural posture does not allow for discussion of facts, or the case has been vacated. In 30 of the remaining 38 fact patterns (one case consolidated two claims), the opinion reveals no dispute over whether the defendant perceived an impairment.

digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;  
or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>40</sup>

The definition does not encompass "physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder."<sup>41</sup> However, the language of this exception suggests that even a personal characteristic could be an impairment if it were (or were regarded as) abnormal. An employer would be regarding a given characteristic that is actually within normal range as an impairment if he believed the characteristic was abnormal. For example, an employer might believe that a man who is five foot nine inches tall is abnormally short even though he is within the normal range of height for men.<sup>42</sup> This is an entirely subjective test measuring what the employer believes, not what is objectively true. The definition of impairment has the potential of covering anything that might be seen as different.

The parties may not dispute the perception of an impairment because 1) the perception is based on a visible or obvious condition in the plaintiff that the employer cannot plausibly deny being aware of; 2) the plaintiff has informed the employer that he has some sort of impairment; 3) the defendant's own actions or statements have revealed the perception; or 4) a medical examination ordered by the employer has reported the existence of a medical condition. In the remaining cases, the defendant employer disputes whether it perceived the plaintiff as having any impairment at all.

1. Fact situations in which establishing the perception of impairment is relatively simple for the plaintiff

First, it is relatively easy to show that an employer has perceived an impairment when the basis for the perception is the presence in the plaintiff of a visible physical condition, an injury to or illness in the plaintiff which has occurred at work or necessitated time off from work, or the presence in the plaintiff of a mental condition that causes disruption at the workplace.

40. 29 C.F.R. § 1630.2(h) (1997).

41. *Id.* app. pt. 1630.2(h).

42. Of course, to be regarding this man as *disabled*, the employer would also have to attribute characteristics to this shortness such that shortness as perceived by the employer would substantially limit a major life activity.

For example, in *EEOC v. Texas Bus Lines*<sup>43</sup> and *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,<sup>44</sup> the plaintiffs were pronounced morbidly obese following medical examinations.<sup>45</sup> In *Texas Bus Lines*, the plaintiff applied for a job as a bus driver.<sup>46</sup> She "was interviewed, her references checked, and she . . . passed a road test . . ." <sup>47</sup> Then she underwent a medical examination required for bus drivers by federal regulations.<sup>48</sup> The doctor refused to issue her the required medical certificate because she was five feet seven inches tall and weighed 345 pounds.<sup>49</sup> He assumed her weight would prevent her from moving fast enough in the event of an accident without actually examining her agility.<sup>50</sup> The court characterized this as "clearly not a medical opinion."<sup>51</sup> She was not hired for lack of the certification.<sup>52</sup>

In *Cook*, the plaintiff reapplied for a position as an institutional attendant that she had previously held and performed satisfactorily.<sup>53</sup> When she reapplied she weighed more than 320 pounds and was five foot two inches tall.<sup>54</sup> The nurse performing the plaintiff's post-offer, pre-employment medical examination concluded that she was morbidly obese, but capable of doing the job.<sup>55</sup> The hospital refused to hire her fearing she would be unable "to evacuate patients in case of an emergency" and that her weight "put her at greater risk of developing serious ailments" leading to absenteeism and worker's compensation claims.<sup>56</sup>

Despite the involvement of medical exams, both of these cases are better understood as involving a visible and obvious impairment rather than an impairment that is revealed only through medical examination. The term morbid obesity itself is not a diagnosis,<sup>57</sup> but a

43. 923 F. Supp. 965 (S.D. Tex. 1996).

44. 10 F.3d 17 (1st Cir. 1993) (a Rehabilitation Act case).

45. See *Texas Bus Lines*, 923 F. Supp. at 967; *Cook*, 10 F.3d at 20.

46. See *Texas Bus Lines*, 923 F. Supp. at 967.

47. *Id.*

48. See *id.*

49. See *id.* at 967 n.1.

50. See *id.* at 967, 977-78.

51. *Id.* at 978.

52. See *id.* at 967-68.

53. See *Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 20 (1st Cir. 1993).

54. See *id.*

55. See *id.* at 20-21.

56. *Id.* at 21.

57. Diagnosis means "the discovery of the source of a patient's illness or the determination of the nature of his disease from a study of its symptoms." BLACK'S LAW DICTIONARY 453-54 (6th ed. 1990).

mere description of the extent of a person's obesity.<sup>58</sup> The doctor in *Texas Bus Lines* based his conclusions about the plaintiff's agility on "myth, fear or stereotype."<sup>59</sup> Because both plaintiffs had physical conditions that clearly provided a basis for the perception of an impairment, neither defendant was able to maintain successfully that it perceived no impairment.<sup>60</sup>

A condition is also obvious when it causes the plaintiff to take significant time off from work. When this happens, defendants cannot dispute that they perceived an impairment. For example, in *Rogers v. International Marine Terminals, Inc.*,<sup>61</sup> Rogers took over a year off of work to recover from persistent ankle pain.<sup>62</sup> The parties did not dispute that this pain constituted an impairment.<sup>63</sup> Similarly in *Ray v. Glidden Co.*,<sup>64</sup> Ray took leave for hip and shoulder replacement surgery.<sup>65</sup> The court simply stated, "Obviously Ray had an impairment."<sup>66</sup>

The defendant may also be precluded from arguing that it perceived no impairment because the plaintiff was injured in an on-the-job accident. For example, in *Hutchinson v. United Parcel Service, Inc.*,<sup>67</sup> a package delivery driver was involved in two driving accidents that injured her back and left shoulder.<sup>68</sup> In a motion for summary judgment, the court accepted "her impairments"<sup>69</sup> and concentrated on the substantially limiting test.<sup>70</sup>

Even the perception of a mental impairment can be taken for granted when it results from an on-the-job accident or otherwise manifests itself in the work environment. In *Marschand v. Norfolk &*

58. "[A] person [is] morbidly obese if she weighs either more than twice her optimal weight or more than 100 pounds over her optimal weight." *Cook*, 10 F.3d at 20 n.1.

59. *Texas Bus Lines*, 923 F. Supp. at 979 (quoting 29 C.F.R. app. pt. 1630.2(l)).

60. In *Texas Bus Lines*, the defendant argued only that it could not hire plaintiff as a driver because she did not receive the required Medical Examiner's Certificate from the examining doctor. *See id.* at 968. In *Cook*, the defendant argued that the alleged mutability and voluntariness of obesity prevented it from being covered by the Rehabilitation Act. *See Cook*, 10 F.3d at 23-24. The court correctly held that mutability and voluntariness spoke to the substantially limiting aspect of the impairment and not to whether the defendant perceived an impairment. *See id.* at 24.

61. 87 F.3d 755 (5th Cir. 1996).

62. *See id.* at 757.

63. *See id.* at 758.

64. 85 F.3d 227 (5th Cir. 1996).

65. *See id.* at 228.

66. *Id.* at 229.

67. 883 F. Supp. 379 (N.D. Iowa 1995).

68. *See id.* at 385.

69. *Id.* at 395.

70. *See id.*

*Western Railway*,<sup>71</sup> the plaintiff was the engineer of a train when it struck a pick-up truck at a grade crossing, killing the young couple and child within.<sup>72</sup> He claimed to suffer post-traumatic stress disorder (“PTSD”) as the result of the accident.<sup>73</sup> The court stated that “[i]t [wa]s undisputed that Marschand’s PTSD qualifie[d] as a ‘mental impairment.’”<sup>74</sup> Similarly, in *Neveau v. Boise Cascade Corp.*,<sup>75</sup> a paper mill worker’s claustrophobia was discovered on the job when she had a panic attack after being lowered into one of the pulp slushers to clean it.<sup>76</sup> Co-workers had to help her out of the slusher.<sup>77</sup> The disruption that the impairment caused at the workplace essentially made it impossible for the employer to maintain that it perceived no impairment.<sup>78</sup>

Second, an employer may be unable to challenge a perceived impairment because the plaintiff told the employer he or she was ill or otherwise impaired. When the plaintiff has told the employer about an impairment, the employer cannot claim that it perceived no impairment. For example, in *Overturf v. Penn Ventilator Co.*, the plaintiff “told [the] Defendant’s Vice President . . . that he had a tumor behind his eye” just a few hours before he was fired.<sup>79</sup> The employer did not deny knowledge of the tumor, but instead argued that it had planned to fire the plaintiff before learning of the tumor.<sup>80</sup> And in *Dotson v. Electro-Wire Products, Inc.*,<sup>81</sup> the plaintiff brought a note to the personnel director of her factory and asked that it be placed in her file.<sup>82</sup> The note informed her employer that she had “a disability which prevented [her from performing] hard physical labor.”<sup>83</sup> She had previously told her supervisor that she could not cut off plastic molds with

71. 876 F. Supp. 1528 (N.D. Ind. 1995), *aff’d*, 81 F.3d 714 (7th Cir. 1996) (abandoning ADA claim on appeal and pursuing only claim under the Federal Employers’ Liability Act).

72. *See id.* at 1530.

73. *See id.*

74. *Id.* at 1538.

75. 902 F. Supp. 207 (D. Or. 1995). The plaintiff’s claim here is based on Oregon law, which has a different standard for finding a substantial limitation in the major life activity of working. *See id.* at 210.

76. *See id.* at 208.

77. *See id.*

78. *See id.* (“[M]anagement decided that other employees would clean and maintain the slushers.”).

79. 929 F. Supp. 895, 897 (E.D. Pa. 1996).

80. *See id.* at 899. It also argued that the tumor did not substantially limit a major life activity. *See id.* at 898.

81. 890 F. Supp. 982 (D. Kan. 1995).

82. *See id.* at 986.

