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Cover Page Footnote

The author wishes to thank her husband and family for their unconditional love and support, Professor Richard Perna for his insight and guidance, and editors Amy Combs and Jason Hilliard for their patience and effort.

TAMING THE NATURE OF THE BEAST: WHY A REASONABLE ACCOMMODATION FOR A PERCEIVED DISABILITY SHOULD NO LONGER BE CONSIDERED THE ADA'S NECESSARY EVIL

*Kristin P. Abbinante**

I. INTRODUCTION

Congress's major purpose for enacting Title I of the Americans with Disabilities Act of 1990 ("ADA") was to provide "equal employment opportunities for qualified individuals with disabilities."[1] Specifically, the statute was designed to remove barriers that prevented such individuals from enjoying the same employment opportunities available to their non-disabled co-workers.[2] For some, however, these barriers were not only physical, but social and economic impediments perpetuated by "society's accumulated myths and fears about disability and disease."[3] Accordingly, Congress acknowledged that such negative stereotypes often extended beyond those who suffered from an actual disability to those who were erroneously *regarded as* having a qualifying physical or mental impairment.[4] To remedy the situation, Congress provided statutory protection for those with "perceived disabilities" by including a *regarded as* provision in its definition of "disability."[5]

By falling under the statutory definition for "disability," a qualified *regarded as* disabled employee is arguably entitled to a "reasonable accommodation" to assist him[6] in the performance of the essential functions of his position.[7] Yet, the confusion begins when one realizes that the individual is not "disabled" because of his actual physical or mental

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[1] 29 C.F.R. § 1630.1(a) (2004).

[2] *See Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. app. § 1630 (2004).

[3] *Sch. Bd. of Nassau Co. v. Arline*, 480 U.S. 273, 284 (1987).

[4] *See* Sen. Rpt. 101-16 at 7 (Aug. 30, 1989); *see also* 29 C.F.R. app. § 1630.2(1) (citing *Arline*, 480 U.S. at 284).

[5] *See* 42 U.S.C. § 12102(2)(C) (2005); *see also Smaw v. Va. Dept. of St. Police*, 862 F. Supp. 1469, 1472 (E.D. Va. 1994) (recognizing that ADA *regarded as* claims are "commonly referred to as 'perceived disability' cases.").

[6] Although the male gender will be used throughout this Comment, it is also meant to include its female counterpart.

[7] *See* 42 U.S.C. § 12111(8) (2005).

impairment, but because of the negative effect of the employer's misperceptions.[8] The question then becomes—*What is being accommodated: the perceived disability or the effects of the employer's misperception?*

For some courts, an accommodation of the perceived impairment is a "bizarre result" of statutory interpretation, and is held not to be required.[9] Others have strictly followed the plain meaning of the statute and ordered that all *regarded as* disabled employees receive full accommodation.[10] However, by limiting the solution to an all or nothing approach, questions concerning Congress's true level of intended protection will inevitably continue.[11] Should such fears of "windfalls" and "bizarre results" outweigh the avoidable injury that Congress attempted to prevent?[12]

The ADA is clear that it "does not guarantee equal results" or require preferential treatment.[13] Granting a reasonable accommodation to those mistakenly perceived as disabled, but denying it to those similarly situated employees who are not, seems to be a form of preferential treatment unintended by the statute.[14] Yet, this Comment will argue that the line does not have to be so rigidly drawn. The reasonable accommodation process is a flexible collaboration between employers and employees, and no specific form of accommodation is required or guaranteed.[15]

Although the ADA is silent on this exact issue, the Equal Employment Opportunity Commission's ("EEOC") regulations and Interpretive Guidance speak loud and clear to a compromising and appropriate course of action known as the interactive process.[16] Through this process, the employer, with the help of the employee, can assess the disabled employee's ability to perform the essential functions of the position and identify possible accommodations.[17] Thus, an employer can meet its duty to reasonably accommodate the *regarded as* disabled

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[8] *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 (2000).

[9] *See Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999).

[10] *See Williams v. Phila. Hous. Auth. Police Dept.*, 380 F.3d 751 (3d Cir. 2004); *D'Angelo v. Conagra Foods*, 422 F.3d 1220 (11th Cir. 2005); *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151 (E.D.N.Y. 2002); *Katz v. City Metal Co. Inc.*, 87 F.3d 26 (1st Cir. 1996).

[11] *See* Travis, *supra* n. 8, at 993 (discussing the difficulty with taking an "all" or "nothing" approach).

[12] *See Kaplan*, 323 F.3d at 1232; *Weber*, 186 F.3d at 916.

[13] *See* 29 C.F.R. pt. 1630, app. Background.

[14] Such an outcome would be the "bizarre result" contemplated by courts denying the right to reasonable accommodation for *regarded as* disabled individuals. For further discussion, *see infra* Section II(C)(2).

[15] *See* 29 C.F.R. app. § 1630.

[16] 29 C.F.R. § 1630.2(o)(3) (1998); *see also Jones v. United Parcel Serv.*, 214 F.3d 402, 407 (3d Cir. 2000) (quoting 29 C.F.R. app. § 1630.9); *Williams*, 380 F.3d at 776 n. 19 (assessing the importance of the interactive process and its ability to reduce potential liability); *DiMarzio*, 200 F. Supp. 2d at 170 (recognizing that engaging in the interactive process may prevent some qualified but impaired employees from unnecessarily losing their jobs).

[17] *See* H.R. Rpt. 101-485 pt. 2 at 65-67 (May 15, 1990); *see also* 29 C.F.R. app. § 1630.9.

employee by engaging in an interactive process with the employee to correct the employer's misperceptions in the workplace, thereby eliminating the social and environmental barriers forming the basis of the statutory disability.[18] In cases where an employee's disabusal of the employer's misperceptions is insufficient to stop the discrimination, the employer may need to make a *corrective accommodation* to rectify the existing workplace misperceptions.[19]

The reasonable accommodation requirement, as it applies to those employees who are *regarded as* disabled, should not be viewed as the ADA's "necessary evil." When implemented correctly, the accommodation will begin through the use of the interactive process and end when the employer has made a good faith, affirmative effort to correct misperceptions in the workplace. This, in turn, eliminates the source of the employee's statutory disability.[20]

Section II outlines the background and rationale for the relevant ADA provisions and introduces the current caselaw interpreting the reasonable accommodation requirement for *regarded as* disabled employees. Section III initially addresses the ADA's conflicting ambiguity by analyzing the statute's plain meaning, interpreting the Congressional silence, and reviewing the appropriate deference standards to the EEOC's regulations and interpretive guidelines. It then discusses in detail the role of the interactive process and concludes that an employer can reasonably accommodate the *regarded as* disabled employee by engaging in the interactive process and affirmatively correcting the employer's misperceptions in the workplace. Finally, Section IV concludes that such a method of *corrective accommodation* is not only reasonable and cost-effective, but consistent with Congress's intent to eliminate discrimination and remove barriers based on unfounded fears, myths, and stereotypes.[21]

II. BACKGROUND

A. Disability under the ADA

By enacting Title I of the ADA, Congress prohibited a majority of private employers from utilizing disability-based discrimination in the workplace.[22] It expanded the federal protection previously granted by the

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[18] *See Williams*, 380 F.3d at 771 (holding that the employer has a duty to engage in an interactive process with the employee requesting an accommodation to determine the appropriate accommodation).

[19] *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n. 12 (3d Cir. 1998) (noting that an employee's correction of the employer's misperception may not be enough to combat the discrimination); *DiMarzio*, 200 F. Supp. 2d at 168 (recognizing that a reasonable accommodation will counter workplace prejudices and prevent perpetuation of erroneous stereotypes).

[20] *Williams*, 380 F.3d at 771.

[21] *See* 42 U.S.C § 12101(b)(1) (2005).

[22] *See* 42 U.S.C. § 12112(a) (2005) (stating that the ADA's broad prohibition against disability-based employment discrimination includes "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."). In addition to employers, the ADA requires employment agencies, labor organizations,

Rehabilitation Act of 1973 ("Rehabilitation Act"), which prohibited discrimination only by federal agencies, contractors, and programs or activities receiving federal financial funds.[23] In doing so, Congress acknowledged that disability-based employment discrimination affected a considerable sector of the population and extended coverage to address the everyday employment discrimination faced by the majority of the country's disabled.[24] Embedded in this discrimination was the existence of both structural and societal barriers that prevented such individuals from equal employment opportunities.[25] Pervasive and diverse in manifestation, the discrimination cost the United States "billions of dollars in unnecessary expenses resulting from [the] dependency and non-productivity" of its disabled.[26] Thus, Congress's "clear and comprehensive national mandate" to eliminate disability discrimination and stereotypical assumptions was rooted in both moral *and* practical grounds for improving self-sufficiency.[27]

To achieve this objective, the ADA's core anti-discrimination provision prohibits an employer from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual" in a wide variety of employment practices.[28] Therefore, in order to state a disability discrimination claim under the ADA, the employee must establish that "(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."[29]

Under the ADA, an individual is considered disabled if they meet one of the following three definitions: "(1) [having] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) [having] a record of such an impairment; or (3) being regarded as having such an impairment."[30] While the first definition covers those employees who manifest an *actual* disability or impairment that substantially limits a major life activity, the third definition includes those employees with only a *perceived* disability who have been mistakenly *regarded as* disabled by their employer. It is the employee that meets the third definition, which this Comment is focused upon.

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and joint labor-management committees to provide reasonable accommodations. *See id.* at § 12112 (a), (b)(5)(A).

[23] *See* Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of 29 U.S.C.).

[24] *See* 42 U.S.C. § 12101(b)(4) (stating that one purpose of the ADA was to "address the major areas of discrimination faced day-to-day by people with disabilities.").

[25] *Id.* at § 12101(a)(5)(7).

[26] *Id.* at § 12101(a)(9).

[27] *Id.* at § 12101(b)(1).

[28] 42 U.S.C. § 12112(a).

[29] *Williams*, 380 F.3d at 761.

[30] 42 U.S.C. § 12102(2)(A)-(C); *see also* 29 C.F.R. § 1630.2(g)(1)-(3).

