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If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded As" Disabled

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IF THEY ASK FOR A STOOL . . . RECOGNIZING REASONABLE ACCOMMODATION FOR EMPLOYEES "REGARDED AS" DISABLED[1]

The Americans with Disabilities Act of 1990[2] ("ADA"), having reached its fifteen-year anniversary, has come to a crossroads in American society. At its inception, Senator Edward Kennedy heralded it as "an Emancipation Proclamation and a Bill of Rights"[3] for some forty-three million disabled Americans.[4] Today, most everyone would agree that its stated purpose, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[5] is still a noble and necessary aim. However, the actual practice of implementing the ADA in the employment context, and the resulting litigation, have generated considerable controversy in our nation.[6] Even if one is not disabled, anyone who has held a job or hired an employee can understand the tensions inherent in promoting equal employment opportunity by granting special status to individuals based on distinct characteristics such as race, gender, and disability. Questions as to who qualifies as disabled, what constitutes discrimination, and how disabilities can be accommodated are still hotly debated in the courts and at the worksite. Many have even accused the ADA of facilitating frivolous litigation—allowing individuals with either minor physical or mental difficulties or no impairment at all to harass their employers.[7]

1. The phrase "if they ask for a stool" comes from a hypothetical reasonable accommodation request in the case of *Williams v. Philadelphia Housing Authority Police Department*, discussed in depth *infra* Parts III and IV. 380 F.3d 751, 776 n.19 (3d Cir. 2004).

2. 42 U.S.C. §§ 12101–12213 (2000).

3. ROBERT L. BURGDORF, JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 43 n.100 (1995).

4. 42 U.S.C. § 12101(a)(1) (2000).

5. 42 U.S.C. § 12101(b)(1).

6. *See Litigating the Americans with Disabilities Act: Hearing before the Subcommittee on Rural Enterprise, Agriculture, & Technology of the Committee on Small Business, House of Representatives*,108th Cong. 1 (Apr. 8, 2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:92589.pdf.

7. *See id.* at 2. Employer advocates have argued that the ADA has allowed workers to obtain unjustified exemptions from generally applicable work rules. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 399 (2000). Disability rights activists, on the other hand, have asserted that courts have imposed an inappropriately restrictive definition of "disability" under the ADA in order to dismiss ADA claims at the summary judgment stage. *Id*. *See generally* Charles B. Craver, *The Judicial Disabling of the Employment*

Much of this debate has sprung out of the differing interpretations given to the ADA's often ambiguously broad statutory language.[8] Specifically, the definition of "disability," and the employer's obligations to those so disabled, have sparked a split in the federal circuits. The ADA's definition of "disability" covers more than just individuals with a commonly recognized disability. It also includes individuals "regarded as" disabled by their employers—in other words, individuals who are discriminated against based solely on misperception.[9] For example, an employee who has lost weight and develops a skin rash on his face is (mistakenly) rumored around the workplace to have AIDS. His manager fires him based on the misperception that he has AIDS. This employee is "disabled" under the ADA, even though he has no actual disability. The ADA provides that an employee with a "disability" is entitled to a "reasonable accommodation" from his or her employer if one is necessary to perform the essential functions of the job.[10] The circuit split has arisen over whether those only regarded as disabled, like the employee in the above example, should have the right to this reasonable accommodation.

In 1996, the First Circuit Court of Appeals held, without analysis, that a regarded as disabled employee is entitled to reasonable accommodation.[11] Subsequently, the Courts of Appeal for the Fifth, Sixth, Eighth, and Ninth Circuits reached the opposite conclusion, broadly denying reasonable accommodation under any circumstances.[12] Only the Eighth and Ninth Circuit Courts explained their holdings, asserting that such a rule prevents the "bizarre" result of forcing employers to accommodate non-existent disabilities.[13]

Discrimination Provisions of the Americans with Disabilities Act, 18 LAB. LAW. 417 (2003); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. CR.-C.L. L. REV. 99 (1999). One commentator has noted that the ADA's definition of disability is so vague that it "demands value judgments that even the most committed textualist cannot avoid." Bagenstos, *supra*, at 400–01. The same commentator has also examined, with alarmingly ambiguous results, the growing accusation that because of these problems the ADA actually has *diminished* employment for the disabled. Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?* 25 BERKELY J. EMP. & LAB. L. 527 (2004) (reviewing THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (Darld C. Stapleton & Richard V. Burkhauser eds., 2003)).