83. *Id.* (describing a condition similar to carpal tunnel syndrome, but calling it only a “disability”).

shears because of what the plaintiff called "a disability in [her] hands."<sup>84</sup> These communications by the plaintiff to her employer established the existence and perception of an impairment in the plaintiff.<sup>85</sup> In granting summary judgment for the employer, the court concentrated on showing that the impairment did not meet the substantially limiting test rather than that no impairment was perceived.<sup>86</sup>

Third, the defendant may even reveal through its own actions and statements that it perceived an impairment and, thus, lose the ability to argue that it did not. In *Spath v. Berry Plastics Corp.*,<sup>87</sup> the employer's vice president referred to the plaintiff's ankle injury when declining to give her work assignments.<sup>88</sup> The plaintiff had broken her ankle and took time off work.<sup>89</sup> The vice president's statements provided direct evidence of the employer's perception.

Fourth, medical examinations can eliminate the possibility of the defendant arguing that it perceived no impairment. For example, in *Bridges v. City of Bossier*,<sup>90</sup> the plaintiff had applied for a firefighter position.<sup>91</sup> After some preliminary tests, he revealed during his pre-employment medical exam that he had a mild form of hemophilia.<sup>92</sup> This revelation formed the basis of the defendant's refusal to offer him the position,<sup>93</sup> precluding any possibility of arguing that it perceived no impairment in the plaintiff. Similarly in *Welsh v. City of Tulsa*, another firefighter applicant "completed all requirements for the application process, but was disqualified by the City's physician" because of slight numbness in two fingers of one hand.<sup>94</sup> Again the results of the medical examination formed the basis for the refusal to hire the plaintiff.<sup>95</sup>

A vision test required before employment or in the course of employment may also establish the perception of an impairment. In

84. *Id.* at 985-86.

85. *Cf. id.* at 988 (assuming "her impairment" existed).

86. *See id.* at 989-91 (finding no evidence that the impairment allegedly perceived was substantially limiting).

87. 900 F. Supp. 893 (N.D. Ohio 1995).

88. *See id.* at 898.

89. *See id.*

90. 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

91. *See id.* at 331.

92. *See id.*

93. *See id.*

94. 977 F.2d 1415, 1416 (10th Cir. 1992).

95. *See id.* The court did not actually reach the question of whether the plaintiff's condition constituted an impairment because it found that the condition did not substantially limit a major life activity. *See id.* at 1419.

*Schluter v. Industrial Coils, Inc.*,<sup>96</sup> the plaintiff was employed as a supervisor in the defendant's factory.<sup>97</sup> Her employer had known about her diabetes since the 1970s, and the disease had not restricted her work activities.<sup>98</sup> But around 1990, her diabetes began to affect her eyesight.<sup>99</sup> After she twice failed a visual acuity test required by her employer so the plant could qualify for a new military contract, she was removed from her position.<sup>100</sup> And in *MacDonald v. Delta Air Lines, Inc.*,<sup>101</sup> the plaintiff was an airplane mechanic who was denied certification to taxi aircraft after failing a vision test.<sup>102</sup> In both cases, the plaintiffs established enough evidence in the summary judgment context to establish the perception of an impairment.<sup>103</sup>

## 2. Fact situations in which the defendant employer is likely to challenge that an impairment was perceived

Despite the relative ease in proving that an impairment was perceived, occasionally defendants dispute that any impairment was perceived at all. For example, in *Pouncy v. Vulcan Materials Co.*,<sup>104</sup> the plaintiff alleged in her complaint that the employer perceived she had a mental impairment.<sup>105</sup> As evidence, she stated that her supervisors had complained of her inability to get along with her co-workers and sent her to career counseling.<sup>106</sup> The career counselor told Pouncy's supervisors that Pouncy would make no progress in a career counseling context.<sup>107</sup> Then the supervisors asked Pouncy if she was going to the company's employee assistance program for personal counseling.<sup>108</sup> They suggested that going to personal counseling would demonstrate her commitment to improving her job performance.<sup>109</sup> Four months later, Pouncy was terminated.<sup>110</sup> The procedural posture in *Pouncy* required the court to view the evidence in the light most

96. 928 F. Supp. 1437 (W.D. Wis. 1996).

97. *See id.* at 1441.

98. *See id.*

99. *See id.*

100. *See id.* at 1441-43.

101. 94 F.3d 1437 (10th Cir. 1996).

102. *See id.* at 1445.

103. Both plaintiffs established the perception of an impairment, yet failed to establish it substantially limited a major life activity. *See Schluter*, 928 F. Supp. at 1449-50; *MacDonald*, 94 F.3d at 1445.

104. 920 F. Supp. 1566 (N.D. Ala. 1996).

105. *See id.* at 1580.

106. *See id.* at 1574-75.

107. *See id.* at 1576.

108. *See id.*

109. *See id.*

110. *See id.* at 1576-77.

favorable to the plaintiff and assume that she had established the perception of a mental impairment.<sup>111</sup> However, the court strongly suggested that the employer merely perceived that Pouncy had a difficult personality, not a mental illness, and that perceiving a difficult personality was not the same as perceiving an impairment.<sup>112</sup> The court strongly suggested that a difficult personality is not an impairment because it is within a normal range of personal characteristics.<sup>113</sup>

Some cases suggest that a lack of evidence that the employer altered the conditions of employment for the plaintiff will show that the employer did not perceive that the plaintiff was impaired. In *Duff v. Lobdell-Emery Manufacturing Co.*,<sup>114</sup> the plaintiff, Duff, thought he suffered a heart attack, but only had high blood pressure.<sup>115</sup> He believed that his doctor attributed his high blood pressure partially to job stress.<sup>116</sup> After a brief absence from work, Duff returned and informed his supervisor that his doctor told him to limit his working hours to forty per week.<sup>117</sup> After his return to work, Duff did in fact work more than forty hours a week.<sup>118</sup> When during his second week back Duff reminded his supervisor about his doctor's forty-hour limitation, the supervisor replied: "you'll work the hours I tell you to work."<sup>119</sup> The court took this as evidence that the defendant employer never regarded Duff as impaired, stating: "This statement does not lead to an inference that [the supervisor] considered Mr. Duff to be disabled in any way; it indicates that Lobdell-Emery believed that Mr. Duff was capable of working the hours demanded of him."<sup>120</sup>

111. *See id.* at 1580. The court was considering the defendant employer's motion for summary judgment on Pouncy's ADA claim that was eventually awarded to the defendant because, even assuming Pouncy had a mental impairment, the impairment did not substantially limit a major life activity. *See id.* at 1581, 1585.

112. *See id.* at 1580-81 & n.8. This is one of the rare cases in which it appears that a completely unimpaired plaintiff has pursued an ADA claim under the "regarded as" prong:

In the instant case, it is clear that [the] defendant perceived Pouncy as having some behavioral and attitude problems that adversely affected her work. However, because Pouncy was never diagnosed with any mental impairment, and indeed she claims she does not have a mental impairment, it is difficult to attribute her problems to anything other than her personality.

*Id.*

113. *See id.*

114. 926 F. Supp. 799 (N.D. Ind. 1996).

115. *See id.* at 802.

116. *See id.*

117. *See id.*

118. *See id.* (working 51.5 hours in the first week back and 75.5 in the second).

119. *Id.*

120. *Id.* at 808.



Similarly in *Shpargel v. Stage & Co.*,<sup>121</sup> the plaintiff claimed that carpal tunnel syndrome limited his ability "to work for more than eight straight hours."<sup>122</sup> The court took the employer's insistence that the plaintiff work overnight to complete a special job as evidence that it did not regard the plaintiff as having any impairment.<sup>123</sup> But the court ultimately relied on a substantially limiting test to award summary judgment to the defendant.<sup>124</sup>

And in *Shah v. Upjohn Co.*,<sup>125</sup> the plaintiff claimed she was allergic to an unspecified substance in the laboratory in which she was required to work.<sup>126</sup> The employer acknowledged that the plaintiff's symptoms could be due to an allergic reaction.<sup>127</sup> However, the court seemed to be somewhat surprised that "Upjohn does not appear to dispute that Shah's condition—described by her as EOS and its alleged 'associated adverse health effects'—is a physical impairment."<sup>128</sup> Medical evaluations were inconclusive about the source of the plaintiff's allergen.<sup>129</sup> Furthermore, Upjohn's insistence that she report to work in the lab and have any symptoms evaluated on site<sup>130</sup> seemed to indicate that it did not perceive the plaintiff as impaired. As this case points out, even where a defendant has evidence that it perceived no impairment, defendants tend to rely on the substantially limiting test anyway.

### *B. Proving that the Impairment as Perceived Substantially Limits a Major Life Activity*

The next part of the test for membership in the class of persons regarded as disabled is to establish that the impairment as perceived substantially limits a major life activity.<sup>131</sup> When the impairment as perceived is alleged to limit substantially a major life activity other than work, the analysis under this test is relatively straightforward, even implicit. Courts look at whether the impairment as perceived

121. 914 F. Supp. 1468 (E.D. Mich. 1996).

122. *Id.* at 1471.

123. *See id.* at 1471, 1474.

124. *See id.* at 1474.

125. 922 F. Supp. 15 (W.D. Mich. 1995), *aff'd*, 107 F.3d 871 (6th Cir. 1997).

126. *See id.* at 17-19.

127. *See id.* at 18.

128. *Id.* at 24 n.12 (citation omitted) (quoting complaint).

129. *See id.* at 19.

130. *See id.* at 21-22.