Given that the ADA does not define the term *regarded as*, one must look to judicial and administrative interpretations for guidance.[31] According to the EEOC, an individual is *regarded as* disabled if he:

> (1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) [h]as none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.[32]

It is important to note that each of these categories has one element in common: they all require that the individual, absent the misperceptions of his employer or others, lack an actual physical or mental impairment that substantially limits a major life activity.[33] Thus, the designation of the disability turns on the employer's perception of the employee's impairment, not the actual impairment itself.[34]

Accompanying this provision, the EEOC lists an example for each category.[35] The first category includes an employee that has controlled high blood pressure that does not substantially limit him in any major life activity.[36] If the employer reassigns the employee on the misperception that he will suffer a heart attack if he continues in his current job, the employer would have regarded the employee as disabled.[37] The second category includes an employee that has a prominent facial scar or disfigurement or condition that causes an involuntary jerk of the head, but such impairment

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[31] *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (defining two ways in which an employee can fit the *regarded as* disabled definition: "(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."); *Deane*, 142 F.3d at 143 (citing to 42 U.S.C. § 12116 (requiring the EEOC to implement said regulations)); 29 C.F.R. § 1630.2.

[32] 29 C.F.R. § 1630.2(l); 29 C.F.R. § 1630.2(h) defines "physical or mental impairment" as:

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

[33] *See Deane*, 142 F.3d at 143; Travis, *supra* n. 8, at 912.

[34] *See* H.R. Rpt. 101-485 pt. 3 at 30 ("The perception of the covered entity is a key element of this test.").

[35] *See* 29 C.F.R. app. § 1630.2(l).

[36] *Id.*

[37] *Id.*

does not limit the employee's major life activities.[38] If an employer discriminates against the employee because of a customer's negative reaction to the condition, the employer would have regarded the employee as disabled by acting because of that perceived disability.[39] Finally, the third category includes an employee that the employer incorrectly believes to have a substantially limiting impairment or illness, such as the Human Immunodeficiency Virus ("HIV"), that the employee does not actually have.[40] If the employer should discharge the employee based on this completely erroneous misperception, it would have regarded the employee as disabled.[41]

Congress's rationale for including the *regarded as* component in the disability definition was based on the finding that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment."[42] Relying on the reasoning articulated by the Supreme Court in *School Board of Nassau County v. Arline*, which considered the *regarded as* prong included in the Rehabilitation Act, Congress recognized that "although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling."[43] Further review of the limited legislative history confirms that the definition "applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment that substantially limits a major life activity."[44]

Congress also noted that sociologists have identified common barriers that frequently result in employers excluding disabled persons, such as: productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers.[45] While this list of common workplace concerns is not exhaustive, it illustrates the attitudinal barriers that Congress clearly intended to combat by including the *regarded as* disabled provision within both the Rehabilitation Act and the ADA.[46]

Many courts have interpreted the *regarded as* provision similarly, with most requiring that the employer either mistakenly believe that the employee has a physical impairment that he does not have *or* mistakenly believe that the employee's non-limiting impairment substantially limits

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *See* 29 C.F.R. app. § 1630.2(l) (quoting *Arline*, 480 U.S. at 284).
[43] *Id.* (quoting *Arline*, 480 U.S. at 283).
[44] H.R. Rpt. 101-485 pt. 3 at 29.
[45] *Id.* 29 C.F.R. app. § 1630.2(l).
[46] H.R. Rpt. 101-485 pt. 3 at 30.

one or more life activities.[47] Essentially, an employer "cannot misinterpret information about an employee's limitations to conclude that the employee is incapable of performing a wide range [or class] of jobs."[48] In fact, an employer may be liable even if it is innocently wrong about the extent of the employee's impairment.[49]

B. Reasonable Accommodations for the Qualified Employee

Once the employee meets the first prong by having a statutory "disability," it must be established that he is a "qualified individual" who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[50] The ADA makes no distinction between applying this definition to those individuals with actual or perceived disabilities.[51] Accordingly, it is this single definition, and lack of statutory clarification, that is the "genesis of the 'unfair advantage' critique."[52] For some courts, there is an overwhelming tendency to automatically apply the single definition identically to both categories of claims.[53] However, a growing minority of courts are rejecting the appropriateness of this mechanical application in favor of a blanket denial for all *regarded as* employees seeking reasonable accommodation from their employers.[54]

Generally, "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[55]

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[47] *Sutton,* 527 U.S. 471; *see also Williams*, 380 F.3d at 770 (quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 189-90 (3d Cir. 1999)) (holding that with respect to a *regarded as* claim, the employer would be "liable if it wrongly regarded [the employee] as so disabled that he could not work and therefore denied him a job.").

[48] *Williams*, 380 F.3d at 769 (quoting *Pathmark,*, 177 F.3d at 190).

[49] *Id.* at 770 n. 14 (rejecting an employer's "good faith" defense to the extent that its misperceptions about the disability were based upon myths, fears, or stereotypes associated with disabilities); *Sutton,* 527 U.S. at 489; *Dyke v. O'Neal Steel, Inc.*, 327 F.3d 628, 632 (7th Cir. 2003). However, the Third Circuit does recognize a limited defense for employers who engage in an "individualized determination of the employee's actual condition" and develop a misperception "based on the employee's unreasonable actions or omissions." *Williams*, 380 F.3d at 769 (quoting *Pathmark,* 177 F.3d at 193).

[50] 42 U.S.C. § 12111(8).

[51] *Kaplan*, 323 F.3d at 1232 (noting that ADA's definition of "qualified individual with a disability" does not differentiate between the three *disability* alternatives); *see also D'Angelo,* 422 F.3d at 1236 (recognizing that the text of the ADA does not differentiate among the three types of disabilities in determining which are entitled to a reasonable accommodation); *Williams,* 380 F.3d at 774 ("[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.").

[52] *See* Travis, *supra* n. 8, at 912-13.

[53] *Id.* at 926.

[54] *Id.* at 927-28.

[55] 29 C.F.R. app. § 1630.2(o); *see also* 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (listing the three categories of reasonable accommodations:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or

Thus, whatever form it takes, the "reasonable accommodation requirement is best understood as a means by which barriers to the equal opportunity of an individual with a disability are removed or alleviated."[56] While such workplace barriers may take the form of either a physical or operational obstacle that prevents an employee from performing the desired job,[57] a reasonable accommodation under the ADA may include, but is not limited to:

> making existing facilities used by employees readily accessible and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[58]

Although the ADA's silence on both the exact definition and proper implementation of a reasonable accommodation has proven frustrating to courts and employers alike, the EEOC's regulations suggest that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation."[59] Specifically, the EEOC's Interpretive Guidance outlines this interactive process as an informal problem-solving approach in which the employer should analyze the position and consult with the employee to determine the appropriate accommodation.[60] Yet, in the alternative, the EEOC also recognizes that in many situations, the appropriate reasonable accommodation may be so obvious that it is not necessary to proceed in the prescribed step-by-step fashion.[61] Ultimately, it is the ADA's silence on this issue that has led federal courts to take varying approaches toward the

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> desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.).

[56] 29 C.F.R. app. § 1630.9.
[57] *Id; see also EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Compliance Manual § 902, intro (October 17, 2002) (available at http://www.eeoc.gov/policy/docs/accommodation.html) [hereinafter EEOC Compliance Manual] ("These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed).").
[58] 42 U.S.C. § 12111(9)(A)-(B); 29 C.F.R. § 1630.2(o)(2)(i)-(ii).
[59] 29 C.F.R. § 1630.2(o)(3).
[60] 29 C.F.R. app. § 1630.
[61] *Id.*

role of the interactive process.[62] As will be discussed in Section III, a review of the legislative history reveals that such an interactive process may have been just what Congress intended in this instance.[63]

As for the third requirement in a disability discrimination claim, an adverse employment decision "include[s] refusing to make reasonable accommodations" for an employee's ADA-qualifying disability.[64] Under the ADA, an employer engages in unlawful discrimination by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[65] However, an employer can be excused from having to provide a reasonable accommodation if it can "demonstrate that the accommodation would impose an undue hardship on the operation of its business."[66]

While the ADA imposes an affirmative obligation on the employer to accommodate the statutorily-disabled employee, the focus of the duty to accommodate is on equal employment opportunity, rather than preferential treatment.[67] The inclusion of the reasonable accommodation and essential functions provisions was Congress's attempt to "level the playing field"—not as a means to give disabled employees an advantage over those without a disability.[68] Absent a reasonable accommodation provision, Congress recognized that a mere antidiscrimination statute would not eliminate the structural and social barriers imposed on the employee by the conventional workplace.[69] Yet, by including the essential functions provision, Congress allowed the employer to retain considerable control over the ultimate functionality and productivity of the position.[70]

Consequently, the ADA was drafted with the intention of preserving the employer's freedom of choice while maintaining its goal of

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[62] John R. Autry, *Reasonable Accommodation under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"*, 79 Chi.-Kent L. Rev. 665, 677-84 (2004).

[63] *See* H.R. Rpt. 101-485 pt. 2 at 65 ("The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. . . . A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.").

[64] *Williams*, 380 F.3d at 761; *see also* Michael J. Zimmer, et al., *Cases and Materials on Employment Discrimination* 677 (6th ed., Aspen Publishers 2003) ("The centerpiece of disability discrimination law is the employer's affirmative duty to provide reasonable accommodation to ensure that individuals with disabilities secure equal employment opportunities and benefits.").

[65] 42 U.S.C. § 12112(a)(5)(A).

[66] *Id.*; *see also* 29 C.F.R. § 1630.9.

[67] *See* 29 C.F.R. app. § 1630.

[68] Travis, *supra* n. 8, at 915.

