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How Bizarre: The Third Circuit's Analysis of the Requirement of Reasonable Accommodation for Regarded as Disabled Employees under the ADA in Williams v. Philadelphia Housing Authority Police Department

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HOW BIZARRE?: THE THIRD CIRCUIT'S ANALYSIS OF THE REQUIREMENT OF REASONABLE ACCOMMODATION FOR "REGARDED AS" DISABLED EMPLOYEES UNDER THE ADA IN *WILLIAMS v. PHILADELPHIA HOUSING AUTHORITY POLICE DEPARTMENT*

I. INTRODUCTION

The United States Court of Appeals for the Third Circuit recently added to the split among federal courts as to whether the Americans with Disabilities Act (ADA)[1] requires employers to make reasonable accommodation for employees who are "regarded as" disabled.[2] Specifically, in the case of *Williams v. Philadelphia Housing Authority Police Department*,[3] the court held that reasonable accommodations for these persons are required.[4] Still, many other federal courts have determined that, despite the language of the ADA, such accommodations are not required because they would lead to "bizarre results."[5]

The ADA prohibits employment discrimination against qualified individuals because of their disabilities.[6] A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[7] There are three categories of disabilities that are protected by the ADA: (1) physical or mental impairments that substantially limit major life activities; (2) a record of an impairment; and (3)

1. *See generally* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12182 (2005) (prohibiting discrimination against persons with disabilities). For a discussion of the relevant language of the ADA, see *infra* notes 6-10 and accompanying text.

2. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004) (holding that reasonable accommodations are required), *cert. denied*, 125 S. Ct. 1725 (2005). "[T]he 3rd Circuit clarified that employers must accommodate employees that they 'regard as' disabled." Adam Long, *Duty to Disabled Employees and Applicants Under the ADA*, THE LEGAL INTELLIGENCER, Dec. 2, 2004, at 5.

3. 380 F.3d 751 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005).

4. *See id.* at 773 (finding that reasonable accommodation requirement applies to "regarded as" disabled employees).

5. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1231 (9th Cir. 2003) (recognizing that majority of federal courts deciding this issue have determined that no requirement exists because it would lead to bizarre results), *cert. denied*, 540 U.S. 1049 (2003). For a discussion of cases holding that no requirement exists under the ADA, see *infra* notes 47-75 and accompanying text.

6. *See* 42 U.S.C. § 12112(a) (stating general rule). "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

7. *See id.* § 12111(8) (defining qualified individual).

being regarded as having an impairment.[8] The definition of discrimination includes failure to make a reasonable accommodation for a qualified disabled individual.[9] Although the language of the ADA clearly includes people that are "regarded as" disabled in its protected class, a debate exists among federal courts as to whether such claimants are entitled to reasonable accommodation.[10]

This Casebrief discusses the Third Circuit's recent determination that employers are required to make reasonable accommodations for employees who are "regarded as" disabled.[11] Part II reviews the pertinent decisions of the Supreme Court of the United States and the current split among the federal courts over whether accommodation is required for employees who are "regarded as" disabled.[12] Part III analyzes *Williams*, explicating the Third Circuit's reasoning for its conclusion that accommodation is required in such cases.[13] Part IV concludes with a discussion of the Third Circuit's analysis, how practitioners should counsel their clients in the Third Circuit in light of *Williams* and the types of claims that the *Williams* decision will likely impact.[14]

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8. *See id.* § 12102(2) (defining disability). For an in-depth discussion of each category of disability, see ANDREW J. RUZICHO & LOUIS A. JACOBS, EMPLOYMENT PRACTICES MANUAL § 6:4 (2004) (providing examples and explanations of categories of disabilities).

9. *See* 42 U.S.C. § 12112(b)(5)(A) (explaining that refusing reasonable accommodation for known physical or mental limitations of otherwise qualified individual constitutes discrimination). Numerous other actions also constitute discrimination under the ADA. *See id.* § 12112 (defining discrimination). Some other examples of discrimination are using standards or tests to screen out individuals with disabilities, using standards or criteria that create discrimination on the basis of disability and excluding or denying jobs to an individual because of a disability. *See id.* § 12112(b)(3A), (4), (6) (delineating actions constituting discrimination). Under the ADA, "[r]easonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions." Job Accommodation Network, *ADA Questions and Answers, at* http://www.jan.wvu.edu/links/ADAq&a.html (last updated Oct. 7, 2003) [hereinafter *ADA Questions and Answers*].

10. For a discussion of federal court decisions holding that no reasonable accommodation is required, see *infra* notes 47-75 and accompanying text. For a discussion of courts holding that reasonable accommodation is required, see *infra* notes 76-105 and accompanying text. Additionally, for a discussion of the Third Circuit's decision requiring reasonable accommodation, see *infra* notes 106-56 and accompanying text.

11. For an analysis of the Third Circuit's holding in *Williams*, see *infra* notes 125-56 and accompanying text.

12. For a discussion of Supreme Court decisions on "regarded as" disabled claims, see *infra* notes 15-43 and accompanying text. For an analysis of federal court decisions on whether accommodation is required for employees who are "regarded as" disabled, see *infra* notes 44-105 and accompanying text.

13. For an analysis of the Third Circuit's reasoning in *Williams*, see *infra* notes 125-56 and accompanying text.

14. For a concluding discussion of the *Williams* decision and the impact of this decision on future cases and practitioners in the Third Circuit, see *infra* notes 157-75 and accompanying text.

II. BACKGROUND

A. *Guidance from the Supreme Court on "Regarded As" Disabled Claims*

Although the Supreme Court has not addressed the issue of reasonable accommodation for "regarded as" disabled employees under the ADA specifically, it has provided some guidance on "regarded as" claims generally.[15] The Court has recognized the importance of providing protection for individuals who are "regarded as" disabled because of the dramatic effects such misperceptions may have on these persons.[16] Additionally, the Court has defined the categories of individuals who fall within the definition of "regarded as" disabled.[17]

1. *The Court's Interpretation of "Regarded As" Disabled Under the Rehabilitation Act*

In *School Board of Nassau County v. Arline*,[18] the Court examined the "regarded as" provision of the Rehabilitation Act of 1973 ("Rehabilitation Act").[19] The ADA is similar to the Rehabilitation Act, and Congress intended the ADA to provide at least the same, if not more, protection.[20] In *Arline*, the Court recognized the congressional intent to protect individu-

15. *See, e.g.*, Sutton v. United Airlines, Inc., 527 U.S. 471, 489 (1999) (explaining two categories of individuals who would fall within "regarded as" disabled provision of ADA); Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284-86 (1987) (discussing "regarded as" provision under Rehabilitation Act). For further discussion of *Sutton* and *Arline*, see *infra* notes 18-43 and accompanying text.

16. *See Arline*, 480 U.S. at 287 (explaining that those who are misperceived as being disabled need protection against societal stereotypes and fears concerning persons with disabilities). For a further discussion on the need for protection for "regarded as" disabled employees, see *infra* notes 20, 24-28 and accompanying text.

17. *See Sutton*, 527 U.S. at 489 (defining "regarded as" disabled categories of plaintiffs). For a further discussion of the Court's interpretation of the definition of "regarded as" disabled, see *infra* notes 36-39 and accompanying text.

18. 480 U.S. 273 (1987).

19. *See id.* at 277-80 (discussing Rehabilitation Act and its protections). *See generally* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-3007 (2004) (prohibiting discrimination against persons with disabilities). The Rehabilitation Act provides advocacy and protection for persons with disabilities. *See* Dep't of Educ., *The Rehabilitation Act, available at* http://www.ed.gov/policy/speced/reg/narrative.html (last visited June 18, 2005). It also authorizes grant programs for "vocational rehabilitation, supported employment, independent living, and client assistance" for persons with disabilities. *See id.* (describing Rehabilitation Act).

20. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004) (citing Bragdon v. Abbott, 524 U.S. 624, 632 (1998)) (explaining relation between ADA and Rehabilitation Act), *cert. denied*, 125 S. Ct. 1725 (2005). Congress realized that the Rehabilitation Act did not provide sufficient protection to individuals in employment and, therefore, enacted the ADA. *See* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 908-09 (2000) (explaining need for enactment of ADA).

als from the myths and stereotypes about disabilities that exist in society and can lead to discrimination in employment.[21]

Gene Arline, an elementary school teacher with tuberculosis, was terminated from her position because of her illness.[22] The Court determined that Arline was disabled as defined by the Rehabilitation Act.[23] It then rejected the school district's argument that there was a difference between the contagiousness of a disease, which would not be protected under the Rehabilitation Act, and the effects of the disease on the individual employee, which would be protected.[24] According to the Court, both result from the same disease and are both protected.[25]

The main focus in *Arline* was on the employee's actual disability.[26] Nevertheless, the Court also discussed the importance of the "regarded as" clause.[27] The Court found that, by inserting this clause in the Rehabilitation Act, Congress acknowledged that societal stereotypes about individuals with a disease or disability could be just as disabling as the actual physical impairments of a disability.[28] Therefore, the Rehabilitation Act requires an inquiry into whether the employee is otherwise qualified for the job before there is a violation.[29] If a court finds that a person is otherwise qualified, it must then determine whether the employer could provide reasonable accommodation.[30] "Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee . . . . [T]hey cannot deny an employee alternative employment op-

21. *See Arline*, 480 U.S. at 282 (analyzing legislative history of Rehabilitation Act).

22. *See id.* at 276 (stating facts of case). Arline was terminated after several relapses of the disease during a two year period. *See id.* (explaining that Arline was "discharged in 1979 after suffering a third relapse of tuberculosis within two years").

23. *See id.* at 281 (determining that Arline had physical impairment and record of physical impairment, which satisfied requirement of disability under Rehabilitation Act).

24. *See id.* at 282 (stating school district's argument).

25. *See id.* ("It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.").

26. *See id.* at 276-89 (analyzing disability and its effect on ability to perform job). The Court ultimately held that it could not determine whether Arline was otherwise qualified for the job, and therefore, the case was remanded for further fact finding. *See id.* at 287 (explaining need for fact finding to determine whether individual is being discriminated against and to balance against other interests, including safety and health risks to others).

27. *See id.* at 286-89 (looking at congressional intent to include protection against misperceptions of disability).

28. *See id.* at 284 (stating congressional reasoning for extension of Rehabilitation Act to include individuals "regarded as" disabled).

29. *See id.* at 287 (explaining that protection is only afforded to handicapped individuals who are otherwise qualified for job).

30. *See id.* at 288 (asserting multiple steps that courts must employ when analyzing disability cases under Rehabilitation Act).

portunities reasonably available under the employer's existing policies."[31] Some federal courts consider this affirmative obligation as binding precedent, requiring reasonable accommodation for "regarded as" disabled employees under the ADA.[32]

2. *The Supreme Court's Definition of "Regarded As" Disabled*

The Supreme Court provided specific guidance on ADA "regarded as" claims in *Sutton v. United Airlines, Inc.*[33] In *Sutton*, twin sisters with severe myopia claimed discrimination on the basis of their disability or, in the alternative, because they were "regarded as" disabled in violation of the ADA.[34] Specifically, the sisters had applied to United for the position of global pilot, but United rejected them because they did not meet the vision requirement.[35]

In its analysis, the Court first determined that the sisters were not actually disabled as defined under the ADA because with contacts or glasses their vision was perfect.[36] The Court then turned to the "regarded as" claim.[37] Here, it noted two categories in which this type of claim could fall: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities."[38] The re-

31. *Id.* at 289 n.19.

32. *See, e.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004) (citing *Arline* as basis for interpreting plain language of ADA to require reasonable accommodations for "regarded as" disabled employees), *cert. denied*, 125 S. Ct. 1725 (2005).

33. *See generally* Sutton v. United Airlines, Inc., 527 U.S. 471, 489-93 (1999) (discussing requirements of "regarded as" claims under ADA).

34. *See id.* at 475-76 (summarizing facts).

35. *See id.* at 476 ("Both were told during their interviews [with United], however, that a mistake had been made in inviting them to interview because petitioners did not meet respondent's minimum vision requirement . . . ."). Each sister's eyesight was 20/200 in the right eye and 20/400 in the left, but with contacts or glasses they both had 20/20 vision. *See id.* at 475 (detailing impairment). United had a "minimum vision requirement, which was uncorrected visual acuity of 20/100 or better." *Id.* at 476. United informed the sisters that, because they did not meet this requirement, they would not be offered a pilot position. *See id.* (explaining reason for rejection of applications).

36. *See id.* at 488-89 (concluding that sisters failed to state claim of actual disability). Although it is not relevant to the discussion in this Casebrief, the Court also made the important determination that a disability under the ADA should be determined with reference to possible corrective measures (i.e., vision with contacts). *See id.* at 482 (deciding that logical definition of disability must take into consideration remedies for impairment). For a discussion of the issues involved in requiring employees to mitigate their disabilities, see Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 219-40 (2004) (discussing reasons why some people do not mitigate their disabilities and proposing standard of reasonableness be used in requirement to mitigate).

37. *See Sutton*, 527 U.S. at 489 (addressing "regarded as" claim).

38. *Id.*

quired misperceptions, according to the Court, are usually based on stereotypes and not on the individual's actual ability.[39]

The Court then provided that if plaintiffs claim that a misperception substantially limits them in the major life activity of working, at a minimum, they must show that they cannot work in a specific class of jobs.[40] Relying on this standard, the Court held that the sisters did not adequately allege that a misperception of their disability substantially limited them in the major life activity of working.[41] Instead, the sisters only proved that they were unable to work in one position, global pilot, but were qualified for numerous other positions, including commercial airline co-pilots.[42] Therefore, they were not substantially limited in the major life activity of working.[43]

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39. *See id.* (citing 42 U.S.C. § 12101(7) (2005)) (asserting requirement of misperception by employer about individual employee). For further discussion on the reasoning for protected "regarded as" claims, see *supra* notes 27-32 and accompanying text.

40. *See Sutton*, 527 U.S. at 491 (analyzing how to prove substantial limitation in major life activity of working). The definition that the Equal Employment Opportunity Commission (EEOC) uses for substantial limitation in the major life activity of working is:

> [S]ignificantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998)). The EEOC also identified several factors for courts to consider, which include the geographical area where the plaintiff resides and the "number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." *Id.* at 492 (citing 29 C.F.R §§ 1630.2(j)(3)(ii)(A), (B)). The Court summarized the requirements for such a claim as:

> [O]ne must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Id.

41. *See id.* (concluding that sisters did not have valid claim of "regarded as" disabled). The Court also emphasized that it was not deciding whether working was really a major life activity and noted that even the EEOC was reluctant to do so. *See id.* (explaining hesitancy to consider working as major life activity because of conceptual problems); *cf.* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 280 (1987) (citing 45 C.F.R. § 84.3(j)(2)(ii) (1985)) (explaining definition of major life activity to include working under Rehabilitation Act).

42. *See Sutton*, 527 U.S. at 493 (suggesting numerous other positions potentially available to sisters).

43. *See id.* (analyzing why claim failed).