131. *See Pouncy v. Vulcan Materials Co.*, 920 F. Supp. 1566, 1580 (N.D. Ala. 1996); *see also Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993); *Chandler v. City of Dallas*, 2 F.3d 1385, 1392 (5th Cir. 1993); *supra* notes 29-31 and accompanying text.

would keep the plaintiff from performing “a major life activity that the average person in the general population can perform;” or restrict the “condition, manner or duration under which [the plaintiff] can perform” the major life activity compared to the average person.<sup>132</sup> The plaintiff’s impairment will fail this test if the employer perceives it to be minor, temporary, or lacking in “permanent or long term impact”<sup>133</sup> on the plaintiff.<sup>134</sup>

For example, in *EEOC v. Texas Bus Lines*,<sup>135</sup> the court found that the defendant perceived the obese bus driver applicant as impaired in her ability to walk.<sup>136</sup> The court did not need to elaborate on whether this perceived impairment substantially limited the plaintiff in a major life activity because the doctor examining the patient for the employer admitted he thought she had difficulty walking.<sup>137</sup> Instead the court concentrated on whether the plaintiff was qualified and whether the defendant relied on the perception in refusing to hire the plaintiff.<sup>138</sup> In ruling in favor of the plaintiff, the court found that the defendant did regard the plaintiff as having an impairment that substantially limited the major life activity of walking.<sup>139</sup> However, in *Rogers v. International Marine Terminals, Inc.*,<sup>140</sup> the employer perceived the impairment (an ankle problem that affected plaintiff’s mobility) as temporary, and it failed the substantially limiting analysis.<sup>141</sup>

When the plaintiff alleges that the impairment as perceived is substantially limiting in the major life activity of working however, the required analysis is more complex.<sup>142</sup> The perceived impairment in such cases generally will be less severe than in cases where another major life activity is implicated. To be regarded as substantially limited in the ability to work, the plaintiff 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 compara-

132. 29 C.F.R. § 1630.2(j)(1) (1997).

133. *Id.* § 1630.2(j)(2)(iii).

134. *Cf. id.* § 1630.2(j).

135. 923 F. Supp. 965 (S.D. Tex. 1996).

136. *See id.* at 967-68.

137. *Cf. id.* at 977-78 (doctor’s testimony).

138. *See id.* at 970-74.

139. *See id.* at 982.

140. 87 F.3d 755 (5th Cir. 1996).

141. *See id.* at 760.

142. In cases of perceived disability, the Equal Employment Opportunity Commission (“EEOC”) instructs its investigators to “consider whether [the employee] is regarded as having an impairment that substantially limits the major life activity of working” only after determining that no other major life activities are implicated. EEOC COMPLIANCE MANUAL, § 902.8(f) (1995) [hereinafter COMPLIANCE MANUAL].

ble training, skills and abilities.”<sup>143</sup> This means that the inability to do a single job will not be considered a substantial limitation on the major life activity of working.<sup>144</sup> Furthermore, because the statute requires a case-by-case analysis, courts may also consider: 1) the geographical area in which the plaintiff could reasonably seek employment; 2) the type of job from which the plaintiff has been disqualified; and 3) whether the plaintiff would be excluded from a class of jobs (jobs using “similar training, knowledge, skills or abilities”)<sup>145</sup> or a broad range of jobs in various classes (jobs not using “similar training, knowledge, skills or abilities”)<sup>146</sup> in the particular area if he were impaired as perceived.<sup>147</sup> These criteria make perceived disability cases involving the major life activity of working the most complicated.

Defendants will succeed in showing that the perceived impairment is not substantially limiting when: 1) the perceived impairment is minor or limits only a narrow job requirement; 2) the job from which the plaintiff is barred is highly specialized; or 3) the plaintiff’s own particular options are not limited. In *Soileau v. Guilford of Maine, Inc.*,<sup>148</sup> the plaintiff’s perceived impairment, chronic depression, made it difficult for him to interact with others “for long periods of time.”<sup>149</sup> The court found that the perceived depression did not limit substantially the major life activity of working because the defendant never limited the types of job responsibilities given to Soileau.<sup>150</sup> In short, the perceived impairment was too minor to be substantially limiting.

Further, in *Schluter v. Industrial Coils, Inc.*, the plaintiff’s perceived vision impairment was found to affect only her ability “to perform a narrow range of production work that involves focused vision on tiny objects . . . [and not the] broad range of production work dealing with larger items.”<sup>151</sup> Similarly in *Dutcher v. Ingalls Shipbuilding*,<sup>152</sup> the plaintiff welder’s perceived impairment prevented her from performing jobs requiring climbing.<sup>153</sup> Because the impairment did

143. 29 C.F.R. § 1630.2(j)(3)(i) (1997); see *supra* notes 29-31 and accompanying text for the definition of substantially limited as it applies to other major life activities.

144. See *id.*

145. *Id.* § 1630.2(j)(3)(ii)(B).

146. *Id.* § 1630.2(j)(3)(ii)(C).

147. See *id.* § 1630.2(j)(3)(ii).

148. 928 F. Supp. 37 (D. Me. 1996), *aff’d*, 105 F.3d 12 (1st Cir. 1997) (failing to pursue a “regarded as” claim on appeal).

149. *Id.* at 43.

150. See *id.* at 51.

151. 928 F. Supp. 1437, 1448 (W.D. Wis. 1996).

152. 53 F.3d 723 (5th Cir. 1995).

153. See *id.* at 727-28 (including language about the perceived disability claim that is dicta because the plaintiff alleged only actual disability).

not bar the plaintiff from all welding jobs, it could not be considered as barring her from a class of jobs.<sup>154</sup> Consequently, the impairment did not substantially limit the major life activity of working.<sup>155</sup>

When plaintiffs apply for a highly specialized job, they may fail to show that the disqualifying impairment is perceived to be a disability because it would not bar them from a class of jobs or a broad range of jobs. For example in *Bridges v. City of Bossier*,<sup>156</sup> the defendant only perceived the mildly hemophiliac plaintiff as unable to perform in the narrow range of firefighter jobs.<sup>157</sup> The employer in *Bridges* maintained that firefighters were at high risk for suffering severe traumatic injury and that Bridges' impairment, as it perceived it, would put him at special risk.<sup>158</sup> The court was unconvinced by Bridges' assertion that a broad range of jobs such as law enforcement, construction work, and quarry work would also present a high risk for severe trauma.<sup>159</sup>

A plaintiff may fail to show that the perceived impairment is substantially limiting in the major life activity of working because of the plaintiff's own skills or training. For example, in *McKay v. Toyota Motor Manufacturing, U.S.A., Inc.*,<sup>160</sup> the plaintiff had carpal tunnel syndrome and alleged that her employer perceived that it substantially limited her in the major life activity of working.<sup>161</sup> The plaintiff established that her employer perceived her carpal tunnel syndrome as disqualifying her from "repetitive factory work."<sup>162</sup> But because McKay "was a [twenty-four] year old college graduate, working on earning her teaching certificate, . . . she . . . qualified for numerous positions 'not utilizing' the skills she learned as an automobile assembler."<sup>163</sup>

154. *See id.* at 727.

155. *See id.*

156. 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

157. *See id.* at 334.

158. *See id.* at 331.

159. *See id.* at 333.

160. 878 F. Supp. 1012 (E.D. Ky. 1995), *aff'd*, 110 F.3d 369 (6th Cir. 1997) (failing to consider the "regarded as" prong on appeal) (reporting also denial of rehearing and suggestion for rehearing en banc).

161. *See id.* at 1014.

162. *Id.* at 1015.

163. *Id.* The Court of Appeals for the Sixth Circuit affirmed the district court's holding that McKay's carpal tunnel syndrome did not substantially limit her in the major life activity of working. *See McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d at 372 (failing to address the "regarded as" portion of the claim). However, in reviewing de novo the award of summary judgment, the appeals court based its decision that carpal tunnel syndrome did "not significantly restrict her 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," on its finding that McKay was only unable to "perform repetitive factory work," which constituted "only a narrow range of jobs." *Id.* at 373. It rejected the contention that McKay was "disqualif[ied]

Therefore, the perceived impairment would not substantially limit her ability to work.

In some cases, a plaintiff succeeds in showing that the impairment is substantially limiting to the major life activity of working. In these cases the plaintiff shows that the impairment as perceived would restrict the plaintiff from a class of jobs or a broad range of jobs. In *EEOC v. Chrysler Corp.*,<sup>164</sup> the complaining party's post-offer medical test revealed a high blood sugar level.<sup>165</sup> Chrysler refused to hire him as a heavy industrial electrician because it perceived him as being "subject to dizziness, fainting, or convulsions."<sup>166</sup> It restricted the plaintiff to floor-level work away from moving machinery, open pits, and fire.<sup>167</sup> The court found that these restrictions demonstrated that the plaintiff's impairment, as the employer perceived it, would bar him from holding a broad range of industrial jobs.<sup>168</sup>

Further, in *EEOC v. Joslyn Manufacturing Co.*,<sup>169</sup> the complaining party, Cruz, had previously undergone operations to relieve carpal tunnel syndrome in both of his wrists.<sup>170</sup> His post-offer medical examination revealed this fact to Joslyn.<sup>171</sup> Although Cruz claimed not to have any remaining symptoms of carpal tunnel syndrome, Joslyn's doctor reported that he should not perform "repetitive motions of [the] bilateral hands."<sup>172</sup> Joslyn withdrew its offer for the position of punch press operator as a result of this report.<sup>173</sup> The court found that given the range of job opportunities available to Cruz, a Mexican immigrant with a GED certificate, the EEOC had presented enough

'from performing any manual labor exceeding light duty.'" *Id.* (quoting Brief for EEOC, *McKay*, 110 F.3d (No. 95-5617)). In so doing, the court not only avoided basing its holding on McKay's ability to perform other kinds of work, but also failed to endorse the EEOC's contention that in considering whether a person is substantially limited in the major life activity of working a court may only consider what the person *cannot* do. *Cf. id.* at 372-73. The relatively lengthy dissent called the majority's characterization of McKay's limitations "disingenuous." *Id.* at 377. This note maintains that the EEOC is incorrect and that it is proper to consider what work plaintiffs can do in determining whether they are substantially limited in the major life activity of working. *See infra* notes 281-94 and accompanying text. For example, using the EEOC's logic, a person who had an LLM from a prestigious university but who also had carpal tunnel syndrome would be substantially limited in the major life activity of working because he could not perform any manual labor exceeding light duty. *Cf. McKay*, 110 F.3d at 372-73.