8. Bagenstos, *supra* note 7, at 399.

9. 42 U.S.C. § 12102(2)(C) (2000).

10. 42 U.S.C. § 12111(8).

11. Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996).

12. *See* Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1231–33 (9th Cir. 2003); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998). Two other circuit courts have considered the issue but declined to address it. *See* Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 64 (2nd Cir. 2003); Mack v. Great Dane Trailers, 308 F.3d 776, 783 n.2 (7th Cir. 2002).

13. *See Kaplan*, 323 F.3d at 1231–33; *Weber*, 186 F.3d at 916–17.

In August 2004, the Third Circuit in *Williams v. Philadelphia Housing Authority Police Department*[14] changed this tide of decision and held that the ADA does entitle regarded as disabled employees to reasonable accommodation.[15] Following the reasoning of a 2002 New York District Court opinion,[16] the *Williams* court cited the legislative history of the ADA, the Supreme Court's ruling in *School Board of Nassau County, Florida v. Arline*,[17] and a practical view of the employment relationship as the foundations for its decision.[18] Entitling regarded as disabled employees to reasonable accommodation, in the Third Circuit's view, is consistent with the ADA's goal of eliminating disability-based discrimination and also promotes an interaction between the employer and employee that is essential to disabuse employers of mistaken perceptions.[19]

This Comment will examine both sides of this hotly contested judicial debate and argue that courts should hold employers liable for failing to reasonably accommodate regarded as disabled employees. This liability should be applied on a case-by-case basis consistent with the ADA's plain language and intended goals of antidiscrimination and equal opportunity. Part I lays out the statutory background of the ADA, analyzing its legislative history to determine the overall goals of the law. Part II explains the pertinent provisions of the ADA in the contexts of their legislative history, relation to earlier disability rights legislation, applicable Equal Employment Opportunity Commission ("EEOC") regulations, and judicial interpretations. Part III explores in detail the key opposing decisions of the Eighth Circuit in *Weber v. Strippit, Inc.*[20] and the Third Circuit in *Williams*. Part IV analyzes key situations in which reasonable accommodation will be at issue for those regarded as disabled. Part V concludes that recognizing reasonable accommodation for perceived disabilities under certain conditions is consistent with a practical view of the employer–employee relationship and is essential to advance the ADA's goals in this context.

14. 380 F.3d 751 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 1725 (U.S. 2005).

15. *Id.* at 772–76.

16. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

17. 480 U.S. 273 (1987).

18. *Williams*, 380 F.3d at 772–76.

19. *Id*. at 776 n.19. Shortly before this Comment went to press, the Tenth Circuit expressly followed the *Williams* decision and explicitly held that "an employer must reasonably accommodate employees regarded or perceived as disabled." Kelly v. Metallics West, Inc., 2005 WL 1332287, at *6 (10th Cir. Jun. 7, 2005).

20. 186 F.3d 907 (8th Cir. 1999).