B. *The Two Views of the Federal Courts on the Requirement for Reasonable Accommodation in "Regarded As" Disabled Claims*

The federal courts are split over whether reasonable accommodation is required under the ADA for "regarded as" disabled employees.[44] Some courts do not require accommodations for these individuals, holding that such a requirement would be an odd result.[45] Other federal courts, however, have decided that because the language of the ADA does not differentiate between an actual disability and "regarded as" disabled claims, accommodations must be afforded to both.[46]

1. *Decisions That Find a Reasonable Accommodation Requirement "Bizarre"*

Several federal courts, including the Eighth and Ninth Circuits, have determined that the ADA does not require reasonable accommodation for employees that are "regarded as" disabled.[47] These courts concluded that requiring employers to provide reasonable accommodation for "regarded as" disabled individuals would create "bizarre results."[48] This interpretation of the ADA has been the predominant view until recently.[49]

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44. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232-33 (9th Cir. 2003) (holding that "regarded as" disabled plaintiffs are not entitled to reasonable accommodation), *cert. denied*, 540 U.S. 1049 (2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999) (same); *cf.* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d Cir. 2004) (recognizing entitlement to reasonable accommodation for "regarded as" disabled employees), *cert. denied*, 125 S. Ct. 1725 (2005); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (same); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (same). The Seventh and the Second Circuits have declined to address the issue. *See* Cameron v. Cmty. Aid For Retarded Children, Inc., 335 F.3d 60, 64 (2d Cir. 2003) (recognizing but not deciding issue); Mack v. Great Dane Trailers, 308 F.3d 776, 783 n.2 (7th Cir. 2002) (same).

45. For a discussion of this line of decisions, see *infra* notes 47-75 and accompanying text.

46. For a discussion of decisions requiring reasonable accommodation, see *infra* notes 76-105 and accompanying text.

47. *See, e.g.*, *Kaplan*, 323 F.3d at 1232-33 (holding that "regarded as" disabled plaintiffs are not entitled to reasonable accommodation); *Weber*, 186 F.3d at 917 (same); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (asserting that "regarded as" plaintiffs are not entitled to reasonable accommodation); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (same). The courts in *Workman* and *Newberry* decided the issue without analysis. *See Workman*, 165 F.3d at 467 (finding that "regarded as" plaintiffs are not entitled to accommodation); *Newberry*, 161 F.3d at 280 (determining that there is no requirement of reasonable accommodation).

48. *See, e.g.*, *Weber*, 186 F.3d at 916 ("Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.").

49. *See 'Regarded As' Disabled Plaintiffs Entitled to Reasonable Accommodations*, 16 No. 18 ANDREWS EMP. LITIG. REP. 5 (2002) (examining cases deciding issue of reasonable accommodation). "Prior to Weber, the Fifth and Sixth Circuits had held that 'regarded as' disabled plaintiffs are not entitled to reasonable accommodations, and, subsequent to Weber, seven out-of-circuit courts had weighed in on the matter, and all had followed the holding and reasoning in Weber . . . ." *Id.*

The Eighth Circuit in *Weber v. Strippit, Inc.*[50] was one of the first circuit courts to determine that reasonable accommodation is not required for "regarded as" disabled employees.[51] Strippit employed David Weber as an international sales manager.[52] Weber suffered a major heart attack in 1993 and continued to have health problems for the next year; despite his health problems, he completed his job responsibilities during this time.[53] Strippit informed Weber that he would have to relocate in order to keep his job or accept a different position with lower pay.[54] Weber told Strippit that his physician advised him not to relocate for six months because of his health.[55] Strippit refused to give Weber six months to relocate, and Weber was either terminated or he left the job.[56]

After dealing with other claims, the court addressed the issue of reasonable accommodation.[57] The court noted that a requirement of reasonable accommodation is clear and easy to apply in cases where the plaintiff is actually disabled.[58] Under the ADA, an employer cannot terminate disabled individuals because of their disability without first making reasonable accommodation.[59] According to the court, it does not make sense to extend this requirement to an employee who is only misperceived as being

50. 186 F.3d 907 (8th Cir. 1999).

51. *See id.* at 917 (deciding accommodation not required).

52. *See id.* at 910 (stating facts).

53. *See id.* (discussing Weber's health condition).

54. *See id.* (explaining Strippit's terms for continued employment).

55. *See id.* (explaining problems leading to termination and suit).

56. *See id.* (discussing final communications between Weber and Strippit). The record is not clear as to whether Weber was terminated or considered to have abandoned his employment. *See id.* (noting Weber's loss of employment).

57. *See id.* at 914-16 (determining that Weber was not actually disabled because he did not prove he was substantially limited in major life activity). The court noted:

> The first element of a prima facie case of disability discrimination required Weber to demonstrate that he was "disabled" within the meaning of the ADA. The second element, which is the focus of the present analysis, required him to demonstrate that he was a "qualified individual," which the ADA defines as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." This inquiry has two prongs. "First, a court must determine whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires. Second, it must determine whether the individual, with or without reasonable accommodation, can perform the essential functions of the position held or sought."

Id. at 916 (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 142-45 (3d Cir. 1998) (en banc) (citing 29 C.F.R. pt. 163, app. § 1630.2(m) (1998))).

58. *See id.* (discussing reasonable accommodation in relation to actual disability).

59. *See id.* (indicating that reasonable accommodation must allow disabled person to perform essential functions of job).

disabled.[60] The court provided a very limited analysis when reaching its decision, citing only two cases.[61] Nevertheless, it held that it is unreasonable to conclude that Congress intended the ADA to create disparities in the treatment of similarly impaired, non-disabled employees.[62]

The Ninth Circuit provided additional guidance in concluding that accommodation is not required in *Kaplan v. City of North Las Vegas*.[63] Frederick Kaplan, a peace officer, severely injured his hand during a training exercise.[64] Kaplan was then misdiagnosed with rheumatoid arthritis and was terminated based on the assumption that he could not hold a gun.[65]

After concluding that Kaplan could not perform the essential job functions of a peace officer, the court considered reasonable accommodation.[66] Because Kaplan was terminated based on a misdiagnosis, his claim

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60. *See id.* (analyzing results of requiring accommodation for non-disabled employee). The court provided a hypothetical to demonstrate why reasonable accommodations do not make sense for a "regarded as" disabled employee:

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

Id.

61. *See id.* at 916-17 (discussing opinions of other courts). The court noted that the First Circuit in *Katz* decided to leave the decision of whether accommodation was required to the jury. *See id.* (citing Katz v. City Metal Co., 87 F.3d 26, 29 (1st Cir. 1996)) (noting indirect decision by First Circuit). Additionally, the court focused on a decision by the Third Circuit, which did not decide the issue of accommodation for "regarded as" disabled employees, but provided some insight. *See id.* at 917 (citing *Deane*, 142 F.3d at 148-49 n.12) (describing reasoning of Third Circuit that accommodations are not required). In *Deane*, the Third Circuit considered the potential windfall that a plaintiff could receive and the potential for unsubstantiated claims as two reasons against finding a requirement of accommodation. *See id.* (analyzing whether "regarded as" disabled plaintiffs are entitled to reasonable accommodation but not deciding issue); *see also Weber*, 186 F.3d at 917 (noting dicta in *Deane*); *cf.* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775-76 (3d Cir. 2004) (recognizing entitlement of "regarded as" employee to reasonable accommodation), *cert. denied*, 125 S. Ct. 1725 (2005). For further discussion of the Third Circuit's most recent analysis in *Williams*, see *infra* notes 106-56 and accompanying text.

62. *See Weber*, 186 F.3d at 917 (refusing to read such disparate treatment of similarly disabled employees into ADA).

63. 323 F.3d 1226, 1231-33 (9th Cir. 2003) (discussing reasonable accommodation debate), *cert. denied*, 540 U.S. 1049 (2003).

64. *See id.* at 1227 (stating facts).