164. 917 F. Supp. 1164 (E.D. Mich. 1996).

165. *See id.* at 1165.

166. *Id.* at 1166.

167. *See id.*

168. *See id.* at 1169.

169. No. 95-C4956, 1996 WL 400037 (N.D. Ill. July 15, 1996).

170. *See id.* at \*1.

171. *See id.* at \*3.

172. *Id.*

173. *See id.* at \*4.

evidence that Joslyn's alleged perceived impairment would substantially limit Cruz in his ability to find work for purposes of withstanding summary judgment.<sup>174</sup>

In *Smith v. Kitterman, Inc.*,<sup>175</sup> the plaintiff was in a position very similar to that of the plaintiff in *McKay*.<sup>176</sup> Smith was an industrial worker with carpal tunnel syndrome that restricted her from working with "tools requiring repetitive grasping, sustained strong gripping and the use of small hand tools."<sup>177</sup> Despite the similarity of Smith's impairment to the impairment in *McKay*, the court found that Smith *could* withstand a motion for summary judgment on the issue of whether she was in the protected class.<sup>178</sup> In contrast to *McKay*, Smith was a forty-two-year-old woman who never completed high school or any vocational training.<sup>179</sup> The impairment as allegedly perceived by Kitterman did substantially limit her in the major life activity of working because of her limited job opportunities.<sup>180</sup> Smith survived the "regarded as" inquiry at the summary judgment level.

### C. Other Important Aspects of Regarded as Disabled Cases

In litigating a "regarded as" disabled claim however, it is not enough simply to understand the test for membership in the protected class. Plaintiffs and defendants should also clearly understand the relationship of this type of claim to a claim of actual disability made in the alternative and to the employer's duty to accommodate the perceived disability. These relationships can be important to each party's case.

#### 1. The relationship between claims of actual disability and perceived disability

A common scenario in perceived disability cases involves plaintiffs alleging in the alternative that they are actually disabled or that their employer regarded them as disabled. Such alternative claims are possible. For example, in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*,<sup>181</sup> the jury had been

174. See *id.* at \*1, \*7.

175. 897 F. Supp. 423 (W.D. Mo. 1995).

176. *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 878 F. Supp. 1012, 1014 (E.D. Ky. 1995), *aff'd*, 110 F.3d 369, 374 (6th Cir. 1997); see *supra* notes 160-63 and accompanying text.

177. *Kitterman*, 897 F. Supp. at 425.

178. See *id.* at 427-28.

179. See *id.* at 427.

180. See *id.*

181. 10 F.3d 17 (1st Cir. 1993) (a Rehabilitation Act case).

charged in the alternative—they could find either that the plaintiff was actually disabled or was regarded as disabled by her employer.<sup>182</sup> The jury failed to specify whether it found that the plaintiff was actually disabled or merely regarded as such.<sup>183</sup> On appeal, the court held that the evidence was sufficient to support either finding.<sup>184</sup>

However, the perceived disability claim cannot serve the plaintiff as a mere fallback position should his actual impairment fail to satisfy the first prong definition. This failure is evident in two cases discussed above: *Schluter v. Industrial Coils, Inc.*<sup>185</sup> and *Soileau v. Guilford of Maine, Inc.*<sup>186</sup> Soileau and Schluter both argued in the alternative that they were actually disabled or were regarded as disabled.<sup>187</sup> However, in each case the impairment alleged to be actual was identical to the impairment alleged to be perceived. An impairment that fails to meet the substantially limiting test when it is an actual impairment will not suddenly become substantially limiting merely because it is perceived. The alternative “regarded as” argument will not work unless the defendant perceived the plaintiff as “more disabled than he actually was.”<sup>188</sup> Otherwise, the “claims of actual disability and perceived disability collapse into one another and both fail.”<sup>189</sup> It is the employer’s perception of the impairment that controls the operation of the perceived disability test. It is this perceived impairment that must substantially limit the plaintiff in a major life activity. Unless the employer’s perception is different from reality, the plaintiff argues in the alternative for naught.<sup>190</sup>

## 2. The employer’s responsibility of reasonable accommodation for the person regarded as disabled

The relationship of the “regarded as” claim to the employer’s duty to accommodate a disability under the ADA can sometimes be an important one for both sides because the presence or absence of employer accommodation can work for or against either side depending on the context. However, issues of reasonable accommodation

182. *See id.* at 23.

183. *See id.*

184. *See id.* at 24, 26.

185. 928 F. Supp. 1437 (W.D. Wis. 1996); *see supra* notes 96-100, 151 and accompanying text.

186. 928 F. Supp. 37 (D. Me. 1996) *aff’d*, 105 F.3d 12 (1st Cir. 1997); *see supra* notes 148-50 and accompanying text.

187. *See Schluter*, 928 F. Supp. at 1443; *Soileau*, 928 F. Supp. at 42.

188. *Lampe v. Anderson News Corp.*, No. 94-16608, 1996 U.S. App. LEXIS 3373, at \*4 n.1 (9th Cir. Feb. 9, 1996).

189. *Id.*

190. *See id.*

seldom arise in "regarded as" cases, and when they do, they are often secondary to issues of class membership.

Although the focus of this note is on the nature of membership in the class of persons regarded as disabled and not on the nature of reasonable accommodation under the ADA, it is important to realize that the act of perceiving the employee as disabled obligates the employer to make reasonable accommodation for the perceived disability.<sup>191</sup> If the employer believes that the employee can perform adequately only with some form of accommodation that the employer unreasonably refuses to provide, then the employer has violated the ADA.<sup>192</sup>

Reasonable accommodation is defined by the EEOC as modifications or adjustments to the job application process, the job description, or the work environment that would allow the disabled employee to apply for a job, perform in a job, and share in the benefits and privileges of a job on an equal basis with other, non-disabled persons.<sup>193</sup> To provide reasonable accommodation an employer might have to modify its facilities, restructure job definitions, modify work schedules, reassign a disabled individual to a vacant position, or provide special equipment or qualified readers or interpreters to aid the disabled employee.<sup>194</sup> An important step in identifying the necessary accommodation can be "to initiate an informal, interactive process with the . . . [disabled individual to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."<sup>195</sup>

In the context of perceived disability case law, where the litigated issue is first and foremost whether the plaintiff is in the protected class, issues of reasonable accommodation are not usually discussed in detail. For instance, in cases where the plaintiff does not believe he is disabled, he will not, of course, have requested reasonable accommodation. Such cases can arise when the plaintiff has not been hired or has been fired or involuntarily transferred. In cases where the employee requests that accommodation be made but the employer re-

191. See 42 U.S.C. § 12111(8) (1994) ("The term 'qualified individual with a disability' means an individual . . . who, with or without reasonable accommodation, can perform the essential functions of the employment position. . . .").

192. See *id.* (defining a qualified individual as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position"); *id.* § 12112(a) (prohibiting employment discrimination "against a qualified individual with a disability").

193. See 29 C.F.R. § 1630.2(o)(1) (1997).

194. See *id.* § 1630.2(o)(2).

195. *Id.* § 1630.2(o)(3).



fuses to make such accommodations, there can be two different results. In some circumstances, the employer's refusal to provide accommodation can serve as evidence that the employer did *not* perceive that the plaintiff was disabled. In other circumstances, the result is the opposite, with the employer's refusal to meet the plaintiff's request serving as evidence that the employer perceived that the plaintiff *was* disabled.

*EEOC v. Chrysler Corp.*<sup>196</sup> is an example of the first type of case, where an employee does not consider himself disabled and makes no request for accommodation. In *Chrysler*, the job applicant, Darling, was refused a position because the results of a post-offer medical test revealed he had elevated blood sugar.<sup>197</sup> Only following the results of the test did Darling seek private medical advice.<sup>198</sup> His physician diagnosed him as a diabetic, but placed no work restrictions on him.<sup>199</sup> Fearing that Darling would be "subject to dizziness, fainting, or convulsions,"<sup>200</sup> Chrysler refused to hire Darling until it could find a position for him that involved only floor-level work.<sup>201</sup> The issue here was not whether seeking a floor-level job for Darling was a reasonable accommodation for his diabetes because, in fact, Darling was not subject to dizziness, fainting, or convulsions. Darling made no request for a floor-level job; it was Chrysler's idea.<sup>202</sup> The EEOC prevailed in the case.<sup>203</sup> Chrysler misperceived the nature of Darling's impairment and limited his job opportunities based on this misperception.<sup>204</sup> Its proposed accommodation worked against it.

*Duff v. Lobdell-Emery Manufacturing Co.*<sup>205</sup> is an example of the second type of case, where the employer's refusal to meet the em-

196. 917 F. Supp. 1164 (E.D. Mich. 1996); *see also supra* notes 164-68.

197. *See id.* at 1165-66.

198. *See id.* at 1165.

199. *See id.* at 1166.

200. *Id.*

201. *See id.* at 1166. Darling was finally hired by Chrysler approximately one year later when it found him a position involving only floor work. *See id.* at 1166-67.

202. *See id.* at 1166.

203. *See id.* at 1173.

204. *See id.* at 1166. *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17 (1st Cir. 1993), and *EEOC v. Texas Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996), are cases similar to *Chrysler*. In both *Cook* and *Texas Bus Lines*, the defendant employers refused to hire the job applicants because they believed that obesity rendered the applicants incapable of performing the job. *See Cook*, 10 F.3d at 21; *Texas Bus Lines*, 923 F. Supp. at 967-68. Therefore, the issue of reasonable accommodation did not arise in either case. Both plaintiffs prevailed. *See Cook*, 10 F.3d at 28; *Texas Bus Lines*, 923 F. Supp. at 982; *supra* notes 43-60 and accompanying text.