[69] *Id.*

[70] *See* 42 U.S.C. § 12111(8) (stating that "For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential").

equal opportunity.[71] Such balance allows the employer the prerogative to prefer certain employee characteristics to others, determine the essential functions, and choose the reasonable accommodations, [72] as long as the employer does not prevent a qualified individual with a disability from enjoying the same employment opportunities that are available to persons without a disability.[73]

It is this premise of equal opportunity that creates difficulty for the courts, especially when applied to a *regarded as* disabled reasonable accommodation claim.[74] Because *regarded as* disabled employees do not usually face the same physical or operational barriers as an employee with an actual disability, the only significant difference between them and non-disabled employees is the employer's misperception.[75] Yet, it is exactly this misperception, and the negative stigma that attaches to it, that prevents the two employees from being construed as similarly situated.[76] Courts vary significantly in their interpretations of this difference, and it leads one to question whether an acceptable middle ground exists.[77]

C. Circuit Splits over Reasonable Accommodation Requirement

1. Reasonable Accommodation Required

Courts that have traditionally granted the *regarded as* disabled employee a reasonable accommodation have followed the plain meaning of the ADA, and identically applied the reasonable accommodation requirement to those with both actual and perceived disability claims.[78] In response to concerns that such mechanical applications would create a windfall for those employees who are impaired but not "disabled," the courts concluded that the *regarded as* disabled employee and the employee with a non-disabling impairment are *not* similarly situated.[79] Although both employees are impaired, the *regarded as* disabled employee is further hindered by the negative stigma and discriminatory attitudes imposed on him by the employer's misperceptions.[80]

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[71] *See* 29 C.F.R. app. § 1630 (prefacing that the ADA is unlike the Civil Rights Act of 1964, which prohibits any consideration of personal characteristics, because it requires the employers to consider the employee's disability when determining if a reasonable accommodation would be effective).

[72] *See Sutton*, 527 U.S. at 490-91 ("By its terms, the ADA allows employers to prefer some physical attributes over others ... just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job."); 29 C.F.R. app. § 1630.2(b).

[73] *See* 29 C.F.R. app. § 1630.

[74] *See* Travis, *supra* n. 8, at 915-16.

[75] *Id.* at 916.

[76] *DiMarzio*, 200 F. Supp. 2d 151 (finding that employees with perceived disabilities are not similarly situated with non-disabled employees because of the negative stigma attached to the employer's misperceptions).

[77] *See supra* Section II(B) for further discussion regarding the circuit splits over providing reasonable accommodation for *regarded as* disabled employees.

[78] *Williams*, 380 F.3d 751.

[79] *See DiMarzio*, 200 F. Supp. 2d at 170.

[80] *Id.*

To illustrate, imagine a scenario in which a clerical worker has a mild form of Tourette's Syndrome. Even though he is not "disabled" under the ADA, his employer has learned of the impairment and mistakenly believes it substantially limits his ability to interact with others. His co-workers are also aware of the impairment and complain about working with him because his outbursts make them feel uncomfortable. Unable to interact with his co-workers because of their discriminatory attitudes, the employee is discharged.[81] Under such circumstances, a reasonable accommodation would be appropriate to combat the co-worker's prejudices and prevent the perpetuation of erroneous stereotypes.[82]

In *Katz v. City Metal Co.*, the First Circuit Court of Appeals was the first to address the issue of whether the reasonable accommodation requirement applied to the *regarded as* category of disabled employees.[83] Although it resolved the issue without analysis, the *Katz* court indicated that it would hold that an employer was required to reasonably accommodate perceived disabilities if necessary.[84] *Katz* involved an employee who sought an accommodation from his employer in the form of a reduced work schedule after suffering a heart attack.[85] The employer denied the employee's request for an accommodation and terminated his employment. In response to his ADA discrimination claim, the First Circuit found sufficient evidence that the employer had perceived the employee as being disabled and determined that a reasonable accommodation could have been granted.[86]

The district court in *Jacques v. DiMarzio, Inc.* then followed with a thorough and convincing analysis in favor of granting reasonable accommodations to *regarded as* disabled employees.[87] The plaintiff, an employee in a guitar factory, suffered from major depression and bipolar disorder, but was not actually disabled under the ADA.[88] The employer terminated her because of numerous arguments with co-workers and complaints about working conditions.[89] Although the court did not initially address the applicability of the reasonable accommodation requirement to *regarded as* disabled employees, it subsequently issued a supplemental

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[81] This scenario was adapted from two *regarded as* examples listed in the *DiMarzio* opinion. *See id.* at 168 (illustrating discriminatory conduct against a *regarded as* police officer with mild multiple sclerosis and a *regarded as* clerical worker with mild schizophrenia).
[82] *Id.*
[83] 87 F.3d 26.
[84] *Id.* at 32-34.
[85] *Id.* at 28-29.
[86] *Id.* at 33.
[87] 200 F. Supp. 2d 151.
[88] *Id.* at 154 (discussing the plaintiff's history of psychological disorders); *see also id.* at 157-59 (determining that the plaintiff's impairment did not rise to a level of actual disability under the ADA).
[89] *Id.* at 155.

decision in response to the *Weber* decision.[90] In addition to upholding the reasonable accommodation requirement for *regarded as* disabled employees, the court also imposed a mandatory obligation on the employer to engage in an interactive process with employees who may be in need of an accommodation for their disabilities.[91] The court reasoned that such an interaction would allow employers to determine if an accommodation was necessary to counter the misperceptions and stereotypes that Congress intended to eliminate.[92]

In *Williams v. Philadelphia Housing Authority Police Department*, the Third Circuit found that employees meeting the ADA's definition of *regarded as* disabled are entitled to a reasonable accommodation.[93] Williams, a veteran police officer who suffered from severe depression, was suspended and required to seek psychiatric evaluation following a serious confrontation with a supervisor.[94] Following psychiatric evaluation, the psychiatrist suggested Williams be placed on non-active duty and advised that he not carry a weapon for a three-month period.[95] When Williams requested a position in the radio room, the employer refused and Williams was subsequently terminated.[96] In addition to finding that Williams was actually disabled under the ADA, the court also determined that there was sufficient evidence to survive summary judgment on his *regarded as* disabled claim.[97] The court concluded that the employer had misperceived the psychiatrist's recommendation as precluding Williams from having any access to weapons, which he would have had in the radio room.[98]

Although the Third Circuit had broached the issue of reasonable accommodation for *regarded as* disabled employees in prior cases, most notably in *Deane v. Pocano Medical Center,* it expressly declined to answer this question.[99] In considering this issue of first impression, the court first looked to the plain language of the ADA. It noted that the definition of "disability" includes "being regarded as having ... an impairment" that substantially limits a major life activity, thus the statutory text of the ADA does not in any way "distinguish between [actually] disabled and 'regarded as' individuals in requiring accommodation."[100]

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[90] *Id.* at 164-71; *see also Weber*, 186 F.3d at 916 (finding that regarded as disabled employees are not entitled to a reasonable accommodation under the ADA). For further discussion of the *Weber* decision, *see infra § II(C)(2).*

[91] *DiMarzio*, 200 F. Supp. 2d at 166.

[92] *Id.* at 168.

[93] 380 F.3d 751.

[94] *Id.* at 756.

[95] *Id.*

[96] *Id.* at 757-58.

[97] *Id.* at 766-67.

[98] *Id.* at 767.

[99] 142 F.3d 138 (declining to answer reasonable accommodation question, but recognizing import of the interactive process); *Taylor,* 177 F.3d 180 (supporting the employer's duty to investigate and educate, but declining to answer the exact reasonable accommodation question).

[100] *Williams*, 380 F.3d at 774.

Next, the court looked to the legislative history of the ADA and recognized that the congressional committee reports confirmed that "the ADA was written to protect one who is 'disabled' by virtue of being 'regarded as' disabled in the same way as one who is 'disabled' by virtue of being 'actually disabled' because being perceived as disabled 'may prove just as disabling.'"[101] In addition, the Third Circuit looked to the Supreme Court's decision in *School Board of Nassau County v. Arline* as supporting the view that *regarded as* disabled employees are entitled to reasonable accommodations under the ADA.[102]

In their analysis, the court acknowledged that "there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results.'"[103] Nevertheless, the court concluded there was "no basis for an across the board refusal to apply the ADA in accordance with the plain meaning of its text."[104] Accordingly, the court found that "the conclusion seems inescapable that 'regarded as' disabled employees are entitled to reasonable accommodation under the ADA in the same way as those who are actually disabled."[105]

Most recently, the Eleventh Circuit in *D'Angelo v. Conagra Foods* found that under the plain meaning of the ADA, employers must provide reasonable accommodations for individuals falling within any of the ADA's definitions of disabled, including those *regarded as* being disabled.[106]

2. Reasonable Accommodation Not Required

In the alternative, courts finding that *regarded as* disabled employees are not entitled to a reasonable accommodation under the ADA take issue with the "bizarre result" that the plain meaning of the statute permits.[107] Specifically, a "formalistic reading" of the statute allows for different outcomes for similarly situated employees solely because of their employers' misperceptions.[108] As a result, some courts have expressed concern that such a finding would permit healthy employees to demand unnecessary accommodations under the guise of a perceived disability and would create a windfall or unfair advantage over other employees that were also impaired, but had not been misperceived by their employer.[109]

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[101] *Id.* (quoting *Arline*, 480 U.S. at 283).
[102] *Id.* at 774.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 775.
[106] 422 F.3d 1220.
[107] *Weber*, 186 F.3d at 916.
[108] *See Kaplan*, 323 F.3d at 1232 (recognizing that a "formalistic reading" would lead to "bizarre results").
[109] *See Deane*, 142 F.3d at 138, 149 n. 12.