65. *See id.* at 1228-29 (discussing misdiagnosis and resulting termination).

66. *See id.* at 1230 (reviewing job description and medical condition of plaintiff). "As part of the essential job functions . . . Kaplan was required to restrain prisoners, use firearms, and engage in hand-to-hand combat." *Id.* Kaplan admit-

was under the "regarded as" disabled prong of the ADA.[67] When determining whether Kaplan was entitled to reasonable accommodation, an issue of first impression for the Ninth Circuit, the court began with the language of the ADA.[68] It recognized that the plain language suggested that "regarded as" employees are entitled to accommodations because the text does not distinguish between the three categories of disability.[69]

The analysis was not yet complete because other courts had argued that a literal reading of the text leads to "bizarre results."[70] The court next considered the reasoning used by the Eighth Circuit in *Weber*, namely, that Congress did not intend to create such disparities in the ADA.[71] It found this reasoning persuasive and determined that no accommodations were required.[72]

> If we were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result under a statute aimed at decreasing stereotyp[es] . . . .[73]

According to the court, providing accommodations to "regarded as" disabled employees would help to perpetuate stereotypes about people with disabilities.[74] Additionally, the court concluded that it would be a waste of resources to require employers to accommodate individuals who are only "regarded as" disabled.[75]

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ted during pretrial discovery that he was unable to perform the functions of his job because of the pain and condition of his hand. *See id.* (explaining plaintiff's condition at time of termination).

67. *See id.* at 1231 (explaining basis for claim).

68. *See id.* at 1231-32 (performing own analysis even though weight of circuit authority suggests that no accommodation is required).

69. *See id.* at 1232 (examining text of ADA for guidance).

70. *See id.* (reasoning that plain language was not determinative).

71. *See id.* (noting Eighth Circuit's decision).

72. *See id.* (accepting Eighth Circuit's analysis).

73. *Id.*

74. *See id.* (asserting that requiring accommodation is wrong result). The court further explained its decision to require reasonable accommodations for a "regarded as" disabled employee:

> Were we to entitle "regarded as" employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability.

Id.

75. *See id.* (suggesting that limited resources should be spent on individuals with actual disabilities).

2. *Decisions in Favor of Reasonable Accommodation for "Regarded As" Disabled Employees*

Fewer federal courts have held that reasonable accommodation is required for "regarded as" disabled employees.[76] The First Circuit in *Katz v. City Metal Co.*[77] was the first federal court of appeals to decide the issue of reasonable accommodation in favor of the "regarded as" plaintiffs.[78] In *Katz*, the plaintiff was terminated after he suffered a heart attack.[79] The court determined that the plaintiff presented sufficient evidence that he was "regarded as" disabled and that he could perform the job with reasonable accommodation.[80] Without analyzing whether the ADA required the employer to make reasonable accommodation, the court assumed such a requirement and determined that reasonable accommodation could have been granted.[81]

The United States District Court for the District of Maine further substantiated the *Katz* decision in *Jewell v. Reid's Confectionary Co.*[82] In *Jewell*, the plaintiff suffered two heart attacks and had a defibrillator implanted; he was terminated shortly thereafter.[83] In its analysis, the court determined that Carl Jewell successfully proved that he was misperceived as disabled and that he could have performed the essential functions of the

76. *See, e.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004) (holding that reasonable accommodation is required in "regarded as" disabled claims), *cert. denied*, 125 S. Ct. 1725 (2005); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (recognizing entitlement to reasonable accommodation for "regarded as" disabled plaintiff); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (holding that reasonable accommodation is needed); Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218 (D. Me. 2001) (same).

77. 87 F.3d 26 (1st Cir. 1996).

78. *See id.* at 33 (holding that "regarded as" disabled plaintiff provided sufficient evidence that he could perform job with reasonable accommodation).

79. *See id.* at 28-29 (discussing facts). The company told the plaintiff that he should recuperate and worry about work later. *See id.* at 29 (stating communication with defendant). One month later, the plaintiff received a call that he was discharged. *See id.* (explaining termination).

80. *See id.* at 33 (determining that plaintiff failed to prove that he was actually disabled but proved that he was regarded as disabled). The plaintiff did not provide sufficient medical evidence to prove that his condition would persist for a sufficient period of time to constitute an actual disability. *See id.* (explaining plaintiff's failure to prove actual disability).

81. *See id.* (analyzing evidence regarding reasonable accommodation). The court merely examined the evidence and determined that reasonable accommodation could have been granted. *See id.* (noting that possible accommodations could have been reduction in hours or salary). The court did not discuss whether the ADA required the employer to provide reasonable accommodation to a "regarded as" employee. *See id.* (failing to discuss requirement).

82. 172 F. Supp. 2d 212, 218 (D. Me. 2001) (holding that reasonable accommodation is required for "regarded as" disabled plaintiffs).

83. *See id.* at 214 (stating facts). Throughout his sick leave, Jewell's supervisor promised him a position when he recuperated. *See id.* at 214-15 (discussing plaintiff's communication with employer).

job.[84] Based on *Katz*, Reid's Confectionary was required to provide reasonable accommodation.[85] Additionally, the court rejected the disparate treatment argument delineated in *Weber*, noting that if an employer fails to engage in the interactive process, it is reasonable to hold the employer accountable.[86]

The United States District Court for the Eastern District of New York provided a persuasive analysis in favor of a reasonable accommodation requirement for "regarded as" disabled employees in *Jacques v. DiMarzio, Inc.*[87] In fact, the *Jacques* opinion persuaded the Third Circuit to change its view on reasonable accommodation.[88] The plaintiff in *Jacques*, an employee at a guitar factory, suffered from bipolar disorder and major depression.[89] He was terminated after numerous incidents with co-workers and after making complaints about the working conditions.[90] The court determined that the plaintiff established a prima facie case of "regarded as" disabled.[91] Initially, the court did not explicitly address the issue of whether reasonable accommodation was required; it merely noted that a triable issue existed as to whether the plaintiff could perform with accommodation.[92] Shortly after its decision, the court learned of *Weber* and issued a supplemental decision to address the issue of accommodation.[93]

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84. *See id.* at 217-18 (examining evidence of disability claims).

85. *See id.* at 218-19 (interpreting *Katz* precedent to require reasonable accommodation).

86. *See id.* (citing Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999)) (discussing disparity of treatment argument in *Weber*). The court stated:

> If an employer fails to explore an employee's need for a reasonable accommodation when the employer wrongly regards the employee as being disabled, opting instead to take adverse action against the employee, it is hardly a "bizarre" result to hold the employer accountable. Indeed, the purpose of the ADA was, in part, to punish employers for making just this sort of "stereotypic [assumption] not truly indicative of the individual ability" of their employees.

Id. at 219 (citing 42 U.S.C. § 12101(7) (2005)).

87. 200 F. Supp. 2d 151, 163-71 (E.D.N.Y. 2002) (providing full analysis of reasons for reasonable accommodation requirement for "regarded as" employees).

88. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004) ("We also find Judge Block's analysis in *Jacques* particularly persuasive, and will largely track his approach . . . ."), *cert. denied*, 125 S. Ct. 1725 (2005). For further discussion of the Third Circuit's previous comments on the requirement of reasonable accommodation and its decision in *Williams*, see *infra* note 107 and accompanying text.

89. *See Jacques*, 200 F. Supp. 2d at 154 (explaining plaintiff's history of psychiatric problems). The court determined that the plaintiff failed to establish a claim for actual disability and a record of disability. *See id.* at 157-59 (determining that plaintiff did not prove substantial limitation in major life activity).

90. *See id.* at 155 (mentioning reasons provided by employer as reason for termination).

91. *See id.* at 161 (concluding that plaintiff provided sufficient evidence to meet burden).