205. 926 F. Supp. 799 (N.D. Ind. 1996). *See supra* notes 114-20 for a discussion of the case in the context of challenging the perception of an impairment.

ployee's request for accommodation served as evidence that the employer did not regard the employee as disabled. In *Duff*, the plaintiff told his employer following a blood-pressure-related illness that his doctor wanted his work hours restricted to forty per week.<sup>206</sup> When he returned to work, the employer asked him to work overtime, and he did.<sup>207</sup> This situation could be characterized as a request for accommodation and a refusal to provide it. But, instead, the court interpreted the employer's demand that the plaintiff work overtime as evidence that the employer did not perceive that the employee was substantially limited in his ability to work.<sup>208</sup>

Reasonable accommodation was at least a secondary, underlying issue in *Schluter v. Industrial Coils, Inc.*<sup>209</sup> In this case, considered on the defendant's motion for summary judgment, the plaintiff alleged that her employer failed to make reasonable accommodation for her vision impairment.<sup>210</sup> Plaintiff's supervisory position required her periodically to inspect soldering for which she used an illuminated magnifier for short intervals.<sup>211</sup> When the employer acquired a military contract, it required all employees involved in soldering to pass a visual acuity test as called for by published military standards.<sup>212</sup> Plaintiff could not use an illuminated magnifier for the test and failed it.<sup>213</sup> She was removed from her supervisory position.<sup>214</sup> Although she and the employer discussed the possibility of transferring to another position, she said she could not think of a position that would not require her to look through a magnifier at all times, for all her work, which she thought would be too difficult.<sup>215</sup> She never actually requested to be transferred to any particular position and eventually resigned.<sup>216</sup> In the end, the court granted summary judgment for the defendant

206. *See id.* at 802, 807.

207. *See id.* at 802.

208. *See id.* at 808. Other cases that can be viewed in a similar manner are *Shpargel v. Stage & Co.*, 914 F. Supp. 1468, 1474 (E.D. Mich. 1996) (insisting that plaintiff work overtime despite requested limit of eight hours work per day), *supra* notes 121-24 and accompanying text, and *Shah v. Upjohn Co.*, 922 F. Supp. 15-19 (W.D. Mich. 1995) (refusing to reassign plaintiff from laboratory work). *See supra* notes 125-30 and accompanying text.

209. 928 F. Supp. 1437 (W.D. Wis. 1996) (involving a plaintiff alleging that she was actually disabled or, alternately, regarded as disabled); *see supra* notes 96-100, 151 and accompanying text.

210. *See Schluter*, 928 F. Supp. at 1441.

211. *See id.* at 1442.

212. *See id.*

213. *See id.*

214. *See id.* at 1442-43.

215. *See id.* at 1443.

216. *See id.*

because the plaintiff failed to allege sufficient facts to show that she was disabled or regarded as such.<sup>217</sup>

Another example of where reasonable accommodation has been an issue is *Stone v. La Quinta Inns, Inc.*<sup>218</sup> In this case, a husband and wife were hired as a team to manage a hotel.<sup>219</sup> The husband had a visual problem and requested that the employer provide emulation software to enlarge the type on the office computer so he could read it.<sup>220</sup> The software was not provided.<sup>221</sup> The couple was fired less than two weeks into their training program, despite positive evaluations from their trainers prior to the request for accommodation.<sup>222</sup> The plaintiffs withstood a motion for summary judgment because they put forth enough evidence to create a question of fact whether the employer regarded the husband as disabled because of a substantial limitation in either the major life activity of seeing or working.<sup>223</sup>

These cases suggest that issues of reasonable accommodation are often not central to perceived disability cases. The reasonable accommodation issue can be subsumed into the underlying threshold issue of whether the plaintiff is in the protected class. As *Chrysler* illustrates, a perceived disability plaintiff that does not believe he is disabled will have no accommodation request. As *Duff* and *Schluter* suggest, vague requests for accommodation or failure to make any request may actually be used to show that the employer did not perceive a disabling impairment. But the plaintiff with a specific accommodation request as in *Stone*, may use the request as evidence that the employer did perceive a disabling impairment.

However, common sense tells us that the duty of reasonable accommodation in perceived disability cases is not likely to be a heavy burden on the employer because the impairments involved are not, by definition, disabling. Any accommodation is either unnecessary or minor.

217. See *id.* at 1450.

218. 942 F. Supp. 261 (E.D. La. 1996).

219. See *id.* at 263.

220. See *id.*

221. See *id.*

222. See *id.* at 263, 266.

223. See *id.* at 264, 267.

#### IV. ISSUES OF DISTRIBUTIVE AND CORRECTIVE JUSTICE IN THE ADA

To demonstrate how perceived disability cases relate to the ADA as a whole, one must address the underlying justifications of the law. To do this, the ADA's relationship to other discrimination laws must be examined. Part IV begins with the laws' relationships to the concepts of distributive and corrective justice.

Throughout this note, distributive justice and corrective justice each convey their Aristotelian meaning. Aristotle described distributive justice as being "concerned with the 'distributions of honour or money or the other things that fall to be divided among those who have a share in the [government].'"<sup>224</sup> Distributive justice emphasizes the relationship of the acting parties to society as a whole. It requires that "things [be] allocated to persons in accordance with a criterion of distribution."<sup>225</sup> It is not primarily concerned with evaluating the behavior of the parties in moral terms. It does not ask if one party has inflicted an injustice on the other. Instead it evaluates each party in the light of the established external criterion seeking to determine which party better deserves to prevail in the particular matter.

Aristotle used corrective justice to describe the kind of justice "concerned with interactions between persons that affect those persons' existing holdings or stocks of goods."<sup>226</sup> When "any interaction results in unjust losses or gains . . . corrective justice reaffirms and restores the preexisting equality [of the parties] by imposing a duty on the injurer to disgorge any unjust gain and to compensate the injured for any unjust loss."<sup>227</sup> The compensation is made regardless of the relative merits of the parties in terms of any distributive justice criterion.<sup>228</sup> Corrective justice asks whether one party has inflicted upon another a moral wrong that must be corrected.

In the context of employment discrimination law, corrective justice operates when the law compensates an employee who has been

224. Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 691 (1992) (alteration in the original) (quoting ARISTOTLE, NICOMACHEAN ETHICS V.2 at 1130b30-33 (W.D. ROSS & J.O. URMSON Trans.) in 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984)).

225. Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 535 (1992).

226. Wright, *supra* note 224, at 691. Professor Wright uses the word *interaction* to replace the traditional Aristotelian term *transaction* to emphasize that the concept covers voluntary and involuntary interactions. See *id.* at 691 n.311.

227. *Id.* at 692.

228. See *id.* at 691-92.

discriminated against because of his race, sex, color, national origin, religion, or age (if over forty). Basing an employment decision on race, sex, color, national origin, religion, or age is prohibited as morally wrong. It is an improper motivation for the employer in the employment transaction. It results in an unjust loss for the employee that is compensable under Title VII<sup>229</sup> or the ADEA.<sup>230</sup>

This is not to say that Title VII and the ADEA serve no distributive justice purpose. They may well increase the amount of societal goods that flow to, for example, racial minorities, women, Hispanics, or older persons through the elimination of employment discrimination. And it may well be that those groups hold generally fewer of the goods offered by society. However, Title VII and the ADEA have a primarily corrective justice approach because neither imposes any duties on the employer until the employer bases an employment decision on a prohibited characteristic. Even in the context of disparate impact cases where an employer violates the statute because its policy has an unintentionally more adverse impact on a protected group than on the workforce as a whole,<sup>231</sup> the statutes still concentrate on corrective justice. In such cases, the employer only has a duty to avoid policies that would tend to make its employment decisions less favorable to a protected class because the policy depends on some factor that is not legitimately job-related.<sup>232</sup> The employer has no duty analogous to reasonable accommodation that would require it to modify any aspect of the job so that members of a protected group can qualify for the position. Here the transactional wrong is not overt prejudice, but more like ignorance—a dependence on an arbitrary factor with an unintentional disparate impact on the protected group. Until this or some other wrong arises in the transaction between the employer and the employee, no duty is owed.

Furthermore, Title VII does not establish any criteria that narrow the protected class. All persons are protected from job actions based on their race, sex, color, religion, or national origin, not just persons whose race, sex, color, religion, or national origin might put them in a group of persons needing or meriting a greater distribution of societal goods. Even members of a generally favored racial, cultural, or reli-

229. 42 U.S.C. §§ 2000e-e17 (1994 & Supp. I 1996).

230. 29 U.S.C. §§ 621-34 (1994 & Supp. I 1996).

231. *See, e.g., Connecticut v. Teal*, 457 U.S. 440 (1982).

232. *See, e.g., id.*

gious group or sex can bring a claim under Title VII.<sup>233</sup> Though the ADEA does restrict its protection to persons aged forty or over, all persons are still potential members of this protected group.

The ADA, on the other hand, primarily serves the purposes of distributive justice in that it establishes criteria that identify a group that needs or merits a greater distribution of societal goods.<sup>234</sup> The ADA states that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."<sup>235</sup> The ADA establishes an affirmative duty on the part of employers to make reasonable accommodation for a qualified person with disabilities in order to accomplish these goals. This is true regardless of whether the employer has caused the disabled person an unjust loss. Redistribution is required because of the employee's status, not because the employer has committed a moral wrong.

Furthermore, the ADA protects on the basis of a characteristic that is not possessed by all persons.<sup>236</sup> One's status as a member of the group of persons with disabilities is the determining factor in whether an employer must reasonably accommodate one's physical or mental impairment. The transaction between the employer and employee that violates the ADA because the employee is actually disabled is not one that can be evaluated in a vacuum. First, we must measure the employee against the criterion established by the statute to see if he is deserving of protection. This important difference between Title VII and the ADEA on the one hand and the ADA on the other is evident in the legislative histories of the statutes.