I. STATUTORY BACKGROUND

A. The Rehabilitation Act of 1973

Arguably the most significant disability rights law prior to the ADA was the Rehabilitation Act of 1973[21] ("Rehab Act").[22] Having a detailed knowledge of the history and purpose of the Rehab Act is vital to formulating a correct understanding and interpretation of the ADA.[23] The Rehab Act established a prohibition on discrimination against the disabled in programs or activities receiving federal financial assistance.[24] As originally written, Section 504 of the Rehab Act specifically prohibited employment discrimination against any "otherwise qualified individual with handicaps" in any of these programs or activities.[25]

To clarify compliance with Section 504, Congress expanded the definition of "handicapped individual" in 1974.[26] The new definition read: "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such impairment."[27] This amendment to Section 504 indicated "Congress'[s] concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws.'"[28] It also evidenced Congress's intent "to preclude discrimination against '[a] person who has a record of, or is

21. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in scattered sections of Title 29 of the U.S.C.). The sections of the Rehab Act that pertain to employment and business opportunities for the disabled are contained in 29 U.S.C. §§ 705, 791–794e (2000). *See* BURGDORF, *supra* note 3, at 584–89.

22. BURGDORF, *supra* note 3, at 39.

23. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (stating that "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973 . . . ."). The ADA explicitly refers to the Rehab Act: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a) (2000); *Bragdon*, 524 U.S. at 631–32 (citing and following this provision with regard to the Rehab Act's regulations) (citations omitted). Section 504 of the Rehab Act "has served as both the testing ground and launch-pad for . . . the concepts and principles" of the ADA. BURGDORF, *supra* note 3, at 43.

24. 29 U.S.C. § 794; BURGDORF, *supra* note 3, at 37.

25. BURGDORF, *supra* note 3, at 39 (quoting Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973) (codified as amended at 29 U.S.C. § 794(a))).

26. *Id*. at 128.

27. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 278–79 (1987); BURGDORF, *supra* note 3, at 128 (quoting Pub. L. No. 93–516, § 111(a)(6), 89 Stat. 2–5 (1974) (codified at 29 U.S.C. § 706(8)(B))).

28. *Arline*, 480 U.S. at 279 (quoting S. REP. NO. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6400).

regarded as having, an impairment [but who] may at present have no actual incapacity at all.'"[29]

The general purpose of Section 504 of the Rehab Act, and especially its subsequent amendments, is to prohibit employers from discriminating against disabled individuals.[30] Congress generally patterned Section 504 after Title VI of the Civil Rights Act of 1964 ("CRA"), which prohibits discrimination on the basis of race, color, or nation origin in federally assisted programs.[31] The CRA had a proven ability to require federal programs, and private employers (through Title VII), to hire minorities.[32] By directly prohibiting adverse actions by employers on the basis of race, the CRA indirectly encouraged the racial integration of employment in America.[33] Congress sought to utilize this function to aid the disabled.[34] By directly prohibiting adverse actions against the disabled in Section 504, Congress would indirectly foster the integration of the disabled into federally funded programs and fight the "'irrational fears or

29. *Id*. (quoting Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 405–06 n.6 (1979)). The Department of Health, Education, and Welfare ("HEW") issued implementing regulations in 1977, detailing an exact definition of Section 504's "physical impairment" that included "any physiological disorder . . . cosmetic disfigurement or anatomical loss affecting" a number of the body's systems. 45 C.F.R. § 84.3(j)(2)(i) (2004); *see Arline*, 480 U.S. at 280. The regulations also defined "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii); *see Arline*, 480 U.S. at 280. Because of judicial reliance on these definitions, they became vital to determining the meaning of "regarded as" disabled in the Rehab Act. *See Arline*, 480 U.S. at 280–83. To be considered regarded as disabled under Section 504, an employee must be viewed by his employer as having an impairment limiting a major life activity within the scope of these definitions. *See id*. at 278–80.

30. BURGDORF, *supra* note 3, at 39. Congress's 1978 amendments to the Rehab Act extended its coverage to federal executive agencies and the U.S. Postal Service. *Id*. The 1992 amendments replaced the original term "handicapped" with "disabled," in line with the recently enacted ADA's terminology. *Id*. at 17, 584.

31. 42 U.S.C. § 2000(d) (2000); *Arline*, 480 U.S. at 277–78. Section 504 has its origins in attempts by Congressmen Humphrey and Vanik to amend Title VI to add disability to the list of prohibited grounds for discrimination. BURGDORF, *supra* note 3, at 26–27, 39.