92. *See id.* (recognizing that triable issue exists).

93. *See id.* at 163-71 (providing detailed reasoning for existence of requirement). The court decided to address the issue *sua sponte* after learning of the

With respect to "regarded as" disabled employees, the court disagreed with the *Weber* decision citing the plain language and legislative history of the ADA, the mandatory interactive process between employers and employees and other courts' critiques of *Weber* as support for its rejection of *Weber*.[94] First, the court noted that the plain language of the ADA does not differentiate between plaintiffs who are "regarded as" disabled and plaintiffs who are actually disabled.[95] Second, according to the court, the legislative history of the ADA expressed congressional intent to codify the Supreme Court decision in *Arline*; specifically, it demonstrated that Congress intended to entitle "regarded as" plaintiffs to reasonable accommodation.[96]

The court also recognized that often simply informing an employer that they have misperceived an employee's ability does not cease the discrimination.[97] Thus, reasonable accommodation is required to "counter the prejudices of employers and co-workers who, in the absence of accommodation, may otherwise erroneously perpetuate a disabling view of a discharged employee's non-disabling impairment."[98] Moreover, the court reasoned that completely denying a requirement of reasonable accommodation would allow the stereotypes and misperceptions that Congress was trying to combat to continue.[99] Additionally, the court considered that the interactive process, which many courts consider mandatory, allows the

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Weber decision. *See id.* at 163-64 (deciding to reconsider original decision, which did not provide reasonable accommodation analysis).

94. *See id.* at 166 (outlining analysis).

95. *See id.* (examining language of statute).

96. *See id.* at 166-67 (citing H.R. REP. NO. 101-485 (III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453) (examining legislative history).

97. *See id.* at 167 (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc)) (asserting need for accommodation). The court provided two examples to demonstrate the need for accommodations:

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

Id. at 167-68 (quoting 29 C.F.R. § 1630.2(l)(2) (2002)).

98. *Id.* at 168.

99. *See id.* (concluding that Congress clearly intended to require reasonable accommodation).

employer to determine what, if any, accommodation an employee may need.[100] The court recognized that this is an easy way to prevent qualified individuals from unnecessarily losing their jobs.[101]

The last part of the court's analysis entailed a critique of *Weber*.[102] The court rejected the *Weber* argument that a requirement of accommodation would result in the differential treatment of similarly situated, non-disabled or equally impaired individuals.[103] The court noted that two impaired individuals of whom only one is "regarded as" disabled are not similarly situated; one is only impaired, while the other is impaired and further hindered by the stereotypes or misperceptions of others.[104] For all of these reasons, the court concluded that the requirement of reasonable accommodation for "regarded as" employees is not a "bizarre result."[105]

III. THE THIRD CIRCUIT'S APPROACH

The question of whether reasonable accommodation is required was an issue of first impression for the Third Circuit in *Williams*.[106] The court had previously approached the issue in dicta, however, and suggested that it would find no requirement of reasonable accommodation.[107] The court examined the plain language of the ADA, the legislative history, the

100. *See id.* at 168-70 (recognizing that many federal courts require employers to participate in interactive process). For further discussion of the interactive process, see *infra* notes 157-65 and accompanying text.

101. *See Jacques*, 200 F. Supp. 2d at 170 (describing interactive process as simple tool to prevent discrimination).

102. *See id.* at 170-71 (citing Weber v. Strippit, 186 F.3d 907, 916 (8th Cir. 1999)) (rejecting bizarre result holding of *Weber*).

103. *See id.* (discussing *Weber* holding).

104. *See id.* (explaining faulty reasoning in *Weber*). The court also rejected the argument that such a requirement would permit non-disabled employees to force accommodations on their employer by threatening a lawsuit. *See id.* (rejecting assertion in *Weber* of potential frivolous lawsuits). The court simply pointed to the good faith requirement under the ADA. *See id.* (illustrating protection inherent in ADA against frivolous lawsuits).

105. *See id.* at 171 (concluding that accommodations are required under ADA).

106. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004) (regarding issue as one of first impression), *cert. denied*, 125 S. Ct. 1725 (2005).

107. *See, e.g.*, Buskirk v. Apollo Metals, 307 F.3d 160, 168-69 (3d Cir. 2002) (recognizing split among courts and both sides of argument); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (noting that language of ADA requires accommodation for "regarded as" disabled employees but recognizing potential of odd outcomes); Deane v. Pocono Med. Ctr., 142 F.3d 138, 148-49 n.12 (3d Cir. 1998) (en banc) (acknowledging considerable force of argument for no accommodation requirement but not deciding issue). "[I]t seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation." *Taylor*, 177 F.3d at 196.

Supreme Court's decision in *Arline* and the windfall proposition.[108] This analysis led the court to conclude—despite its previous dicta—that employees who are "regarded as" disabled are entitled to reasonable accommodation.[109] Although the court recognized that there may be instances in which the requirement would produce "bizarre results," it was unwilling to create a bright-line rejection of such entitlement.[110]

A. *The Facts:* Williams v. Philadelphia Housing Authority Police Department

Facts are extremely important when determining claims under the ADA because these kinds of cases focus not only on the disability but also on its effect on the individual's life.[111] In *Williams*, Edward Williams worked as a police officer for the Philadelphia Housing Authority Police Department (PHA) for twenty-four years before his termination.[112] In response to a confrontation with a supervisor, Williams yelled profanities and made threatening remarks, which resulted in his immediate suspension without pay.[113] The PHA then required Williams to undergo a psychological examination.[114] Williams requested a medical leave of absence, which the PHA granted.[115]

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108. For further discussion of the court's analysis, see *infra* notes 125-56 and accompanying text.

109. *See Williams*, 380 F.3d at 774 (holding that reasonable accommodation requirement applies to "regarded as" disabled plaintiffs).

110. *See id.* (stating that lack of reason for applying "across-the-board" refusal is based on text of ADA).

111. *See* Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 509 (3d Cir. 2001) (explaining importance of facts in ADA claims). "The determination of whether an individual has a disability is . . . based . . . on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others." Katz v. City Metal Co., 87 F.3d 26, 32 (1st Cir. 1996) (citing 29 C.F.R. pt. 1630, app. at 402 (1996)).

112. *See Williams*, 380 F.3d at 756 (discussing facts).

113. *See id.* (describing confrontation with supervisor). In a conversation with a counselor after the confrontation, Williams made comments about shooting people and being able to do it. *See id.* (reporting statements made by Williams to counselor about "going postal"). The Philadelphia Housing Authority (PHA) told Williams to report for a new assignment in the PHA radio room, but he did not return and called in sick daily. *See id.* (explaining beginning stages of communication between Williams and PHA).

114. *See id.* (noting that Williams attended three appointments with PHA psychologist).

115. *See id.* (outlining action by parties during summer of 1998). Williams provided the PHA with the counselor's report that he was suffering from severe and recurrent major depression. *See id.* (recounting diagnosis). Shortly before the expiration of his sick leave, the PHA notified Williams that he needed to request a leave of absence or otherwise he would be treated as having voluntarily resigned. *See id.* (acknowledging Williams's employment status at expiration of his sick leave). Williams applied for a leave of absence after receiving a second request from the PHA. *See id.* (discussing Williams's application for leave of absence).