#### A. *The Legislative History of the ADA as Compared to Those of Title VII and the ADEA*

The legislative histories of the statutes support the contention that the ADA is based in distributive justice while the other statutes are based in corrective justice. In adopting Title VII and the ADEA, Congress was primarily concerned with correcting unjust losses inflicted on employees by employers who were motivated by racial, reli-

233. See, e.g., *Loeffler v. Frank*, 486 U.S. 549 (1988) (involving a male postal employee successfully suing his employer under Title VII for employment discrimination on the basis of sex).

234. The ADA does not, however, establish an overall scheme of distributive justice. It does not require that all things in society be allocated to each person according to one's degree of disability.

235. 42 U.S.C. § 12101(a)(8) (1994).

236. See *supra* notes 18-28 and accompanying text for a discussion of the definition of person with disabilities under the ADA.

gious, or sex-based prejudice, or bias against older persons rooted in ignorance. In adopting the ADA, however, Congress was first and foremost concerned with eliminating barriers to the ability of the disabled to participate fully in society and only secondarily concerned with correcting the injustices involved in the discriminatory transaction between employer and disabled employee. This can be seen in the emphasis given to the statute's reasonable accommodation provisions in the legislative history.

As part of the Civil Rights Act of 1964 (the "CRA"),<sup>237</sup> Title VII has its origins in the struggle for civil rights for African Americans. The CRA was "designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States."<sup>238</sup> But the law was clearly designed to deal with the specific problems of the African American population. In its general statement about the CRA, the House Judiciary Committee described what motivated the bill:

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against [African Americans] which exists throughout our Nation. . . .

. . . .

. . . [I]n the last decade it has become increasingly clear that progress [in eliminating such discrimination] has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced . . . by a growing impatience by the victims of discrimination . . . and . . . a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.<sup>239</sup>

Title VII's prohibitions were drafted in the context of this moral outrage aimed at racial prejudice. The employer who bases an adverse job action against an individual on the individual's race, sex, religion, color, or national origin commits a moral wrong. As Senator Hubert Humphrey stated when explaining to the Senate proposed changes to Title VII, "[The bill] can provide the framework of law within which men and women of good will and of reason, dedicated to the preservation of the dignity of human rights, can . . . adjudicate civil wrongs."<sup>240</sup>

237. Pub. L. No. 88-352, 78 Stat. 241, 253 (1964).

238. H.R. REP. NO. 88-914, at 16 (1963) (Judiciary Committee's report on the CRA submitted by Rep. Rodino).

239. *Id.* at 18.

240. 110 CONG. REC. 12,725 (1964).

That Title VII of the CRA was making a moral assertion about the way individuals should act toward one another in the employment context can also be seen in the nature of the opposition to the bill. Rather than objecting to the bill's employment provisions on morally neutral grounds, such as an adverse economic impact on employers, opponents of Title VII positioned their views on moral grounds as well. The opposition claimed that the bill exceeded Congress' constitutional powers and impinged the personal constitutional rights of citizens.<sup>241</sup> In explaining that he thought the bill went too far, one representative wrote that, "Respect for these personal rights is . . . a matter of individual moral duty."<sup>242</sup>

Similarly, the Age Discrimination in Employment Act has its roots in the CRA. While Title VII covered only employment discrimination on the basis of race, color, religion, sex, and national origin, the CRA also directed the Secretary of Labor to study age discrimination in employment and make "recommendations for legislation to prevent arbitrary [age] discrimination in employment."<sup>243</sup> The resulting study emphasized that employment discrimination against older persons did not stem from general societal prejudice against older persons.<sup>244</sup> Rather, it stemmed from ignorance of the capabilities of older persons and arbitrary rules automatically excluding older persons from consideration for employment in the name of bureaucratic expediency.<sup>245</sup> The result of banning such arbitrary discrimination would be to force employers not to bar older persons automatically from consideration for employment. However, as finally adopted, the ADEA did not impose any duty on employers to make accommodation for any actual limitations created by the worker's age.<sup>246</sup> The older person would merely have "the right to be equally considered for employment and promotion."<sup>247</sup>

241. See H.R. REP. NO. 88-914, at 46 (additional views of Rep. George Meader).

242. *Id.* at 61 (additional views of Rep. Carleton J. King).

243. Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964).

244. See W. WILLIAM WIRTZ, SECRETARY OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* 5-17 (1965), reprinted in OFFICE OF THE GENERAL COUNSEL, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT* 16, 22-34 (1981).

245. See *id.*

246. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 ("It is . . . the purpose of this Act to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment. . . ."). In fact, the ADEA specifically recognizes that age can be a bona fide occupational qualification. See 29 U.S.C. § 623(f)(1) (1994). And it allows employers to provide lesser benefits for older employees because of the greater cost involved in providing benefits to older, as compared to younger, workers. See *id.* § 623(f)(2)(B)(i).

247. 113 CONG. REC. 31,253 (1967) (remarks of Sen. Yarborough).



The immediate genesis of the ADA, however, is not in the civil rights movement of the 1960s, but in federal efforts to aid the disabled. In 1984, Congress directed the National Council on the Handicapped to prepare a report on federal programs detailing the degree to which they, *inter alia*, “promote[d] the full integration of [disabled] individuals in the community, in schools, and in the workplace, and contribute[d] to the independence and dignity of such individuals.”<sup>248</sup> The resulting report was entitled *Toward Independence* and included a proposal for “a comprehensive law requiring equal opportunity for individuals with disabilities.”<sup>249</sup> The goals of the proposed law were to promote “independence and access to opportunities for people with disabilities,”<sup>250</sup> and its coverage was to include a prohibition on both intentional and unintentional exclusion of the disabled and an express “duty to make reasonable accommodations” for a person’s disability.<sup>251</sup> Implicit in this recommendation is that the proposed law would transfer some of the costs of caring for the disabled from government-financed support programs to employers.

The report led to the introduction of the bill that would become the ADA. Legislators in each house gave credit to the report as an important step in the development of the bill.<sup>252</sup> Furthermore, the legislative history is filled with references to the goals advanced in the report—removing societal barriers which prevent the disabled from participating fully in the life of the nation and improving the economic lot of the disabled.<sup>253</sup> For example, the Senate Committee on Labor

248. Pub. L. No. 98-221, 98 Stat. 17, 27 (1984) (amending the Rehabilitation Act of 1973).

249. NATIONAL COUNCIL ON THE HANDICAPPED, *TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES—WITH LEGISLATIVE RECOMMENDATIONS* 18 (1986) [hereinafter *TOWARD INDEPENDENCE*]. The report suggested entitling the law “The Americans with Disabilities Act of 1986.” *Id.*

250. *Id.*

251. *Id.* at 19-20.

252. *See, e.g.*, 136 CONG. REC. 11,701 (1990) (containing comments of Rep. Gingrich on the role of the National Council on Disability in the development of the ADA); S. REP. NO. 101-116, at 6 (1989) (containing the report of the Senate Comm. on Labor and Human Resources submitted by Sen. Kennedy).

253. *See, e.g.*, 136 CONG. REC. 17,360 (1990) (statement of Sen. Kennedy) (“By approving the Americans with Disabilities Act, the Congress affirms its commitment to remove the physical barriers and the antiquated social attitudes that have condemned people with disabilities to second-class citizenship for too long.”); 136 CONG. REC. 11,471 (1990) (extension of remarks by Rep. Hoyer) (“[T]his act is designed to continue breaking down barriers to the integrated participation of people with disabilities in all aspects of community life.”); 136 CONG. REC. 11,701 (1990) (extension of remarks by Rep. Gingrich) (“The goals of the ADA . . . are to remove attitudinal, architectural, transportation, communication, and employment barriers which exist for persons with disabilities in American society.”); *id.* at 11,462 (remarks of Rep. Stokes) (“[W]e now have before us a bill that takes strong action to eliminate barriers to the full participation of the disabled in our society, . . .”); *id.* at 10,880 (remarks of Rep. Coyne) (“The [ADA] will remove the barriers disabled individuals experience. Further, it will provide employment

and Human Resources wrote that a major goal of the ADA was “to bring persons with disabilities into the economic and social mainstream of American life.”<sup>254</sup> The employment provisions of the ADA were part of this overall goal and were not simply designed to prevent employment discrimination against the disabled, but to remove all barriers to their employment. The ADA necessarily had to address who would pay for the removal of those barriers if it was to be effective.

The essential provision of the ADA’s employment protection is the requirement that employers make reasonable accommodation for the disabled up to the point that such accommodation causes the employer undue hardship.<sup>255</sup> An important focus of the debate on the ADA was the cost this would impose on employers. From the beginning, supporters of the bill maintained that the cost of accommodation would normally be small.<sup>256</sup> But the duty of reasonable accommodation and the meaning of undue hardship became a focus of debate about the employment provisions of the bill. Supporters of the bill acknowledged that costs to the employer were involved, but stressed the ultimate benefits to society.<sup>257</sup> Opponents of the employment

and economic opportunities to a deserving population in this country.”); *id.* at 10,874 (remarks of Rep. Kleczka) (“Removing barriers to full participation by disabled individuals in everyday life will create direct and tangible benefits for the American economy. More disabled persons working increases earnings, lessens dependence on the Social Security system, increases spending on consumer goods, and increases revenues.”); 135 CONG. REC. 19,893 (1989) (statement of Sen. Leahy) (“If we remove barriers to work for the disabled, we can turn welfare payments into tax receipts.”); 134 CONG. REC. 11,182 (1988) (remarks of Sen. Riegle) (“[R]ehabilitation and work efforts will not allow individuals to achieve their maximum potential unless we eradicate barriers to employment and transportation, and other forms of discrimination.”); *id.* at 9607 (extension of remarks by Rep. Owens) (noting “the savings we’ll realize from decreased benefit support costs, as employment barriers fall and disabled people recover their innate productive capacity.”).