32. *See* Robert D. Loevy, *The Impact and Aftermath of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 334 (Robert D. Loevy ed., 1997).

33. *See id*.

34. Both Senator Humphrey and Representative Charles Vanik testified that their intent to add a disability provision to Title VI of the CRA had been fulfilled by Section 504's passage. BURGDORF, *supra* note 3, at 40. Moreover, the Supreme Court has recognized that Representative Vanik's "remarks constitute a 'primary signpost on the road toward interpreting the legislative history of § 504.'" *Arline*, 480 U.S. at 282 n.9 (quoting Alexander v. Choate, 469 U.S. 287, 295 n.13 (1985)); *see* Loevy, *supra* note 32, at 348–49 (labeling the Rehab Act and ADA as "subsequent laws . . . that expanded and further defined the scope" of the CRA).

prejudice . . . of employers or fellow workers.'"[35] A primary way the Rehab Act achieved this goal was through the requirement (established by regulatory and judicial interpretation of Section 504) that employers give reasonable accommodations to disabled workers.[36] These same motivations and methods of enforcement eventually formed the bedrock for one of the most expansive nondiscrimination laws our country has seen—the ADA.

B. The Americans with Disabilities Act of 1990

In the late 1980s, disability rights groups pressured Congress to pass new legislation that would solidify judicial interpretations of the Rehab Act and expand its nondiscrimination mandate to all business entities.[37] The Department of Health, Education, and Welfare ("HEW")'s National Council for the Handicapped (now called the National Council on Disability)[38] published a report to the White House and Capitol Hill in 1986, which recommended that "Congress . . . enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."[39] "The Council even suggested a name for the proposed statute—the Americans with Disabilities Act."[40] Congress introduced the

35. *Arline*, 480 U.S. at 284 n.13 (quoting Senator Hubert Humphrey's remarks on the Senate Floor in 1977).

36. *See id*. at 287 n.17 (citing 45 C.F.R. § 84.3(k) (1985), currently codified in the Rehab Act as 29 U.S.C. § 794(d) (2000)).

37. Despite the recognized desirability of the Rehab Act's essential goals and requirements, it was criticized for problems with inconsistent judicial interpretation, enforcement, and primarily its limited scope of coverage. BURGDORF, *supra* note 3, at 44; *see, e.g.*, Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997 (1984); Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81 (1986). For example, "reasonable accommodation" was not explicitly written into the statute, and it only covered entities with direct federal connections. BURGDORF, *supra* note 3, at 44. Amending the CRA was again considered, but this method, it was ultimately decided, would be insufficient to explicitly address the specific aspects of disability-based discrimination, such as the need for reasonable accommodation and the removal of architectural barriers. *Id*. (citing NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE A-35-A-39 (app.) (1986) [hereinafter TOWARD INDEPENDENCE]). In pushing for this new legislation, a major goal of the disability rights movement was to "eliminate the attitudes and practices that exclude people with actual, past, or perceived impairments from opportunities to participate in public and private life." Bagenstos, *supra* note 7, at 426.

38. This Council was created and placed under the HEW by Congressional mandate as part of a Rehab Act amendment in 1978. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 390 (1991).

39. BURGDORF, *supra* note 3, at 45 (quoting TOWARD INDEPENDENCE, *supra* note 37, at 18).

40. *Id*. at 45 (quoting TOWARD INDEPENDENCE, *supra* note 37, at 18).

ADA bill in the 101st Congress in 1989.[41] After substantial debate in both the House and Senate, and negotiations with the Bush Administration, Congress passed the final version of the ADA on July 13, 1990, and President George Bush signed it into law thirteen days later on July 26.[42] The ADA extends disability-based discrimination prohibitions to the private sector, including all employers, pursuant to Congress's powers to regulate commerce and enforce the Fourteenth Amendment.[43]

The express purposes of the ADA are "(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities . . . ."[44] Congress also listed several findings to provide a factual foundation for the ADA.[45] Of particular importance for this present study:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment . . .
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and *resulting from stereotypic assumptions* not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . .
>
> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is

41. Provisions were redrafted to add greater specificity to the statutory language, and some requirements, such as those relating to architectural accessibility, were reduced. *Id*. at 46.