In *Weber v. Strippit, Inc.*, the Eighth Circuit addressed the anomaly of reasonably accommodating perceived disabilities and held that *regarded as* disabled plaintiffs are not entitled to reasonable accommodations.[110] The employee had been discharged after the employer refused to accommodate the employee's request to delay relocation following a major heart attack.[111] In upholding the decision for the employer, the court concluded that "[t]he ADA cannot reasonably have been intended to create a disparity in treatment among impaired, but non-disabled employees, denying most the right of reasonable accommodations, but granting to others, because of their employer's misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees."[112]

Subsequently, the Ninth Circuit in *Kaplan v. City of North Las Vegas*, followed *Weber's* lead and concluded that *regarded as* disabled individuals are not entitled to reasonable accommodations because doing so would create a "windfall" for non-statutorily-disabled persons.[113] Kaplan, a peace officer, was misdiagnosed with rheumatoid arthritis and fired because the employer mistakenly believed that he could not hold a gun, an essential function of the job.[114] Although the court found that Kaplan had been *regarded as* disabled, they refused to apply the plain meaning of the statute on grounds that a reasonable accommodation would give Kaplan an unfair advantage over other similarly situated employees and waste valuable employer resources.[115]

Furthermore, the *Kaplan* court reasoned that "[d]ispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments."[116] If *regarded as* disabled employees were entitled to reasonable accommodations, the employees would not be encouraged to educate the employers of their true capabilities and talents; instead, the employees would be induced to deceitfully perpetuate their employers' misperception of their disabilities.[117]

III. ANALYSIS

A. The ADA's Ambiguity: Source of the Conflict?

As previously indicated, courts continue to struggle with Congress's failure to precisely define multiple terms and obligations that

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[110] 186 F.3d 907.
[111] *Id.* at 910.
[112] *Id.* at 917.
[113] 323 F.3d at 1232; *see also Workman v. Frito Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Cannizaro v. Neiman Marcus, Inc.* 979 F. Supp. 465 (N.D. Tex. 1997); *Nuzum v. Ozark Automotive Distributors, Inc.*, 320 F. Supp. 2d 852 (S.D. Iowa 2004).
[114] *Kaplan*, 323 F.3d at 1228-29.
[115] *Id.* at 1232.
[116] *Id.*
[117] *Id.*

are essential to an employer's mandatory compliance with the ADA.[118] For instance, the ADA provides no guidance for implementing the reasonable accommodation requirement, especially as it pertains to the *regarded as* disabled employee, nor does it directly refer to the role of the interactive process.[119] While this silence has led some courts to bemoan ambiguity and speak of "windfalls" and "bizarre results,"[120] other courts have matter-of-factly looked to the plain meaning of the text for their direction.[121] For "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms."[122]

1. Following the Plain Meaning

The statutory text of the ADA states that "no [employer] shall discriminate against a qualified individual with a disability" on the basis of such disability.[123] Because the ADA's definition of "disability" explicitly includes those individuals "*being regarded as having such an impairment* [that substantially limits one or more of the major life activities],"[124] a "qualified individual with a disability" would include an "individual [*regarded as having such an impairment*] who, with or without reasonable accommodation, can perform the essential functions of the employment position."[125] Furthermore, an employer discriminates by "not making reasonable accommodations" for "an otherwise qualified individual with a disability."[126] The text makes no distinction between the actual or *regarded as* individual who requires a reasonable accommodation. Thus, employers must reasonably accommodate those employees it regards as disabled.[127]

Still, other courts have taken the view that the "absence of a stated distinction ... is not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations."[128]

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[118] *See Sutton*, 527 U.S. at 489.

[119] *See* Autry, *supra* n. 62, at 666-67 (noting that there is a lack of statutory text revealing the process an employer should follow when attempting to accommodate its disabled employee).

[120] *See Kaplan*, 323 F.3d at 1228-29; *Weber*, 186 F.3d at 916.

[121] *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (stating that the standard approach to statute interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case").

[122] *Kaplan*, 323 F.3d at 1231-32 (quoting *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)).

[123] 42 U.S.C. § 12102(2)(A)-(C).

[124] *Id.* at § 12102(2)(A), (C) (emphasis added).

[125] *Id.* at § 12111(8) (emphasis added).

[126] *Id.* at § 12112(b)(5)(A).

[127] *See D'Angelo*, 422 F.3d at 1235-36 (using the statute's plain meaning, the court uses a similar *substitution* process and finds that "the statute's prohibition on discrimination applies equally to all statutorily defined disabilities," including those falling under the *regarded as* prong of disability); *Williams*, 380 F.3d at 774 (finding no statutory distinction between *actual* and *regarded as* individuals requiring accommodation).

[128] *See Kaplan*, 323 F.3d at 1232 (citing *Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001) (recognizing that a court should look past the plain meaning when a literal interpretation of the statute would lead to an absurd result)); *see also Weber*, 186 F.3d at 917 (finding that following the plain meaning of the ADA in granting reasonable accommodations to those with perceived disabilities would lead to a "bizarre result").

These courts have focused on the potential for "bizarre results" from such a "formalistic reading," and pursued a meaning beyond the act's literal language.[129] Accordingly, these courts have reasoned that the impaired, but not statutorily-disabled, employees would have a better advantage under the ADA if the employers misperceived them as disabled than if they did not.[130] They assumed that such employees would be discouraged from correcting the employers' misperceptions and educating them of their "true" capabilities.[131] Thus, to allow such a "windfall," "would be a perverse and troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly indicative of the individual ability of [people with disabilities.]'"[132]

On the contrary, it is the opposing courts' rationale that appears to be founded upon stereotypical assumptions. These courts pessimistically presume that every *regarded as* disabled employee will willingly approve of his misperceived status to take advantage of the employer's statutory obligation to accommodate.[133] While the potential for such a windfall does exist, it should not lead courts to impose a blanket denial for all such employees.[134]

These courts' unwillingness to grant the employee an opportunity for such an accommodation essentially denies the employee the benefit of the "disability" status provided by the *regarded as* provision in the ADA. As the legislative history clearly indicates,[135] the potential disadvantages of such stereotypical misperceptions were a significant impetus for Congress's inclusion of the *regarded as* provision.[136] Without the right to some form of a reasonable accommodation, the provision loses substantial value. Furthermore, when a misperceived employee is refused his statutorily granted reasonable accommodation, the courts deny the employee the opportunity to educate the employer about the true extent of their impairment and prevent the employer from correcting the misperceptions in the workplace.

2. Interpreting the Legislative History

Due to a limited concession from all sides of the argument that the text of the ADA lacks overall clarity, a review of the available legislative history is both useful and instructive in finding Congress's true legislative

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* (quoting 42 U.S.C. § 12101(a)(7)).
[133] *Kaplan*, 323 F.3d at 1232.
[134] *Williams*, 380 F.3d at 774.
[135] For further discussion of the legislative history, *see infra*, Section II(C)(2).
[136] *See D'Angelo*, 422 F.3d at 1236 (citing *Arline*, 480 U.S. at 205 ("Excluding individuals regarded as disabled from the coverage of the Rehab Act . . . would leave then 'vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.")).

intent.[137] "When addressing questions of statutory construction, [the] task is to interpret the words of the [statute] in light of the purposes Congress sought to serve."[138] Although Congress failed to address the issue of reasonable accommodations for *regarded as* disabled employees directly, it repeatedly referred to the ADA's incorporation of the Rehabilitation Act's reasonable accommodation requirements and their subsequent application to employment conditions under the ADA.[139] Additionally, Congress directly cited the Supreme Court's rationale articulated in *Arline* as justification for the ADA's inclusion of the *regarded as* definition:[140]

> Although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. . . Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.[141]

Moreover, Congress explicitly recognized that a reasonable accommodation might only require "a change in attitude regarding employment of people with disabilities."[142] This acknowledgement, in conjunction with the *regarded as* rationale articulated in *Arline*, indicates that Congress contemplated accommodating those employees whose injury stems from an employer's misperception rather than the actual physical or mental impairment. By including this statement, Congress recognized that the proper accommodation for such individuals need not always be a change to the employee's structural or operational work environment. Rather, the accommodation could involve a modification of the employer's attitudes toward an employee's specific impairment. Thus, Congress not only contemplated, but advocated, providing accommodations geared toward eliminating stereotypes and removing social barriers in situations where a traditional removal of structural or operational barriers was unnecessary.

Furthermore, the courts that have departed from the ADA's plain meaning have not identified any legislative history suggesting that the so-called "bizarre results" following a faithful reading of the text are contrary

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[137] *See Ex parte Collett*, 337 U.S. 55, 61 (1949) (stating the general principle that legislative history is instructive when the text of the statute is ambiguous); *United Steel Workers v. Weber*, 443 U.S. 193 (1979) ("Legislative history may reveal the 'true' intent of the Congress.").

[138] *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

[139] Sen. Rpt. 101-116 at 2, 31 (1989) (stating that the "duty to make reasonable accommodations applies to all employment decisions, not just simply hiring and promotion decisions").

[140] H.R. Rpt. 101-485 pt. 3 at 30.

[141] *Id.* (quoting *Arline*, 480 U.S. at 284).

[142] H.R. Rpt. 101-485 pt. 2 at 67 (recognizing "that many individuals with disabilities do not require any reasonable accommodation whatsoever. The only change that needs to be made for such individuals is a change in attitude regarding employment of people with disabilities.").

to Congress's intent.[143] Some commentators suggest this silence indicates that Congress never considered whether the reasonable accommodation requirement made sense for perceived disabilities.[144] These critics depict the legislative history examples of *regarded as* disabilities as "prototypical" and non-reflective of cases where the non-disabling conditions actually impair an employee's ability to perform. [145] Consequently, Congress must have failed to consider the impact of the reasonable accommodation requirement for those with actual performance-limiting impairments.[146]

While the legislative history does not explicitly address the act of accommodating a *regarded as* disabled employee, this alone is insufficient to establish a complete lack of consideration of such accommodations by Congress.[147] In fact, Congress explicitly provided that "the [*regarded as* status] applies *whether or not a person has an impairment*,"[148] which implies that Congress at least considered, albeit minimally, the fact that such individuals may also have an actual impairment that limits their abilities to perform.

3. Legislative Inaction and Statutory Precedents

Although several courts have made repeated use of the legislative history surrounding the *initial* enactment of the ADA, few have made reference to the lack of legislative history *following* its passage. However, a review of such legislative inaction, and the various theories behind it, may be appropriate for correctly interpreting the ADA and determining Congress's true intent.[149] It is well-accepted among the theories of statutory interpretation that such legislative inaction is based on the presumption that what Congress fails to do following the passage of certain legislation may be an indication of what they originally meant or intended to do.[150]

In cases such as this, where an administrative agency, like the EEOC, has promulgated regulations based on its interpretation of the statute, the *acquiescence rule* may be most instructive.[151] According to this

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[143] *D'Angelo*, 422 F.3d at 1239.

[144] *See* Travis, *supra* n. 8, at 940.

[145] *Id.* at 941-42; *see also Deane*, 142 F.3d at 148 n. 12 (noting that because Congress illustrated the *regarded as* prong with examples of non-disabled individuals with no performance limiting impairments, it must not have intended to include such individuals that need accommodation).

[146] Travis, *supra* n. 7, at 941.

[147] H.R. Rpt. 101-485 pt. 3 at 29; *see also* Travis, *supra* n. 8, at 941 n. 160 (recognizing that whether or not the omission was deliberate or not is speculation).

[148] H.R. Rpt. 101-485 pt. 3 at 30. (emphasis added).

[149] *See* William N. Eskridge, Jr. et al., *Legislation: Statutes and the Creation of Public Policy* 1020-22 (3d ed. West 2001) (recognizing that a review of post-enactment legislative history and other extrinsic reference canons may be helpful if the precise intent of the enacting legislature is obscure).