Dr. Finley, the PHA's psychologist, evaluated Williams on three occasions.[116] Subsequently, Dr. Finley determined that Williams was not ready to return to active duty, required further psychological treatment, could return to an alternative work assignment and should be reevaluated after three months.[117] Additionally, Dr. Finley reported to the PHA that Williams was able to return to non-active duty and should not carry a weapon.[118]

After receiving clearance from Dr. Finley, Williams requested assignment to the training unit.[119] The PHA denied that request, and Williams then requested assignment to the radio room.[120] The PHA, however, did not respond to that request but notified Williams that he had exhausted his leave time and would face termination unless he requested a medical leave of absence.[121] Williams did not respond and was subsequently terminated.[122] Following his termination, Williams commenced a lawsuit against the PHA in the district court.[123] The district court granted sum-

116. *See id.* at 756-57 (referring to Williams's contact with PHA psychologist). Dr. Levitt, Williams's personal psychologist, also sent a letter to the PHA at Williams's request that he was ready to return to work. *See id.* (displaying pertinent parts of letter). The letter noted that Williams requested minimal contact with the supervisor, who was involved in the confrontation, upon his return. *See id.* (discussing Williams's request).

117. *See id.* at 757 (indicating PHA psychologist's opinion on Williams's condition). The doctor also noted that the tension between Williams and the supervisor exacerbated his condition. *See id.* (discussing doctor's evaluation).

118. *See id.* (acknowledging doctor's recommendation). "Mr. Williams is fully capable of working, for a temporary period, in either an administrative and/or clerical capacity. He should not carry a weapon, however, for a minimum period of three months. He can work around other officers who will be wearing their weapon." *Id.* Dr. Finley also informed the PHA that she would not be treating Williams on an ongoing basis. *See id.* (explaining termination of treatment). She anticipated that Williams would be able to return to active duty after the three month period, but a reevaluation would need to be done at that time. *See id.* (providing prognosis that Williams could fully return to active duty after three month period).

119. *See id.* (stating Williams's initial request).

120. *See id.* (discussing communication between PHA and Williams). The PHA informed Williams that he was not qualified to work in the training room due to his ongoing treatment with Dr. Finley and her recommendation that he not carry a gun for a three month period. *See id.* (noting response to Williams's request for training unit).

121. *See id.* at 757-58 (noting final action by PHA). The court determined that the PHA did not respond to Williams's request for assignment to the radio room until he commenced the lawsuit. *See id.* at 757 n.1 (recognizing that record is unclear as to whether PHA responded but assuming that it did not respond for summary judgment purposes).

122. *See id.* (explaining attempts by PHA to have Williams apply for medical leave of absence and his failure, which resulted in his termination).

123. *See id.* at 758 (discussing initiation of lawsuit).

mary judgment in favor of the PHA on the claims and Williams appealed.[124]

B. *The Third Circuit's Reasoning*

On appeal, the Third Circuit reversed the district court's finding that Williams was not actually disabled.[125] The Third Circuit found an actual disability because Williams was substantially limited in the major life activity of working; specifically, he was unable to carry a firearm and was therefore restricted from a class of jobs—law enforcement.[126] The court also determined that Williams provided sufficient evidence to survive summary judgment on his "regarded as" disabled claim and therefore presented a prima facie case for discrimination under the ADA.[127] Next, the court addressed the PHA's argument that reasonable accommodation is not required for a "regarded as" disabled employee.[128] Noting the circuit split, the court found the reasoning of *Jacques* persuasive and rejected those opinions that found no accommodation requirement.[129] The court ac-

124. *See id.* (explaining procedural background). Williams asserted multiple claims, but only the discrimination claims under the ADA and the state law survived the PHA's motion to dismiss. *See id.* (discussing Williams's claims).

125. *See id.* at 766-67 (concluding that reasonable jury could find that Williams was actually disabled).

126. *See id.* at 763 (citing 29 C.F.R. § 1630.2(j)(3)(i) (2001)) (explaining that substantial limitation can be restriction from class of jobs *or* broad range of jobs). For discussion of the relevant language of the ADA, see *supra* notes 6-10 and accompanying text.

127. *See Williams*, 380 F.3d at 767-72 (analyzing evidence and determining that material dispute as to facts existed). The court stated:

> To establish a *prima facie* case of discrimination under the ADA, a plaintiff must therefore show "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination."

Id. at 761 (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) (quoting Gaul v. Lucent Technologies, 134 F.3d 576, 580 (3d Cir. 1998) (internal citation omitted))). Williams was "regarded as" disabled because the PHA believed that he could not be around people with weapons, in addition to not being able to carry a firearm himself. *See id.* at 768 (explaining PHA's misperception). The court considered numerous factors in reaching the conclusion that Williams was excluded from a class of jobs. *See id.* at 762-67 (discussing substantial limitations on Williams due to his condition).

128. *See id.* at 772-73 (addressing PHA's argument).

129. *See id.* at 773 (indicating division among federal courts). For a discussion of *Jacques*, see *supra* notes 87-105 and accompanying text. The court briefly analyzed the Ninth and Eighth Circuit decisions and their acknowledgment of the plain language of the ADA. *See Williams*, 380 F.3d at 773-74 (citing Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999)) (summarizing analysis of decisions). Despite the language, both courts determined that requiring reasonable accommodation in "regarded as" cases would lead to "bizarre results." *See id.* (same). For a discussion of the Eighth and Ninth Circuit decisions, see *supra* notes 47-75 and accompanying text.

knowledged that applying the plain language of the ADA could lead to "bizarre results" in some cases but saw no reason "for an across-the-board refusal."[130]

1. *The Plain Language of the ADA*

In reaching its decision, the court first examined the plain language of the ADA.[131] It noted that the ADA's definition of discrimination includes not making reasonable accommodation for a qualified individual.[132] Additionally, the court recognized that the definition of disability also includes persons who are "regarded as" disabled.[133] "[A]s all would agree, the statutory text of the ADA does not in any way 'distinguish between [actually] disabled and "regarded as" individuals in requiring accommodation.'"[134]

2. *The Legislative History*

The Third Circuit found that the legislative history of the ADA also demonstrates that reasonable accommodation is required for employees who are "regarded as" disabled.[135] Specifically, the court interpreted the legislative history to confirm the plain language of the statute.[136] The legislative history also reflects Congress's intent to codify the Supreme Court's analysis in *Arline*, namely, that the misperception of others can be disabling even if a person is not actually impaired.[137] The ADA protects people who are "regarded as" disabled in the same way it protects people who are actually disabled.[138] "This case demonstrates the wisdom of that conclusion, in that but for PHA's erroneous perception that Williams was unable to be around firearms because of his mental impairment, Williams would have been eligible for a radio room assignment."[139]

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130. *See Williams*, 380 F.3d at 774 (announcing that court will apply plain language of ADA in present case).

131. *See id.* (examining pertinent sections of ADA).

132. *See id.* (defining discrimination under ADA). For the pertinent language of the statute, see *supra* note 9 and accompanying text.

133. *See Williams*, 380 F.3d at 774 (noting definition of disability). For the language of the ADA, see *supra* note 8 and accompanying text.

134. *Williams*, 380 F.3d at 774 (quoting Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999)).

135. *See id.* (examining legislative history).

136. *See id.* (same).

137. *See id.* (citing H.R. REP. No. 101-485 (III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450) (noting legislative intent).

138. *See id.* (explaining purpose of ADA's protection of "regarded as" individuals).