42. *Id*. at 47. The House passed the ADA by a vote of 377 to 28. *Id*. The Senate passed it by a margin of 91 to 6. *Id*.

43. 42 U.S.C. §§ 12101(b)(4), 12111(2) (2000). Commentator Robert Burgdorf stated: "The ADA has the broadest scope of coverage of any single civil rights measure enacted to date, with the Civil Rights Act of 1964 being the only statute even comparable in the breadth of its nondiscrimination coverage." BURGDORF, *supra* note 3, at 53. Congress has authority to regulate interstate commerce and enforce antidiscrimination in the states via powers granted to it by the U.S. Constitution. U.S. CONST. art. 1, § 8; *id.* amend. XIV, § 5. Essentially all employers, private or public, fall under these powers, and thus so does the ADA itself. *See* BURGDORF, *supra* note 3, at 53–54.

44. 42 U.S.C. § 12101(b)(1)–(2).

45. 42 U.S.C. § 12101(a).

> justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting form dependency and nonproductivity.[46]

Even a cursory reading of the ADA's purpose and factual underpinnings reveals an attempt by Congress to encourage the integration of the disabled into American society by, first and foremost, eliminating discrimination against this class of people.[47] It is also important to note that the Congressional findings specifically address the obstacle that discrimination based on "stereotypic assumptions" poses to the desired integration.

Moreover, this "antidiscrimination-integrational" understanding of the ADA is reinforced by an appreciation of its connection with its predecessors, the Rehab Act and the CRA.[48] The ADA explicitly provides that it offers at least as much protection to disabled individuals as provided under the Rehab Act and that Act's enforcement regulations.[49] The Congressional debate on the ADA also shows a clear connection between the nondiscrimination focus of the three acts.[50] Reflecting on the ADA's passage, Senator Tom Harkin, chief

46. 42 U.S.C. § 12101 (a)(2)–(3), (7), (9) (emphasis added).

47. *See generally* Elizabeth Clark Morin, Note, *Americans with Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U. L. REV. 189 (1990). Authors and Supreme Court Justices have recognized the importance of the ADA's findings in interpreting the statute. *See* Bagenstos, *supra* note 7, at 418–19. Justice Ginsburg has noted that the ADA's findings provide "[t]he strongest clues to Congress'[s] perception of the domain of the Americans with Disabilities Act." Sutton v. United Air Lines, 527 U.S. 471, 494 (1999) (Ginsburg J., concurring); Bagenstos, *supra* note 7, at 419 n.79.

48. *See* 1 GARY PHELAN & JANET BOND ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE, 1-9 (2004) (stating: "The basic framework of the Americans with Disabilities Act of 1990 extends the scope of coverage of the 1964 Civil Rights Act to persons with disabilities and incorporates the principles of nondiscrimination established in Section 504 of the Rehabilitation Act of 1973.").

49. *See supra* note 23 and accompanying text. Moreover, the remedies available under the ADA are the same ones afforded by Title VII of the CRA. 42 U.S.C. § 12117(a); 1 PHELAN & ARTERTON, *supra* note 48, at 1-9.

50. Senator Tom Harkin noted that the ADA adopted

> many standards and interpretations from the original HEW regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide a reasonable accommodation . . . [and] incorporates by reference the remedies set out in [T]itle VII of the Civil Rights Act of 1964, which includes injunctive relief and limited back pay.