254. S. REP. NO. 101-116, at 2.

255. 42 U.S.C. § 12112(b)(5) (1994). Representative Steny H. Hoyer described the employer’s duty of reasonable accommodation as “a central provision of the bill.” 136 CONG. REC. 11,468 (1990) (extension of remarks).

256. *See, e.g.*, TOWARD INDEPENDENCE, *supra* note 249, at app. A15-16 (“Concerns about the costs and disruptiveness of the duty to make reasonable accommodations have been found to be largely misplaced. Studies have found that workplace accommodations [made pursuant to regulations under the Rehabilitation Act] for individuals with disabilities frequently cost little or nothing.”) (citation omitted); S. REP. NO. 101-116, at 10 (“Several witnesses also explained . . . that compliance with [regulations under the Rehabilitation Act] has been ‘no big deal.’”).

257. *See* 136 CONG. REC. 11,471 (1990) (extension of remarks by Rep. Hoyer) (“While the integration of people with disabilities will sometimes involve substantial short-term burdens, the long-range effects of integration will benefit society as a whole.”).

provisions as written stressed that the imposition of costs on the employer was a departure from previous civil rights bills.<sup>258</sup>

An amendment to the reasonable accommodation provisions introduced in the House shows that House members were aware of the costs that employers would potentially bear under the Act. Representative Olin proposed an amendment that would have created a presumption of undue hardship if an employer had to spend more than ten percent of an employee's annual salary or annualized hourly rate on accommodating that employee's disability.<sup>259</sup> In debating the amendment, the members on both sides of the issue acknowledged that the ADA imposed costs on employers that would aid the disabled.<sup>260</sup> Their debate was essentially over the nature of the criterion of merit in the ADA's distributive justice scheme. Supporters of the amendment claimed that it would help employers, especially small businesses, to plan for the costs involved in "helping the handicapped gain employment."<sup>261</sup> But opponents stressed that some reasonable accommodations would last for years and should not be charged against a single employee's salary.<sup>262</sup> Furthermore, it was inequitable to say, in effect, that more highly paid disabled employees deserved more reasonable accommodation than their lower-paid counterparts.<sup>263</sup> Finally, opponents of the amendment argued that the standard should be flexible because the proper measure of reasonable accommodation was not the employee's salary, but the employer's

258. See, e.g., 136 CONG. REC. 11,457-58 (1990). Rep. DeLay introduced into the record the following testimony from attorney Ronald A. Lindsay made before the Republican Study Committee on the ADA:

I want to emphasize the dramatic differences between this bill and other employment discrimination legislation. The ADA has been described as just another civil rights measure that extends to the disabled the protections that have already been given to blacks, women and the elderly. It is not. Unlike Title VII . . . [and] the [ADEA] which, at least theoretically, only require businesses to make decisions based on merit, the ADA expressly imposes costs on employers. The ADA tells employers that they must offer "reasonable accommodation" to the known physical or mental disabilities of a qualified applicant or employee. This is a significant departure from other civil rights legislation. At a time when we are legitimately concerned about the competitiveness of American business, it is questionable whether we should impose additional burdens on employers, especially if the magnitude and scope of these burdens is unclear.

*Id.* at 11,457.

259. See *id.* at 10,904.

260. See *id.* at 10,904-08 (reporting floor debate).

261. *Id.* at 10,908 (statement of Rep. McCollum).

262. See *id.* at 10,907 (Rep. Payne stated, "[T]he . . . amendment fails to recognize that many accommodations such as a ramp, reader, or interpreter, last for many years and would benefit employees other than the applicant . . .").

263. See *id.* at 10,906 (Rep. Schroeder stated, "It [the amendment] is great for Donald Trump. It is lousy for the person who is cleaning up after Donald Trump.").

ability to pay.<sup>264</sup> The disabled employee deserves to be accommodated to the extent reasonably possible for the employer. The amendment was defeated.<sup>265</sup>

It is this requirement to make reasonable accommodation up to the point of undue hardship that so firmly establishes the ADA's employment protections in concepts of distributive justice. Title VII and the ADEA address only the internal qualities of the transaction of employer and employee. If the adverse employment action objected to is motivated by the complaining party's race, sex, color, religion, national origin, or age (if over forty), then the employer has imposed an unjust loss on the complaining party that must be corrected. In establishing whether there has been a violation, there is no reference to the employer's financial capabilities and no requirement that the complaining party have some special quality not possessed by all persons. On the other hand, the ADA looks beyond the internal qualities of the transaction. Does the complaining party meet the definition of a disabled person so as to be deserving of reasonable accommodation? And would the accommodations required by the disabled party be reasonable for the particular employer? It is this imposition of a duty on employers to bear the costs of accommodating the disabled person's impairment(s) that is essentially a decision about how societal goods should be allocated.

### *B. Why Does the ADA Protect Persons Regarded as Disabled?*

However, if the ADA is a statute based in distributive justice that requires that the complaining party deserve its protection, why does it cover persons who do not need the protection? Including persons regarded as disabled in the protected class under the ADA subverts its distributive justice rationale. Including such persons in the reach of the statute seems more consistent with ideas of corrective justice. This is because, in evaluating whether an employee has been regarded as disabled, we emphasize not how the employee stacks up against the criterion established by the statute, but how the employer perceived the employee. We return to evaluating the internal transaction between the two parties as in Title VII and ADEA discrimination cases. The crux of the analysis is once again whether (assuming proof of dis-

264. See *id.* at 10,907 (Rep. Hoyer stated, "[F]or a small business, [the amount of money that would constitute undue hardship] will obviously be a smaller number than for a larger business.>").

265. See *id.* at 10,908 (reporting that Noes were 213, and Ayes, 187, with thirty-two members not voting).

criminatorious motivation) the employee suffered an unjust loss. It is an unjust loss if the employer acted because it perceived him as disabled.

The inclusion of persons regarded as disabled in a statute protecting the disabled from job discrimination is not automatic. Not all state statutes which protect the disabled from employment discrimination include persons regarded as disabled in the language of the statute.<sup>266</sup> For example, the Washington State Law Against Discrimination prohibits, without further elaboration, employment discrimination against individuals based on "the presence of any sensory, mental, or physical disability."<sup>267</sup> Other states follow the federal model and explicitly include protection for persons regarded as disabled.<sup>268</sup> If the purpose of the ADA truly is "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [disabled] individuals,"<sup>269</sup> why must it protect people who are not prevented by disability from attaining those goals on their own? One cannot claim that these goals are directly advanced by protecting those regarded as disabled.<sup>270</sup>

There seem to be two reasons the ADA has a "regarded as" provision. The first might be called a moral equivalence justification. In analogizing the ADA to the discrimination statutes that came before it, it seems unjust to allow an employer to act against someone he thinks is in the protected class simply because he is mistaken.<sup>271</sup> It is too much like allowing an employer who does not like Hispanics not to hire an individual she mistakenly thought was Hispanic.<sup>272</sup> The

266. See Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345, 347-48 (1996).

267. WASH. REV. CODE ANN. § 49.60.010 (West Supp. 1998). However, the Washington statute has been interpreted by state agencies and courts to protect persons regarded as disabled despite its lack of explicit language to that effect. See Moberly, *supra* note 266, at 349-50.

268. For example, Michigan's Handicappers' Civil Rights Act includes persons "regarded as having a determinable physical or mental characteristic." MICH. COMP. LAWS § 37.1103(e)(iii) (1997). Wisconsin's statute includes "an individual who . . . [h]as a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work . . . or . . . [i]s perceived as having such an impairment." WIS. STAT. § 111.32(8) (1997).

269. 42 U.S.C. § 12101(a)(8) (1994).

270. See Moberly, *supra* note 266, at 365 ("[T]he need of the 'class' is not often cited in support of the argument that employment discrimination statutes should protect individuals erroneously perceived to be disabled.").

271. In amending the Rehabilitation Act in 1974 to include persons regarded as disabled, the Senate analogized to the employment protection under the Civil Rights Act for persons mistakenly thought to be members of a racial minority. See S. REP. NO. 93-1297, at 38-39 (1974).

272. See *Perkins v. Lake County Dep't of Utilities*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994). The *Perkins* court wrote:

[F]or purposes of entitlement to relief under Title VII, [t]he court deems it unnecessary, and indeed inappropriate, to attempt to measure Plaintiff's percentage of Indian blood or to examine his documentable connection to recognized existing tribes. Employers do not discriminate on the basis of such factors. Objective appearance and

mere fact that she was motivated by racial animus, whether or not her perception of the individual's race was correct, would violate Title VII.<sup>273</sup> Why should we shield the employer from liability just because of her lucky mistake when she is engaging in exactly the kind of behavior prohibited by the statute?

In the case of the disabled, we are saying that the employer discriminating against the employee she believes is disabled is acting in the same way as an employer discriminating against an employee who is truly disabled. As the United States Supreme Court has explained, "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."<sup>274</sup> This rationale was clearly stated in *Vande Zande v. Wisconsin Department of Administration*:

Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.<sup>275</sup>

The second reason for having the "regarded as" provision could be called the prophylactic justification.<sup>276</sup> Because the broad terms of the first prong of the definition of disability are difficult to meet and are designed to be flexible,<sup>277</sup> employers might be willing to take a chance that a given individual they think is disabled might not actually be disabled under the definition and refuse to hire her. Such behavior would inevitably lead to discrimination against the truly disabled when an employer was not sure about an employee's status under the first prong of the definition. Protecting an employee that an employer believes is disabled would prevent such spillover discrimination.<sup>278</sup> In

employer perception are the basis for discrimination and . . . the key factors relevant to enforcing rights granted members of a protected class.

*Id.*

273. See, e.g., *id.*

274. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987) (referring to the protection for individuals regarded as disabled under the Rehabilitation Act).

275. 44 F.3d 538, 541 (7th Cir. 1995).