[150] *Id.*

[151] *See* William Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 70-78, 125-28 (1988) (analyzing the use of the acquiescence rule in interpreting legislative inaction and citing supporting cases).

rule, if Congress is aware of an agency's interpretation of a statute and does not amend or override it, a court may presume that Congress has implicitly ratified or acquiesced in the interpretation's correctness.[152] Thus, one may argue that if Congress was aware of the EEOC's interpretations and thought them to be contradictory to their original intent, Congress would have amended the ADA to expressly exclude those with perceived disabilities from receiving reasonable accommodations. Similarly, this also demonstrates Congressional support of the EEOC's regulation suggesting the implementation of the interactive process.

A court may also look to the *reenactment rule* for further interpretive guidance.[153] The Supreme Court has repeatedly held that "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[154] Since the passage of the EEOC's regulations,[155] Congress subsequently amended the ADA in 1991[156] and again in 1995[157] without changing or commenting upon the interpretations. This "creates a strong presumption that authoritative constructions of a statute become tightly bonded to the text and ought not to be overruled by the court."[158]

Finally, it is often common practice for legislatures drafting statutes to borrow terms and phrases from other established legislation, a practice referred to as *stare de statute*.[159] Consequently, courts often find it significant when administrative and judicial precedents construe the term or definition in a similar or uniform manner.[160] It is presumed under the *borrowed statute* or *in pari materia rule* that "when administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate administrative and judicial interpretations as well."[161]

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[152] *Id.*; *Faragher v. City of Boca Raton*, 524 U.S. 775, 804 n. 4 (1998).
[153] William M. Eskridge, Jr., et al., *Legislation and Statutory Interpretation*, 281-82 (Found. Press 2000) [hereinafter Eskridge II].
[154] *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *see also U.S. v. Cerecedo Hermanosy Campania*, 209 U.S. 337, 339 (1908) ("[T]he reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction.").
[155] *See* 29 C.F.R. §§ 1630 *et seq.*
[156] The ADA was amended by the Civil Rights Act of 1991 on Nov. 21, 1991, Pub. L. No. 102-66, 105 Stat. 1071 (1991).
[157] 42 U.S.C. § 12209 (1990) was amended effective one year after January 23, 1995. This amendment deleted subsections (a) and (b) and all specific references to coverage of the Senate and House of Representatives, and made the statute applicable only to instrumentalities of Congress.
[158] Eskridge II, *supra* n. 153, at 281; *but see id.* at 282 (noting that the reenactment rule is not always followed.).
[159] Frank Horack, Jr., *The Common Law of Legislation*, 23 Iowa L. Rev. 41 (1937).
[160] *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).
[161] Eskridge II, *supra* n. 153, at 283.

Thus, it is informative that Congress followed this practice of *stare de statute* when they drafted the ADA, drawing much of its terminology, including the definition of "disability," almost verbatim from the Rehabilitation Act.[162] In its review of the ADA in *Bragdon v. Abbott,* the Supreme Court acknowledged that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with the pre-existing regulatory interpretations" and found that the plaintiff was covered under the ADA as he was under the Rehabilitation Act.[163] In what appears to be a further act of reconfirmation, Congress amended the Rehabilitation Act in 1992 to incorporate the standards of the ADA into its section defining "reasonable accommodation."[164]

Furthermore, the *Bragdon* Court noted that Congress explicitly included a provision in the ADA that states "'nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 . . . [165] or the regulations issued by Federal agencies pursuant to such title.'"[166] Consequently, the Court applied Congress's directive to "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[167] Following this rationale, several circuits have adopted the *Arline* Court's conclusion that employers have an affirmative obligation under the Rehabilitation Act of 1973 to accommodate *regarded as* employees, and applied it to the ADA.[168] Thus, in light of the decisions in *Arline* and *Bragdon*, along with statutory precedent, "the conclusion seems inescapable that 'regarded as' employees under the ADA are entitled to reasonable accommodation in the same way as are those who actually disabled."[169]

B. What Does the Silence Mean?

While the generally accepted rule is to "presume 'that Congress said what it meant and meant what it said,'"[170] courts refusing to accommodate the *regarded as* employee have chosen to focus instead on what Congress has *not* said. Relying on this silence, rather than the statutory text, such courts purport to find Congress's true intent by reading between the lines. These courts refuse to concede that Congress's silence is

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[162] *See Bragdon,* 524 U.S. at 631-32 (recognizing that the ADA definition of disability was drawn from the Rehabilitation Act almost verbatim).
[163] *Id.*; *see also Lorillard*, 434 U.S. at 580-81.
[164] *See* 29 U.S.C. § 794(d) (1973); *Mengine v. Runyon,* 114 F.3d 415, 420 n. 4 (3d Cir. 1997) (citing the amendment).
[165] 29 U.S.C. § 790 (1973) et seq.
[166] *Bragdon,* 524 U.S. at 632 (quoting U.S.C. § 12201(a) (1990)).
[167] *Bragdon*, 524 U.S. at 632.
[168] *See D'Angelo*, 422 F.3d at 1236-37 (citing the Third Circuit's use of this reasoning in *Williams*, 380 F.3d at 775).
[169] *Williams*, 380 F.3d at 775.
[170] *D'Angelo*, 422 F.3d at 1238 (quoting *Best v. Christopher Ranch, LLC*, 361 F.3d 629, 632 (11th Cir. 2004)).

"tantamount to an explicit instruction from Congress that 'regarded as' individuals are entitled to reasonable accommodations."[171] Opposing courts have in turn responded that to imply the ADA lacks "explicit instruction" merely because the reviewing court must plug the statutory definitions into the statute's discrimination provisions to understand "the precise contours of Congress' directive," completely disregards the text's plain meaning.[172] Thus, the floor is open for debate on what this silence really means.

However, congressional silence and ambiguity can be interpreted in various ways. While the silence may mean that Congress did not contemplate the potential result in debate, it is often the result of Congress's intentional act. [173] It is well established that enacted statutes often leave gaps that can be filled or ambiguities that can be resolved by consulting extrinsic sources.[174] Perhaps Congress's silence was an attempt to "leave the door open" for future adaptations as the surrounding social, legal, and technological contexts change.

Alternatively, Congress may have intentionally left the specifics to the EEOC, the administrative agency "constitut[ing] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[175] Thus, Congress may have chosen to leave strategically-placed holes in its well-developed canvas to allow it to ebb and flow with the winds of economic change. Rather than prescribe mandatory obligations and set bright-line standards too rigid for regular, voluntary compliance, Congress allowed the EEOC to define the terms and set the necessary regulations for proper implementation.[176]

In fact, the interpretations emphasize the flexibility of the process, which Congress explicitly noted in its use of "problem solving" and "process" language in the available legislative history discussing reasonable accommodations.[177] The regulations operate on a case-by-case basis, leaving the employer and employee to choose how to remove the barriers impeding the employee.[178] To expressly exclude the *regarded as* provision from the "disability" definition would inevitably leave some *regarded as* disabled employees without corrective options and even perpetuate the misperceptions that Congress intended to prevent.[179]

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[171] *Kaplan*, 323 F.3d at 1232.
[172] *D'Angelo*, 422 F.3d at 1238.
[173] *See* Eskridge II, *supra* n. 153, at 287-88.
[174] *Id.*
[175] *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).
[176] *See* 42 U.S.C. § 12116 (granting EEOC the authority to make regulations pertaining to Title I of the ADA).
[177] *See* H.R. Rpt. 101-485 pt. 2 at 65.
[178] *See* 29 C.F.R. app. § 1630 (recommending that issued regulations be used on a case-by-case basis).
[179] *Arline*, 480 U.S. at 285.

C. Deference or no Deference to the EEOC

Congress was aware that substantial uncertainty would exist over the rights and obligations established by the ADA. Therefore, it charged various federal administrative agencies with the authority to promulgate regulations for administering and enforcing its various subchapters.[180] The EEOC is one of these federal administrative agencies charged with this authority.[181] Pursuant to Title I of the ADA, the EEOC was given the power to interpret the statute and promulgate regulations necessary to carry out that particular subchapter.[182] Accordingly, the EEOC issued regulations,[183]Interpretive Guidance,[184] and various other materials based on these interpretations.[185]

However, the issue of judicial deference to the EEOC's interpretations has recently been the subject of considerable debate.[186] Various courts have disagreed on the extent or level of deference due these ADA regulations and interpretive materials.[187] Although the question of deference has been presented to, but not answered by, the Supreme Court,[188] the Court's decision in *Bragdon* suggested that it was willing to give agencies a principal role in interpreting the statute.[189] In general, this finding is not surprising; it has long been recognized that courts should show great deference to the authorized agency's interpretation when dealing with a problem of statutory construction.[190] Moreover, under the well-established *Chevron* standard, a court should defer to the agency's interpretation in situations where the statute itself is silent or ambiguous, as long as the agency's interpretation is not an impermissible construction of the statute.[191] When the statute is clear, courts assume that Congress has

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[180] Zimmer, *supra* n. 64, at 711.

[181] *See* 42 U.S.C. § 12111 (defining the term "Commission" as the EEOC); *see also* 42 U.S.C. § 12116 ("Not later than 1 year after the date of the enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with [the Administrative Procedure Act].").

[182] *Id.*

[183] *See* 29 C.F.R. §§ 1630 et seq.

[184] Contained in an appendix to the regulations listed at 29 C.F.R. §1630

[185] EEOC Compliance Manual, *supra* n. 56.

[186] *See Sutton*, 527 U.S. at 479-80 (questioning deference level to EEOC regulations interpreting definitional terms of the ADA).

[187] *See id.*

[188] *See id.* at 504 (Court refused to defer to the EEOC's interpretation regarding the mitigating measures question because it found the statutory text unambiguous, thus sidestepping the important question concerning the appropriate deference standard required).

[189] 524 U.S. 624.

[190] *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see also* Eskridge II, *supra,* n. 153, at 313 (recognizing that the agencies are "better informed about the statutory history and the practicality of competing policies than courts" as well as a "tendency to interpret statutes flexibly and even dynamically").