139. *Id.*

3. *The Supreme Court's Decision in* Arline

The court then turned to the Supreme Court's decision in *Arline*.[140] In *Arline*, the Court explained that the definition of a handicapped individual under the Rehabilitation Act had been expanded to include individuals who may be misperceived as having an impairment.[141] After it determined that the plaintiff in that case fell into the "regarded as" category, the Supreme Court stated that employers had an "affirmative obligation" to make reasonable accommodation for employees who are "regarded as" disabled.[142] Moreover, the Court noted that the "regarded as" sections of the ADA and the Rehabilitation Act are virtually identical and the ADA must be read to provide "at least as much protection as provided by . . . the Rehabilitation Act."[143] Therefore, the logical conclusion is that employees under the ADA are also entitled to reasonable accommodation if they are misperceived as being disabled.[144] The Third Circuit pointed out that neither the *Weber* nor *Kaplan* courts addressed *Arline* in their decisions.[145]

4. *The "Windfall" Proposition*

One of the main arguments against requiring reasonable accommodation is that "regarded as" individuals could receive a windfall.[146] Essentially, the PHA argued that Williams would receive a windfall if the court determined that reasonable accommodation was required—Williams would be accommodated, while another similarly situated individual would not be accommodated.[147] The problem with this argument is that the PHA misperceived Williams's ability to be around others with weapons,

140. *See id.* at 775 (seeking guidance from *Arline* for ADA claims). For a more in depth discussion of *Arline*, see *supra* notes 18-32 and accompanying text.

141. *See Williams*, 380 F.3d at 775 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987)) (detailing reasoning of Supreme Court).

142. *See id.* (citing *Arline*, 480 U.S. at 289 n.19) (stating significance of *Arline*).

143. *See id.* (citing Bragdon v. Abbott, 524 U.S. 624, 632 (1998)) (emphasizing role of "regarded as" sections in statutory scheme of both acts and well-established rule of extent of protection afforded by ADA).

144. *See id.* (drawing "inescapable conclusion"). Again, Congress intended to codify the *Arline* interpretation when it enacted the ADA. *See id.* (repeating legislative intent).

145. *See id.* (implying lack of complete analysis in other circuits' decisions). For a discussion of *Weber* and *Kaplan*, see *supra* notes 50-75 and accompanying text.

146. *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (suggesting that employees would be in better position for lawsuit if their employer misperceived them as disabled); *cf.* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (noting that "regarded as" plaintiff is impaired by misperception of disability). For a general discussion of how ADA defendants are more likely to receive a windfall, see Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (analyzing outcomes of cases under ADA). Defendants often prevail generally through summary judgment or dismissal of cases. *See id.* (examining ADA cases).

147. *See Williams*, 380 F.3d at 775 (stating PHA's argument on windfall theory).

a fact contradicted by the PHA's psychologist.[148] As a result of this misperception, the PHA refused to assign Williams to the radio room.[149] The argument failed because another employee with a condition similar to Williams's would have been assigned to the radio room if the PHA did not misperceive the extent of the employee's condition as it did in Williams's case.[150] "The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid."[151] The Third Circuit viewed this as a clear example of the disabling effect of misperceptions, and the situation Congress was trying to guard against when it included "regarded as" within the definition of disability.[152]

The court concluded its discussion by noting that a simple solution may not always exist.[153] Therefore, it is crucial for an employer to engage in the interactive process to communicate with the employee.[154] The PHA's refusal to grant Williams's request was a refusal to provide reasonable accommodation.[155] The court was clear that an employer will be held

148. *See id.* (discussing misperceptions). For a discussion of the PHA psychologist's opinion, see *supra* notes 116-18 and accompanying text.

149. For a discussion of the PHA's refusal/inaction in assigning Williams to the radio room, see *supra* notes 120-21 and accompanying text.

150. *See Williams*, 380 F.3d at 775 (rejecting PHA's argument regarding similarly situated employees).

151. *Id.*

152. *See id.* at 776 (promoting importance of "regarded as" provision in protecting against discrimination based on misperceptions). For further discussion on the legislative history, see *supra* notes 135-39 and accompanying text. *See also* ADA, 42 U.S.C. § 12101 (2005) (stating congressional findings and purpose of Act). The purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). In these types of cases, the simple solution of an accommodation may easily be reached between the employer and employee. *See Williams*, 380 F.3d at 776 n.19 (discussing availability of reasonable accommodation). The court noted:

> For example, an employer supermarket requires all of its cashiers to stand. One cashier has a back problem that causes discomfort but does not amount to an actual disability. The employer misperceives this back problem as one that prevents the employee from standing for more than an hour, and fires the employee because she cannot stand. Even if the supermarket and cashier never reach a meeting of the minds as to the true extent of the cashier's limitations, the supermarket might, assuming its erroneous perception amounted to a substantial limitation of a major life activity, be required to reasonably accommodate such a "regarded as" disabled employee by, for example, providing a stool.

Id.

153. *See Williams*, 380 F.3d at 776 n.19 (explaining that more extensive accommodations were required in present case).

154. *See id.* (discussing importance of interactive process). *See generally id.* at 771-72 (explaining requirement that parties work together to find mutually agreeable solution).

155. *See id.* (emphasizing discrimination that occurred). One commentator stated:

> The court also rejected PHA's suggestion that an employee must demonstrate the existence of a vacant position he was capable of performing in

liable for not making reasonable accommodation if: (1) it perceives an employee as being unable to work; and (2) it does not make a good faith effort to determine an employee's actual limitations.[156]

IV. CONCLUSION: WHAT *WILLIAMS V. PHILADELPHIA HOUSING AUTHORITY POLICE DEPARTMENT* REALLY MEANS

Williams makes clear that employers in the Third Circuit should engage in the interactive process with employees seeking reasonable accommodations under the ADA.[157] The interactive process will allow the employer to determine the extent of the employee's disability and what kind of reasonable accommodation might be necessary.[158] Any misperception could potentially be resolved during this process.[159] Determining exactly what, if any, accommodations would be necessary during

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> the eyes of the employer, even if the employer wrongly perceives the employee's limitations. Thus, according to PHA, Williams' claim failed because there were no jobs he could have performed given its misperception that he could not be around others who carried or had access to firearms. The court stated that this argument would make the "regarded as" protection meaningless.

Gary S. Marx, *Third Circuit Rules That Police Officer Regarded as Disabled Is Entitled to Reasonable Accommodation*, 12 NO. 10 DISABILITY L. COMPLIANCE REP. 1 (Oct. 2004).

156. *See Williams*, 380 F.3d at 771-72 (noting potential liability for PHA if jury found that it erroneously perceived Williams's limitations and general requirement for employers to determine actual disability).

157. *See* Maureen Q. Dwyer, *Labor & Employment Law Update: Reasonable Accommodations for Employees 'Regarded As' Disabled* (Jan. 2005), *at* http://www.pepperlaw.com (discussing implications of *Williams* decision). "This decision creates no new obligations for employers but rather demonstrates the importance of gathering and acting upon all necessary information in possible accommodation situations." Long, *supra* note 2, at 5.

158. *See* Long, *supra* note 2, at 5 (explaining importance of employers engaging in process in good faith to prevent potential liability); *see also Williams*, 380 F.3d at 776 n.19 (asserting interactive process can help reduce misperceptions by employers). The type of accommodation to be afforded is based on the facts of the case. *See ADA Questions and Answers*, *supra* note 9 (explaining how to determine appropriate accommodation for disabled individual). The source further provides:

> [T]he principal test is that of effectiveness, i.e. whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

Id.

159. *See Williams*, 380 F.3d at 776 n.19 (noting benefits of process); *cf.* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 168 (E.D.N.Y. 2002) (asserting that simply notifying employer of misperception will not always suffice to remedy situation). The Third Circuit recognized a limited defense of reasonable mistake for employers in "regarded as" claims. *See* M. ELAINE JOCABY, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE PROGRAM § 1:119 (2003) (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999)) (discussing various employer defenses under ADA). An employer can claim the defense if it can prove that the employee is responsible for the misperception and

this process would also resolve the fear of the *Kaplan* court that reasonable accommodation in this context might be a waste of resources or a windfall for plaintiffs.[160]

As the court recognized in *Jacques*, two individuals are not similarly situated, even if they have the same condition, when only one is perceived as having the condition or a related impairment.[161] There will be no disparate treatment, as the court suggested in *Weber*, however, if the employer engages in the interactive process and determines whether any reasonable accommodation is required.[162] As the courts in both *Jewell* and *Jacques* discussed, it is not unreasonable to hold employers accountable if they fail to communicate with employees in order to determine the extent of their disability or the accommodation that would be required.[163] The legislative intent and the language of the ADA are clear that Congress intended to protect individuals who are "regarded as" disabled under the ADA.[164] Until Congress says differently, all of the protections encapsulated in the ADA should be afforded to such individuals.[165]

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that the perception is not based on "impermissible stereotypes." *See id.* (explaining defense).