276. Cf. *Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 22 (1st Cir. 1993) ("[The plaintiff's] allegations state a cause of action under the Rehabilitation Act, for the prophylaxis of section 504 embraces not only those persons who are in fact disabled, but also those persons who bear the brunt of discrimination because prospective employers view them as disabled.").

277. See *supra* notes 18-20 and accompanying text.

278. See *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997) ("By subjecting to liability employees who discriminate on the mistaken belief that an individual has a disability—for example, an employer who fires an employee based on the erroneous belief that the em-

this way, the “regarded as” disabled protection is indirectly necessary to accomplish the integrational goals of the ADA. Without it, employers would have an incentive to discriminate against some persons who were actually disabled.

Both of these explanations are more consistent with corrective justice than with distributive justice. Both examine the nature of the employer’s motivation in acting against the employee. But the prophylactic justification helps explain why the “regarded as” prong is not necessarily inconsistent with the distributive justice goals of the ADA as long as we are focussed on the nature of the employer’s behavior.<sup>279</sup>

#### V. THE CONFLICT BETWEEN DISTRIBUTIVE AND CORRECTIVE JUSTICE WHEN THE PERCEIVED IMPAIRMENT COULD SUBSTANTIALLY LIMIT ONLY THE MAJOR LIFE ACTIVITY OF WORKING

When the “regarded as” prong intersects with the major life activity of working, the corrective justice aspect of the “regarded as” prong conflicts with the distributive justice goals of the truly disabled definition. Compare *McKay*<sup>280</sup> and *Kitterman*<sup>281</sup>—two carpal tunnel syndrome cases discussed previously. The comparison reveals that the “regarded as” prong can lead to situations in which the identically-motivated behavior of employers is and is not violative of the ADA.

ployee has heart disease—the [ADA] deter[s] discrimination against those who actually have such disabilities.”)

279. *But cf.* Robert L. Burgdorf Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstruction of the Definition of Disability, 42 VILL. L. REV. 409 (1997). Professor Burgdorf argues against the “protected class” approach of ADA jurisprudence. *Id.* at 424-27. In the language of this note, he would prefer that our reading of the ADA be based in concepts of corrective justice rather than distributive justice. He argues that the second (record of disability) and third (“regarded as”) prongs of the definition of disability should be understood to broaden the protections offered by the statute “to any person who has been treated differently or unequally in relation to a real or perceived mental or physical impairment.” *Id.* at 528 (disregarding whether the real or perceived impairment substantially limits a major life activity). He writes that “the restrictive language of the first prong of the definition of disability responds to th[e] need for a definite eligibility class for affirmative action purposes, while the second and third prongs give the expansive breadth needed for the prohibition of discrimination.” *Id.* He suggests that, in all cases, “analysis under disability nondiscrimination laws should focus on the alleged discriminatory treatment meted out by the party charged with discriminating, not on the characteristics of the person allegedly subjected to such discrimination.” *Id.* at 584. He concludes, “[I]t is not too late . . . to get back on the right track.” *Id.* at 585.

280. *McKay v. Toyota Motor Mfg. U.S.A., Inc., Co.*, 878 F. Supp. 1012 (E.D. Ky. 1995), *aff’d*, 110 F.3d 369 (6th Cir. 1997). For a discussion of *McKay*, see *supra* notes 160-63 and accompanying text.

281. *Smith v. Kitterman, Inc.*, 897 F. Supp. 423 (W.D. Mo. 1995). For a discussion of *Kitterman*, see *supra* notes 175-80 and accompanying text.

*McKay* and *Kitterman* both involved women factory workers who had carpal tunnel syndrome.<sup>282</sup> After losing her job, each made a claim against her employer under the ADA.<sup>283</sup> *McKay* was twenty-four years old and studying to be a teacher.<sup>284</sup> She was qualified for other kinds of employment.<sup>285</sup> *Smith*, however, was forty-two years old, had “never completed high school and ha[d] no vocational training,” and had worked at only two jobs in twenty-five years—both for *Kitterman*.<sup>286</sup> Her prospects for finding a job using different skills, training, and abilities than factory work were not good.<sup>287</sup> Upon motion for summary judgment made by the employer challenging the plaintiff’s status as a person with disabilities, *McKay*’s claim failed, but *Smith*’s claim survived.<sup>288</sup> These different results occur because the focus of the “regarded as” prong is on the behavior of the employer while the focus of the inquiry into substantial limitation of the major life activity of working is on the employee.

If one gave preference to the corrective justice aspect of the “regarded as” prong, one would put both plaintiffs in the protected class and potentially hold the employer liable in both situations. One can make a moral equivalence argument<sup>289</sup> and say that the *McKay* employer was behaving in a way that was just as wrong as the behavior of the *Kitterman* employer. One could also make a prophylactic argument<sup>290</sup> about each case—preventing both employers from basing their decisions on such perceptions would help to prevent discrimination against the truly disabled. However, to do so fundamentally alters the nature of the class that the ADA protects.

The ADA is not a statute that prevents employers from discriminating in employment on the basis of non-disabling impairments except when the employer perceives that the employee’s impairment is disabling. Rather the ADA is designed to protect persons whom an individual assessment has revealed are disabled and are, for that reason, deserving of protection in the distributive justice sense. To protect the *McKay*-type employee who could do other kinds of work even if she were impaired as perceived would be to turn the ADA into a

282. See *McKay*, 878 F. Supp. at 1013-14; *Kitterman*, 897 F. Supp. at 425.

283. See *McKay*, 878 F. Supp. at 1013; *Kitterman*, 897 F. Supp. at 424.

284. See *McKay*, 878 F. Supp. at 1015.

285. See *id.*

286. *Kitterman*, 897 F. Supp. at 427.

287. See *id.* at 427-8.

288. See *McKay*, 878 F. Supp. at 1016; *Kitterman*, 897 F. Supp. at 431.

289. See *supra* notes 271-75 and accompanying text.

290. See *supra* notes 276-77 and accompanying text.



statute that protects persons not based upon an individual assessment of the plaintiff, but based on an idea that certain impairments are automatically disabling despite the individual analysis.

Protecting the *McKay*-type employee who is capable of working in a field in which the perceived impairment would not impede her would be too far removed from the goals of the ADA. The *Kitterman*-type worker would be substantially limited in her ability to find work if she had the perceived impairment because she is not capable of finding work using skills, training, and abilities not affected by the perceived impairment. If she were actually impaired as perceived, she would meet the criterion of merit identified by the ADA. But McKay would not meet the criterion even if she were actually limited in the way her employer imagined. Protecting her would require an unjustifiable double fiction. The first fiction is evaluating whether the impairment *as perceived* is substantially limiting. The second fiction would be to base the answer to the previous question not on an assessment of the abilities of the plaintiff but on some imagined worker in the same field. This goes against the "case-by-case" analysis contemplated by the ADA and takes the analysis to a level of abstraction not supported by the language of the statute.<sup>291</sup>

The Equal Employment Opportunity Commission ("EEOC") takes this very approach. The EEOC's Compliance Manual instructs its investigators that they "should look at the number and types of jobs, in the geographical area to which the individual has reasonable access, that use similar training, knowledge, skills, and abilities (a class of jobs) and that do not use similar training, knowledge, skills, and abilities (a broad range of jobs)."<sup>292</sup> If the perceived impairment would preclude the complainant from either "a class of jobs or a broad range of jobs in various classes," the EEOC would conclude that the employer regarded the complainant as substantially limited in the major life activity of working.<sup>293</sup>

In taking this approach however, the EEOC ignores promulgated regulations which emphasize comparing the complainant "to the average person having comparable training, skills and abilities."<sup>294</sup> The EEOC's approach as exemplified in the Compliance Manual fails to

291. See *Ennis v. National Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir. 1995); see also *supra* note 20 and accompanying text (discussing the requirement for case-by-case analysis).

292. COMPLIANCE MANUAL, *supra* note 142, at § 902.8(f) (relying on 29 C.F.R. § 1630.2(j)(3)(ii) (1997)).

293. *Id.*

294. 29 C.F.R. § 1630.2(j)(3)(i).

make an individual assessment when determining whether the complainant is substantially limited in the major life activity of working. The EEOC would have the ADA protect the complainant when the perceived impairment would disqualify her from jobs that use training, skills, and abilities similar to the employer's job even if the complainant had other skills, training, and abilities that would allow her to perform different jobs even if she were impaired as perceived. Under the EEOC's approach both the *McKay*- and *Kitterman*-type complainants would be in the protected class. This approach is very consistent with the corrective justice aspects of the "regarded as" provision, but it fails to recognize that a complainant who would remain employable even if she were impaired as perceived by the employer does not merit the protection of the statute.

## VI. CONCLUSION

Including persons "regarded as" disabled in the definition of persons with disabilities under the ADA is an important part of the statute's scheme to integrate the disabled into the American workforce. It serves as a prophylaxis to deter discrimination against truly disabled persons that employers might otherwise believe would not meet the stringent statutory definition of persons with disabilities. It also reinforces the aspect of moral condemnation of discrimination against the disabled contained in the statute by requiring that employment actions taken against individuals an employer perceives as disabled should be treated the same whether that individual is truly disabled or not.

However, when "regarded as" disabled protection is combined with an alleged substantial limitation in the major life activity of working, care should be taken not to protect individuals who would not be substantially limited in their ability to work by the perceived impairment. It is not enough to justify protection to find that the plaintiff could not do jobs similar to the one that has been denied when there are other jobs that the plaintiff could do. Failing to take such care undermines the integrational goals of the ADA by turning it into a statute that protects individuals who would not have difficulty joining the workforce if impaired as perceived. Protecting such individuals would stray too far from the ADA's goal of protecting the disabled and could undermine public support for the statute. Because the ADA imposes affirmative obligations on employers to accommodate

persons with disabilities, support for the statute is crucial to its continued viability.

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