[191] *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

addressed the precise question at issue in the statutory text, and thus no implied delegation of interpretive authority is required.[192]

It is important to note that the *Chevron* standard only attaches when an agency has been delegated substantive rule-making authority.[193] Title I of the ADA, which includes reasonable accommodation, clearly confers such substantive and interpretive authority on the EEOC.[194] However, because the definition of "disability" is absent from Title I, but contained instead in the general provisions of the Act, the Supreme Court has stated that "no agency has been delegated authority to interpret the term 'disability.'"[195] Where the agency lacks substantive authority to promulgate regulations, the agency's interpretations may only be given persuasive authority, based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other] factors which give it power to persuade, if lacking power to control."[196] While this may seem detrimental to the *regarded as* provision contained in the EEOC's regulations, there is substantial evidence that Congress intended to include such individuals within the protection of the ADA.[197]

D. What Is a Reasonable Accommodation for the Regarded as Disabled Individual?

If *regarded as* individuals are entitled to a reasonable accommodation under the ADA,[198] the question of what constitutes a "reasonable" accommodation still remains.[199] As previously discussed, neither the ADA nor the EEOC regulations offer specific guidance for accommodating *regarded as* disabled employees; yet, both the legislative history and the Interpretive Guidance suggest that reasonable accommodation involves an interactive process requiring a fact-sensitive, case-by-case approach to determine the appropriate accommodation that meets the needs of the particular individual.[200] This implies that a reasonable accommodation will be deemed appropriate as long as it

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[192] *Id.*; *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (explaining when an implied delegation of interpretive authority would be found).

[193] *Mead*, 533 U.S. 218; *see also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (noting that the EEOC was only given *procedural* rule-making authority under Title XII, thus the court refused to follow the agency's interpretation that Title VII protected against pregnancy-based discrimination).

[194] *See* 42 U.S.C. § 12111.

[195] *Sutton*, 527 U.S. at 479; *see also Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002) ("[N]o agency has been given authority to issue regulations interpreting the term disability in the ADA.").

[196] *Skidmore*, 323 U.S. at 140.

[197] *See supra*, Section III(A)(2)-(3) (discussing legislative history and legislative inaction).

[198] *Williams*, 380 F.3d 751.

[199] *See Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335-36 (7th Cir. 2004) (recognizing that being *regarded as* disabled is a form of disability that could trigger a duty to accommodate, but questions *what* must be accommodated).

[200] *See* 29 C.F.R. app. § 1630; H.R. Rpt. 101-485 pt. 2 at 65.

provides an equal employment opportunity by removing the barriers facing the individual in the workplace.[201]

Thus, the reasonableness of the accommodation must revolve around two issues: (1) the interactive process used to uncover the barrier, and (2) the nature of the barrier to be removed. Because the nature of the employee's barrier is not always readily apparent, this section will first focus on the role of the interactive process. It will then examine the unique nature of the barrier facing the *regarded as* disabled employee and the type of accommodation that is required to remove the barrier.

1. The Role of the Interactive Process

In order for the employer to deduce the true nature of the employee's barrier to equal employment opportunity, the employer must communicate with the employee and engage in an interactive process.[202] Although the ADA gives no definitive guidance on implementing this interactive process,[203] it is "inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee."[204] The available legislative history clearly states that the "reasonable accommodation requirement is best understood as a process . . . [in which] employers . . . will consult with and involve the individual with a disability in deciding on the appropriate accommodation."[205]

In an effort to clarify the statutory ambiguities, the EEOC's regulations provide that "to determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation. This process should identify the precise limitation resulting from the disability and the potential reasonable accommodation that could overcome those limitations."[206] Similarly, the Interpretive Guidance states that once the employee has made a request or the employer has recognized a need for such an accommodation,[207] the employer must

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[201] *Id.*

[202] *See U.S. Airways v. Barnett*, 535 U.S. 391, 407 (2002) (Stevens, J., concurring) (noting that the Ninth Circuit's holding with respect to requiring an interactive process was "correct" and remains "untouched by the [Supreme] Court's opinion").

[203] *See Williams*, 380 F.3d at 771 (quoting *Shapiro v. Township of Lakewood*, 292 F. 3d 356, 359 (3d Cir. 2002) (noting "'the ADA itself does not refer to the interactive process,' but does require employers to 'make reasonable accommodations' under some circumstances for qualified individuals.")); *see also* Alysa M. Barancik, *Determining Reasonable Accommodations under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process"*, 30 Loy. U. Chi. L.J. 513, 524 (1999) (stating that lawmakers "failed to articulate many important details concerning reasonable accommodations").

[204] *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999).

[205] H.R. Rpt. No. 101-485, pt. 2 at 65.

[206] *See* 29 C.F.R. § 1630.2(o)(3).

[207] *See* 29 C.F.R. app § 1630.9; *Barnett*, 228 F.3d at 1112 (recognizing that "the interactive process is triggered either by a request for accommodation by a disabled employee or by the employer's recognition of the need for such an accommodation."); EEOC Compliance Manual, *supra* n. 56 (stating that the employer may have a duty if the disability is apparent or if they are aware of the disability).

make a reasonable effort to engage in a flexible, yet communicative interaction with the employee to determine the proper accommodation.[208]

Rather than clarifying the language of the ADA, the EEOC's regulations have arguably created some confusion by suggesting that the employer take an active role in the implementation without delineating the specific details or confirming which party incurs liability when the process breaks down.[209] Consequently, courts have been forced to address the extent to which an employer must participate in this interactive process to adequately comply with the ADA.[210] While a small minority of circuit courts have found that there is no obligation for the employer to engage in the interactive process,[211] a majority have imposed such an obligation on grounds that it establishes a good faith effort by both parties to find a reasonable accommodation.[212]

Although there is no per se liability under the ADA for failure to engage in the interactive process, [213] the regulations and legislative history clearly indicate that there are situations in which it may be necessary to reach the level of accommodation required under the ADA.[214] Under such situations, courts have found that the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.[215] The statute mandates that an employer can only be found liable

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There is some disagreement among the circuits, however, about when the employer's duty to engage in the process is triggered. In general, the employee must request the accommodation, unless the employer is aware of the disability, and the nature of the impairment (e.g. mental illness) keeps the employee from requesting. *See Bultemeyer v. Ft. Wayne Community Sch.*, 100 F.3d 1281 (7th Cir. 1996); *Taylor v. Phoenixville*, 184 F.3d 296, 313-15 (3d Cir. 1999).

[208] *See* 29 C.F.R. app. § 1630.9 (suggesting that "the employer must make a reasonable effort to determine the appropriate accommodation . . . [which is] is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability").

[209] *See* Barancik, *supra* n. 203, at 527.

[210] *Id.*; *see generally* Autry, *supra* n. 62. For further discussion *see supra* Section III(C)(1).

[211] *See Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997) (finding no obligation to engage in interactive process independent of an obligation to reasonably accommodate). *See also* Autry, *supra* n. 62, at 668,681-82 (stating that the Tenth and Eleventh Circuits have taken the minority position on this issue).

[212] *See e.g. Beck v. U. of Wis. Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) (suggesting that failure to engage in interactive process may result in liability whether or not a reasonable accommodation is possible); *see also id.* at 1135 ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."). *See also* Autry, *supra* n. 6262, at 668, 677-82 (summarizing several of the circuit courts of appeals cases that have taken this majority approach).

[213] *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) (finding no per se liability for failure to engage in interactive process).

[214] *Id.* (recognizing that the Interpretive Guidance outlines when it is *necessary* for the employer to engage in the interactive process); *see also* H.R. Rpt. 101-485 pt. 2 at 66 (acknowledging that in situations where the accommodation is not obvious to the employer or applicant, an employer should consider an informal four-step process to identify and provide an appropriate accommodation).

[215] *Id.*; *Phoenixville*, 184 F.3d 296, 319-20 (holding that a disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process:

under the ADA for failing to accommodate and not for failing to engage in the interactive process. Whether or not the employer engaged in the interactive process, however, is usually indicative of whether they met their overall statutory duty to accommodate.[216]

For example, the Third Circuit has repeatedly held that "an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily-disabled employee, and thereby violate the ADA."[217] This implies that the interactive process is an indivisible component of the reasonable accommodation process in situations where the employer requires an interaction with the employee to provide an appropriate accommodation.[218] Therefore, the employer's role in the interactive process should carry great weight in determining the liability in *regarded as* disabled cases, due to the likelihood that the employee's true limitations may be misperceived and overestimated by the employer.[219]

For instance, if an employer fails to engage in the interactive process where an available accommodation is not easily rendered, and employee interaction is required for effective accommodation,[220] this is prima facie evidence that the employer did not act in good faith. In this case, a court would be justified in precluding summary judgment for the employer.[221] Thus, an employer could avoid such an inevitable preclusion simply by engaging in an informal interactive process before deciding to take adverse action against the employee on grounds that no reasonable

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1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.).

[216] *See* Autry, *supra* n. 61, at 690 (noting that an employer's ultimate liability springs from the employer's failure to accommodate the employee, not from its failure to interact).

[217] *Deane,* 142 F.3d at 149 (citing *Mengine*, 114 F.3d at 420-21).

[218] In *Jacques v. Clean-Up Group, Inc.* the First Circuit adopted the *case-by-case* approach, stating that "the regulations' use of the word 'may' clearly suggests that Congress, while it could have imposed an affirmative obligation upon employers in all cases, chose not to." 96 F.3d 506, 513 (1st Cir. 1996). However, the Court also noted that "cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior [and] there may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA."). *Id.* at 515.

[219] *See* Timothy J. McFarlin, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees Regarded as Disabled*, 49 St. Louis U. L.J. 927, 960 (Spring 2005) (stating that the finding of a mandatory obligation under the ADA to engage in the interactive process is the best argument for holding employers liable when they fail to consider reasonable accommodations for employees they regard as disabled).

[220] *See* H.R. Rpt. 101-485 pt. 2 at 65-66 (recognizing that "people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently in many different circumstances. Frequently, therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job. And, just as frequently, the employee or applicant's suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefiting from the consultation.").