160. For a discussion of the *Kaplan* court's analysis on why there is no requirement of reasonable accommodation, see *supra* notes 63-75 and accompanying text.

161. For a discussion of the differential treatment argument in *Jacques*, see *supra* notes 103-05 and accompanying text.

162. For a discussion of the mandatory interactive process in *Jacques*, see *supra* notes 100-01 and accompanying text. "If an employer properly engages in the interactive process and gathers all necessary information . . . the employer should not erroneously regard an individual as disabled." Long, *supra* note 2, at 5.

163. For a discussion of *Jewell* and *Jacques*, see *supra* notes 82-105 and accompanying text.

164. For a discussion of the legislative history of the "regarded as" prong of the ADA, see *supra* notes 96, 135-39 and accompanying text. Clearly not everyone agrees that reasonable accommodation should be afforded to "regarded as" disabled employees. *See* Travis, *supra* note 20, at 902 (arguing that providing accommodation to "regarded as" employees is unfair because they already have equal opportunity). Although Congress intended to protect "regarded as" disabled employees, one commentator suggested that Congress intended the protection to be different than that afforded to actually disabled employees. *See id.* at 939-45 (same).

165. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004) (examining plain language of statute and legislative history), *cert. denied*, 125 S. Ct. 1725 (2005); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (discussing interpretation of ADA). "The EEOC 'has not taken an official position' on whether the reasonable accommodations . . . should apply to perceived disability claims." Travis, *supra* note 20, at 933 (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc)) (noting lack of explicit guidance from EEOC for courts deciding issue). For a further discussion on EEOC guidelines in this area, see Travis, *supra* note 20, at 936-43 (arguing that EEOC materials suggest that no accommodations are required for "regarded as" disabled employees).

Still unclear, however, is what the Third Circuit would consider a "bizarre result."[166] Based on its disclaimer, the court did not rule out the possibility that there may be situations in which the requirement would lead to odd results.[167] As one commentator noted, the plaintiff in *Williams*, like the plaintiff in *Katz*, had an actual disability and was therefore already entitled to reasonable accommodation.[168] Thus, a claim involving a truly non-disabled employee may provide a situation in which reasonable accommodation is not required.[169] In other words, if an employee is not disabled, then no reasonable accommodation would be necessary to enable him or her to perform the job.[170] Such an issue should be resolved during the mandatory interactive process in order to prevent "bizarre results."[171]

The Third Circuit enriched the current debate among the federal courts with a well-reasoned analysis and its decision that reasonable accommodation is required for "regarded as" disabled employees under the

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166. *See Williams*, 380 F.3d at 774 (leaving open possibility that situation could arise where requirement would not be needed).

167. *See id.* (explaining when accommodations might not be required). "While the court clearly intended its decision to be definitive, the decision may be less than it initially appears." Sid Steinberg, *Are Accommodations Due Employees 'Regarded As' Disabled?*, THE LEGAL INTELLIGENCER, Oct. 13, 2004, at 5. The court's example of an employee in a supermarket being misperceived as having a back problem and needing a stool may be the type of odd result the court suggested. *See id.* (suggesting that example leads to bizarre result because employee becomes entitled to accommodation they would not otherwise receive). For the hypothetical used by the court, see *supra* note 152.

168. *See* Steinberg, *supra* note 167, at 5 (explaining lack of clarity in Third Circuit's decision).

169. *See Williams*, 380 F.3d at 774 (recognizing possibility of case where no reasonable accommodations are required). "[E]ven where an employer mistakenly regards an employee as so disabled that the employee cannot work at all, the employer still must accommodate a 'regarded as' employee by seeking to determine, in good faith, the extent of the employee's actual limitations." *Id.* at 776 n.19. "While the Williams decision may lead to an increase in 'regarded as' claims, it appears that there may still be an open question of whether a 'not disabled but regarded as such' employee is entitled to reasonable accommodation as a matter of law." Steinberg, *supra* note 167, at 5.

170. *See* Job Accommodation Network, *The ADA: Your Responsibilities as an Employer, at* http://www.jan.wvu.edu/media/EMPLOYERRESP.html (last updated Jan. 29, 2004) (defining reasonable accommodation as change or adjustment that enables employee to perform essential job functions). "The best way to [determine what reasonable accommodation is necessary] . . . is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform essential functions of the job." *Id.*

171. *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) ("It is clearly a mechanism to allow for early intervention by an employer, outside of the legal forum, for exploring reasonable accommodations for employees who are perceived to be disabled."). For a further discussion of the interactive process, see *supra* notes 152-54 and accompanying text.

ADA.[172] Other courts may follow the Third Circuit, especially considering that decisions like *Kaplan* and *Weber* were partly based on previous Third Circuit dicta.[173] Thus, attorneys in the Third Circuit should counsel their clients that it is essential that they engage in the interactive process with any and all employees who may be disabled before taking any adverse action.[174] The interactive process may prevent waste of limited resources and disparate treatment, while allowing for the necessary and reasonable accommodations required under the ADA without litigation.[175]

Máire E. Donovan

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172. For a discussion of the Third Circuit's analysis, see *supra* notes 125-56 and accompanying text. At least one commentator opined that the court's reasoning in *Williams* is problematic on certain grounds. *See* Steinberg, *supra* note 167, at 5 (arguing that court's analysis is circular but promotes importance of interactive process).

173. For a discussion of *Kaplan* and *Weber*, see *supra* notes 50-75 and accompanying text. For a discussion of previous dicta by the Third Circuit, see *supra* note 107.

174. *See* Long, *supra* note 2, at 5 (emphasizing need for employers to engage in interactive process). Employers should take precautionary measures by engaging in the interactive process. *See id.* (explaining significance of Third Circuit's decision).

175. *See* Dep't of Labor, *Accommodations Get the Job Done*, *at* http://www.dol.gov/odep/pubs/fact/accomod.htm (last visited Feb. 20, 2005) (explaining importance of cooperation between employee and employer in determining reasonable accommodation). "Accommodations are developed on an individual basis and in a partnership between the person with the disability and the employer. This teamwork generally results in cost-effective solutions." *Id.* Some examples of disabilities and suggested reasonable accommodations are:

> (1) Problem: A clerk with low back strain/sprain has limitations in lifting, bending, and squatting, all results of lower back injury. The job requires mail sorting and filing incoming documents in a large numerical filing system.
> Solution: Both the clerk and the documents are put on wheels! A rolling file stool is supplied for use when filing at lower levels, and upper-drawer filing is done with documents on a rolling cart, without need to lift or bend. COST: $44.
> (2) Problem: A receptionist who is blind works at a law firm. She cannot see the lights on the phone console which indicate which telephone lines are ringing, on hold, or in use by staff.
> Solution: The employer purchases a light-probe, a penlike product which detects a lighted button. COST: $45.
> (3) Problem: A clerk-typist with severe depression and problems with alcoholism experiences problems with the quality and quantity of her work.
> Solution: Employee is provided with extended sick leave to cover a short period of hospitalization and a modified work schedule to attend weekly psychotherapy treatment. Treatment is covered by company medical plan. COST: $0.

Id.