[221] *See Fjellestad*, 188 F.3d at 952.

accommodation was available.[222] While an employer is not required to provide a reasonable accommodation where one is not available, the potential for underestimation is high, due to the employee's individual experiences and the multitude of opportunities available through technology and accommodation specialists.[223]

2. The Interactive Process Defined

It is apparent that an employee's request for an accommodation triggers the employer's obligation to engage in the interactive process.[224] At that point, the employer and employee must actively communicate to investigate the potential accommodations available.[225] Although the EEOC has identified four informal steps that should be involved in this process,[226] an employer's participation in the interactive process does not require the employer to follow these four steps to the letter.[227]

However, an employer is required to make a good faith effort to seek reasonable accommodations.[228] The employer should explore "what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered [the] employee's request, and offer and discuss available alternatives when the request is too burdensome."[229] In addition, it is the employer's burden to investigate the

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[222] *See Phoenixville*, 184 F.3d at 319-20 (holding that a disabled employee must demonstrate the following factors to show that an employer failed to participate in the interactive process:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.).

[223] *Id.* at 317 (finding that failure to respond to an accommodation request further subjected the employer to the risk that it would overlook an opportunity to accommodate a statutorily-disabled employee).

[224] *DiMarzio*, 200 F. Supp. 2d at 169; *Phoenixville*, 184 F.3d at 315 (finding that once the employer knows of an employee's disability and the employee has requested accommodation, the employer's obligation to participate in the interactive process has been triggered).

[225] *DiMarzio*, 200 F. Supp. 2d at 169.

[226] The four steps are:

> (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for the employee and the employer.).

29 C.F.R. app. § 1630.9.

[227] *Id.* (noting that in many instances a reasonable accommodation may be so obvious that it may not be necessary to proceed in the prescribed "step-by-step fashions").

[228] *Fjellestad*, 188 F.3d at 954.

[229] *Phoenixville*, 184 F.3d at 317.

request, educate itself about the nature of the impairment, and make an individualized assessment about the particular employee.[230] As a result, the employer will be able to verify the existence and extent of the disability, and subsequently identify an appropriate accommodation.[231] This good faith effort to make an individualized assessment of the employee's actual condition, rather than a stereotypical assumption about the *regarded as* employee's disability, may provide the employer with a limited defense to liability and other available remedies.[232]

While it is undisputed that an employer bears some responsibility to determine the necessary accommodation, the regulations clearly state that the process is not one-sided.[233] Rather, it has been consistently recognized as a process of communication and cooperation in which "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith."[234] Consequently, neither party should be able to initiate a failure in the interactive process to either inflict or avoid liability.[235] Thus, if the employee fails to provide the employer with requested information, the employer may be prevented from completing a fully informed individual assessment, thereby giving the employer a limited defense to ADA liability.[236] Additionally, if an employee's insistence on receiving a particular accommodation is deemed unreasonable as a matter of law, the employee will be held at fault for the breakdown in the interactive process.[237]

3. The Barrier and the Beast

In *regarded as* disabled cases the focus of the analysis is on the reactions and perceptions of the employer, not on the employee's functional

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[230] *See Pathmark*, 177 F.3d at 192-93; *see also Arline*, 480 U.S. at 284-85 (observing that the statute was "carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments").

[231] *Williams*, 380 F.3d at 771; *see also Phoenixville*, 184 F.3d at 316 (acknowledging that the purpose of the interactive process is to determine the appropriate accommodations).

[232] *See Pathmark*, 177 F.3d at 193. Furthermore, while "an employer's innocent mistake (which may be a function of 'goofs' or miscommunications) is sufficient to subject it to liability under the ADA," the "employer's state of mind [remains] relevant to the appropriate remedies." *Id.* at 182-83; *see also* 42 U.S.C. § 1981a(a)(3) (where "discriminatory practice involves the provision of a reasonable accommodation," "damages may not be awarded . . . where the covered entity demonstrates good faith efforts, in consultation with [the employee], to identify and make a reasonable accommodation"); *Deane*, 142 F.3d at 148 n. 12 (recognizing that a *regarded as* plaintiff "might be entitled to injunctive relief against future discrimination"); *Williams*, 380 F.3d at 770.

[233] *See* 29 C.F.R. app. § 1630.9 (stating that the interactive process involves both the employer and the employee); *see also Beck*, 75 F.3d at 1135 (recognizing that the regulations foresee a process that requires participation by both parties).

[234] *Deane*, 142 F.3d at 149 (quoting *Mengine*, 114 F.3d at 419-20).

[235] *Bultemeyer*, 100 F.3d at 1285 (quoting *Beck*, 75 F.3d at 1135).

[236] *See Pathmark*, 177 F.3d at 192-93; *Phoenixville*, 184 F.3d at 317 (finding that an employer will not be at fault if after communicating with the employee, the employee then fails to provide information that the employer needs or requests).

[237] *See Phoenixville*, 184 F.3d at 316 (citing *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3d Cir. 1998)).

limitations.[238] Unlike the structural or operational barriers facing the actually disabled employee, the barrier facing the *regarded as* employee is due to the disabling effects of the employer's misperceptions.[239] Although the employee's non-disabling physical or mental limitation may have caused the misperception, "the non-disabling impairment is not the statutorily defined source of the inequality that Congress intended the ADA to prevent."[240] Rather, Congress intended the ADA to prevent the employer's stereotypical assumptions that incorrectly flow from these physical or mental impairments.[241]

Since Congress only intended the employer to provide accommodations for the direct source of the employee's statutory "disability,"[242] the *regarded as* disabled employee's accommodation request should not be interpreted to require a traditional accommodation response.[243] To provide the reasonable accommodation most likely to effectuate the intent of Congress, the employer need only remove the barrier created by the employer's misperception, not the non-qualifying impairment.[244]

Due to the disabling effect that prejudicial attitudes and stereotypes have on a *regarded as* disabled employee, it will not always be sufficient for the employee to merely disabuse the employer of their misperceptions.[245] Consequently, the employer must then take an affirmative step beyond the employee's own disabusal to correct the misperceptions in the workplace.[246] Otherwise, in the absence of such a good faith effort to correct the misperceptions, the employers and co-workers may "erroneously perpetuate a disabling view of [an] employee's non-disabling impairment," which would undermine the ADA's goal to eliminate disability discrimination in the workplace.[247]

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[238] *See* H.R. Rpt. 101-485 pt. 3 at 30.
[239] *Arline*, 480 U.S. at 284.
[240] Travis, *supra* n. 8, at 944-45.
[241] *See Arline*, 480 U.S. at 284; *Giordano v. City of New York*, 274 F.3d 740, 748 (2d Cir. 2001) (acknowledging that "the decisive issue is the employer's perception of his or her employee's alleged impairment").
[242] Travis, *supra* n. 8, at 944.
[243] *Id.* at 943-44; *see also* McFarlin, *supra* n. 219, at 959.
[244] *See Cigan*, 388 F.3d at 335-36 (recognizing that even though an employee might be *regarded as* disabled, it would be difficult to imagine that the employer would have to afford them the sort of accommodations appropriate to a genuine disability).
[245] *Deane*, 142 F.3d at 148 n. 12 (stating that the perception of the disability, "socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough." Thus, a "failure to mandate reasonable accommodations . . . would undermine the role the ADA plays in ferreting out disability discrimination in employment.").
[246] *Id.*
[247] *Id.*; *see also* McFarlin, *supra* n. 219, at 965-70 (discussing residual discrimination and hostile work environments under the ADA).

D. Proposal for a Corrective Accommodation

An employer charged with accommodating a *regarded as* disabled employee should only be required to provide the employee a *corrective accommodation*, rather than the structural or operational accommodation traditionally granted in an actual disability case.[248] To provide a *corrective accommodation*, both parties must engage in an interactive process whereby the employee disabuses the employer of the misperception and the employer then makes a good faith, affirmative effort to correct the misperception throughout the workplace.[249] Essentially, the employer must continue along the "disabusal train" to explain the misperceptions to those managers and supervisors that make employment decisions, thereby preventing the perpetuation of harmful stereotypes and removing the social and environmental barriers impeding the *regarded as* disabled employee.

Once the employer has made such a good faith affirmative response, the employer should be deemed to have met its accommodation duties under the ADA. At this point, the source of the statutory disability dissolves and the employment relationship returns to status quo or "pre-regarded as disabled" status.[250] If the employee still suffers from a non-disabling impairment that prevents him from completing the essential functions of the job, the employer *may* offer the employee an accommodation on its own prerogative, but it should not be required to do so to comply with the ADA.[251] Nor should any voluntary act of accommodation leave the employer vulnerable to liability under a future *regarded as* claim.[252] To find otherwise would require an illogical construction of circular reasoning[253] and discourage the agreeable resolution

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[248] For similar recommendations, see Travis, *supra* n. 8, at 998; McFarlin, *supra* n. 219, at 976-78.

[249] *See* H.R. Rpt. 101-485 pt. 2 at 65-66 (noting that many individuals will only require a reasonable accommodation that consists of a "change in attitude regarding employment of people with disabilities").

[250] *See* McFarlin, *supra* n. 219, at 976-77.

[251] *See* 29 C.F.R. app. § 1630.2(o); EEOC Compliance Manual, *supra* n. 56 (clarifying that if an individual requests multiple reasonable accommodations, he is entitled only to those accommodations that are necessitated by a disability and provide an equal employment opportunity); *Smith*, 138 F.3d 1304 (finding the employer would not be required to do more than the ADA requires). Furthermore, should the employee reject the employer's offer of a reasonable accommodation, the individual will no longer be considered a qualified individual with a disability under the ADA. *See* 29 C.F.R. § 1630.9(d).

[252] *See Williams*, 380 F.3d at 776 (stating that an offer of accommodation does not, by itself, establish that an employer regarded an employee as disabled); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (finding that an employer's voluntary steps to accommodate an employee's restrictions is not conceding that the employee is disabled under the ADA or that it regards the employee as disabled).

[253] *See Cigan*, 388 F.3d at 335 (recognizing that such a result would be the effect of improper circular reasoning:

> an employer must provide reasonable accommodations to a disabled worker; . . . [a] provision of *any* accommodation shows that the employer regards the worker as disabled; the worker therefore *is* (statutorily) disabled; and so the worker must receive the full set of accommodations appropriate to a genuinely disabled person, not just the tentative or incomplete steps the employer took voluntarily).

of numerous employment disputes in favor of lengthy and costly litigation.[254]

Both parties may decide to implement a *corrective accommodation*, as long as it adheres to the ADA's stated objectives. The accommodation may include such actions as informing the proper decision makers and supervisory personnel of the employee's true non-disabled status, holding sensitivity trainings, or incorporating presentations on diversity in the workplace.[255] Such accommodations should be provided to combat residual discrimination among co-workers and avoid any potential ADA discrimination or hostile work environment claims.[256] However, an employer is obligated to make such an accommodation only when the employer becomes aware of the employee's impairment, and the employee requests an accommodation from the employer.[257]

By way of illustration, Bob is a sales employee at a large electronics store and has a mild neurological condition that sporadically causes an involuntary jerk of his head. Although he is well-spoken and fully capable of performing all functions of the job, his co-workers and supervisors prevent him from interacting with several of the customers. They suspect that he will scare some of the customers and hurt business. This exclusion significantly limits his chances to make substantial commissions from these potential sales. At this point, Bob's co-workers and lower level supervisors have regarded him as disabled; they believe he is unable to successfully interact with customers, and that he is substantially limited in the major life activity of working and/or interacting with others.[258] By preventing him from fully interacting with customers, and competing for commissions, his employer has also discriminated against him because of his impairment.[259]

Assume Bob then asks the store's general manager that he be moved to another department or shift so that he can work with different co-workers and supervisors. The manager communicates with Bob and investigates the issue, thus engaging in the interactive process. This interactive process corrects the manager's misperceptions and disabuses

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[254] *Thornton*, 261 F.3d at 798.

[255] *See* Travis, *supra* n. 8, at 998-1000. In regards to confidentiality, the ADA restricts the disclosure of an employee's disability to certain personnel, but allows such disclosure to the employee's supervisors and managers. Any further disclosure would require the employee's consent to disclose it to the entire work place or disclosure in an anonymous fashion. *See* 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C); 29 C.F.R. § 1630.14(d)(1).

[256] *See* McFarlin, *supra* n. 219, at 967-78 (discussing the accommodation of residual discrimination and ADA hostile environment claims). The Fourth, Fifth, and Eighth Circuits have recognized hostile environment claims under the ADA. *Id.* at 969. *See also Shaver v. Indep. Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (allowing a hostile work environment claim under the ADA through the plaintiff's co-workers' harassment).

[257] *See* 29 C.F.R. app. § 1630.9.

[258] *See* 29 C.F.R. §1630.2(l)(2); 29 C.F.R. app. § 1630.2(l); *DiMarzio*, 200 F. Supp. 2d at 160 (finding that the ability to interact with others is a major life activity).

[259] *See* 42 U.S.C. § 12112(a).

him of Bob's true impairment and the impact it has on his customer interactions. However, thinking that moving Bob would cause unnecessary scheduling problems, the manager denies Bob's request. This forces Bob to return to work in that department. After a while, Bob gets tired of the discrimination and quits. Bob then files an ADA claim alleging both discrimination and failure to accommodate under a *regarded as* disabled scenario.

Under these facts, Bob could prevail on both claims. However, the manager could have provided a *corrective accommodation*, either by holding a supervisor's meeting to address and correct the co-workers' misconceptions, or by conducting a broader, company-wide employee development session focusing on working with diverse co-workers and clientele. As a result, the employer would have provided an accommodation that removed barriers put in place by employer and co-worker misperceptions. Because the accommodation attempted to eliminate and dispel inaccurate myths and stereotypes, it would have both effectuated the intent of the ADA and provided a sufficient good faith effort to avoid liability for a failure to accommodate.[260] Ideally, such employer efforts would have substantially improved Bob's working conditions and deterred him from either quitting or filing an ADA claim in the first place.

As a whole, the creation of a *corrective accommodation* standard for the *regarded as* disabled employee is consistent with the established intent of Congress. If the legislative history, regulations, and corresponding Interpretive Guidance are viewed in their totality, a theme of flexibility emerges.[261] Congress clearly did not intend for the ADA to mandate a universal, blanket approach to accommodation, for the ADA suggests that a variety of accommodations are appropriate as long as they address the "aspects of the work environment that limit performance" and provide a "meaningful equal opportunity for the individual with a disability."[262]

EEOC determinations are to be made on a "case-by-case basis" to ensure that "qualified individuals of varying abilities . . . receive equal opportunities," rather than an unintended grant of preferential treatment.[263] Moreover, no specific form of accommodation is guaranteed by the ADA, since it simply provides "parameters to guide employers in how to consider, and take into account, the disabling condition involved."[264] Rather than impose a rigid accommodation scheme on both the employer and the employee, the regulations allow both parties to retain some freedom of choice, thereby making an employer's voluntary cooperation more likely in the future.

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[260] *See Williams*, 380 F.3d at 770-71.
[261] H.R. Rpt. 101-485 pt. 2 at 65; *see also* 29 C.F.R. app. § 1630.
[262] *Id.*
[263] *See* 29 C.F.R. app. § 1630.9.
[264] *Id.* at Background.

Establishing a *corrective accommodation* for the *regarded as* cases will also eliminate the potential for windfalls and unfair advantages that sometimes result when the *regarded as* disabled employee is granted an accommodation that corresponds with the physical impairment, and not the misperception.[265] By correcting the misperception rather than the non-disabling impairment, the employer avoids preferential treatment and may instead use its valuable employer resources to accommodate other disabled employees requiring a more complex accommodation.[266] It will also minimize any backlash from healthy employees trying to take advantage of a traditional accommodation by claiming a *regarded as* disabled status.[267]

While a *corrective accommodation* may not put the employee in the same position as a traditional accommodation that corresponded with his non-disabling physical impairment, it would put the employee in the same position as if the impairment had not been misperceived at all. Such an outcome may not be preferred by all employees, but it is consistent with the ADA's objectives to eliminate discrimination based on stereotypes and provide equal employment opportunities.[268]

For example, the use of a *corrective accommodation* in *Williams* would have placed the depressed police officer back into a position to request a non-active duty assignment in the employer's radio room. On the other hand, it would not have guaranteed the plaintiff in *Weber* the absolute right to delay his relocation. Yet, by engaging in the interactive process and correcting the employer's misperceptions about his heart condition, the plaintiff in *Weber* may have been able to negotiate an acceptable compromise with his employer. Such a result could have prevented costly litigation and an unnecessary discharge of an otherwise qualified employee.[269]

By emphasizing the role of the interactive process, a *corrective accommodation* encourages an employer to communicate with the *regarded as* disabled employee through a problem-solving approach. This approach allows the employer to evaluate the employee's request, investigate the existence and extent of the impairment, and make an informed decision based on the individualized assessment of the employee's particular needs.[270] Contrary to the opinion stated in *Kaplan*, participation in the *corrective accommodation* would not only encourage, but require, the employees "to educate the employers of their capabilities" rather than

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[265] *See Kaplan*, 323 F.3d at 1232; McFarlin, *supra* n. 219, at 976-77.

[266] *Kaplan*, 323 F.3d at 1232. Under a corrective accommodation, there may be no structural or operational barrier to remove; thus, the cost for the employer to provide workplace education will likely be minimal.

[267] Travis, *supra* n. 8, at 992-93.

[268] *See* 42 U.S.C. § 12101(b)(1); 29 C.F.R. § 1630.1(a).

[269] *See DiMarzio*, 200 F. Supp. 2d at 170 (stating that interactive process may keep capable but impaired employees from losing their jobs).

[270] *Id.*; *Williams*, 380 F.3d at 771.

"induc[e them] to perpetuate their employers' misperception of a disability."[271] Notably, both *Weber* and *Kaplan* completely failed to acknowledge the use of the interactive process or its ability to limit such "windfall" or "bizarre results."[272] Perhaps the outcome could have been different had they analyzed the situation with an eye on the benefits of the interactive process.[273]

Finally, from a practical perspective, the *corrective accommodation* process is an economic labor tool[274] that can be used to benefit both the employer and the employee.[275] Specifically, it serves as a catalyst for an informed intervention outside the legal forum that not only meets the objectives of the ADA, but also allows both parties to retain their individual prerogatives.[276] Similar to mediation, its flexible and non-threatening nature encourages participation, which decreases the need for expensive and time-consuming litigation.[277] Rather than relying on judicially mandated terms or decrees, the parties handle disputes on their own agreed-upon terms.[278] By taking the initial time to communicate with the employee, the employer will most likely retain employee productivity and keep potential accommodation costs down.[279] This means of accommodation is consistent with the Supreme Court's opinion that a reasonable accommodation for a perceived disability should be viewed "'in a practical way,' consistent with the need to take a 'practical view of the statute.'"[280]

IV. CONCLUSION

Under the proposed *corrective accommodation*, the reasonable accommodation requirement for the *regarded as* disabled employee should no longer be viewed as the ADA's "necessary evil." When implemented properly, the *corrective accommodation* begins through use of the interactive process and ends when the employer has made a good faith, affirmative effort to correct the misperceptions in the workplace, thereby eliminating the source of the employee's statutory disability. The

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[271] *Kaplan*, 323 F.3d at 1232.
[272] *See* McFarlin, *supra* n. 219, at 964-65 (acknowledging that Weber failed to address the interactive process, which they later ruled to be required under certain factual situations in *Fjellstad v. Pizza Hut of Am., Inc.*).
[273] *Id.*
[274] *See DiMarzio*, 200 F. Supp. 2d at 170 (describing the interactive process as a "labor tool").
[275] *See* H.R. Rpt. 101-485 pt. 2 at 66 (acknowledging that employer and employee can mutually benefit from consultation).
[276] *Id.*
[277] *See Phoenixville*, 184 F.3d at 316 n. 6 (comparing the benefits of the interactive process to the benefits of mediation).
[278] *Id.*
[279] *See* H.R. Rpt. 101-485 pt. 2 at 65-66 (recognizing that people with disabilities may have a lifetime of experience identifying ways to accomplish tasks differently, will know exactly what accommodation will be needed to perform particular job successfully, and will often suggest an accommodation that is simpler and less expensive than the accommodation the employer might have devised).
[280] *See DiMarzio*, 200 F. Supp. 2d at 170 (citing *Barnett*, 535 U.S. 391).

establishment of a corrective, rather than a traditional, accommodation will eliminate the potential for windfalls and unfair advantages that may result when the *regarded as* disabled employee is granted an accommodation that corresponds with the physical impairment rather than the employer's misperception.[281] Such a method of accommodation is not only reasonable and effective, it is also consistent with Congress's intent to eliminate discrimination and remove barriers based on unfounded fears, myths, and stereotypes.

[281] *See Kaplan*, 323 F.3d at 1232; McFarlin, *supra* n. 219, at 976-77.