135 CONG. REC. S10714, *reprinted in* THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, 118 (G. John Tysse ed., 1991). Senator Harkin also noted that preventing discrimination against disabled individuals under the ADA is akin to extending to them the protections the CRA provides to racial minorities. 135 CONG. REC. S10711. Senator Durenberger, ranking member on the subcommittee for the handicapped, stated: "[I]n 1964, we passed civil rights protections based on race, color, religion, sex, or national origin . . . . [I]t is time to complete that commitment to individual rights . . . and add persons with disabilities to the list of those protected from unjust discrimination." 135 CONG. REC. S10721.

sponsor of the ADA bill and chairman of the Senate Subcommittee on the Handicapped at the time,[51] made a telling pronouncement:

> The ADA . . . is not about giving something to people with disabilities. It is about civil rights . . . . It is about breaking down barriers and opening doors of opportunity to bring all Americans with disabilities into the mainstream of American life . . . . Above all, the ADA is about one clear and forthright message: Discrimination has no place in America.[52]

Through its drafting of the ADA and its supporting remarks on the floors of Capitol Hill, Congress expressed its intention that the ADA continue the mission of the CRA and the Rehab Act of promoting social integration, i.e. "equal opportunity," through nondiscrimination.[53]

While there are differences among the CRA, the Rehab Act, and the ADA, their unifying theme is undeniably the elimination of discrimination against

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Senator Kennedy remarked: "[The Civil Rights Act of 1964] helped bring about one of the greatest peaceful transformations in our history for millions of Americans who were victims of racial discrimination, and this legislation can do the same for millions of citizens who are disabled." 135 CONG. REC. S10717. Democratic Senator Cranston, a principal author of Section 504 of the Rehab Act, stated: "[The ADA] would build on 16 years of successful experience with [S]ection 504 [of the Rehab Act] to eliminate disability discrimination in the private sector and all levels . . . of Government." 135 CONG. REC. S10722. Representative Martin of Illinois remarked: "[T]his legislation is important because it builds on the prohibitions against such discrimination which we enacted for recipients of Federal funds in the 1973 Rehabilitation Act. [The ADA] extends those protections throughout the private sector in employment . . . ." 136 CONG. REC. H2411 (1990).

51. Lowell P. Weicker, Jr., *Foreword* to 1 PHELAN & ARTERTON, *supra* note 48, at viii.

52. 138 CONG. REC. S24763 (1992), *available at* 1992 WL 221209.

53. Scott Burris and Kathryn Moss describe Title I of the ADA as serving two distinctive goals: "'full participation' . . . for individuals with disabilities . . . and the more limited purpose of eliminating discrimination in employment[,]" and they charge Congress with "elid[ing] the distinction" between the two in its stated purpose for the ADA. Scott Burris and Kathryn Moss, *A Road Map for ADA Title I Research*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 23 (Peter David Blanck ed., 2000) (quoting 42 U.S.C. § 12101). However, this seems to miss the connection between the two goals: Congress, using methods it employed in the CRA and the Rehab Act, could foster the integration of the disabled *through* the mechanism of employment antidiscrimination law. Burris and Moss do concede that "Title I may contribute to meeting the goal of 'full participation.'" *Id.* at 23. This, in the author's view, is a sufficiently accurate statement of Congressional intent. Through Title I, Congress meant in the first instance to give individuals a forum for claims of employment discrimination, thereby deterring discrimination against the disabled generally, thereby fostering an integration of the disabled into the workforce and greater society, i.e., "indirect integration through antidiscrimination." *See* John M. Vande Walle, Note and Comment, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 933–34 (1998). As Senator Harkin stated on the Senate floor in 1992: "Barring employment discrimination opens doors of opportunity . . . ." 138 CONG. REC. S24763 (1992), *available at* 1992 WL 221209. Whether or not the statute has been successful in this goal over the past fifteen years, it remains its intended function.

protected classes. The ADA must be understood to have the elimination of discrimination against the disabled as its chief objective, an objective designed to integrate the disabled into American society. All specific provisions of the ADA should be read with this goal in mind.

II. PERTINENT PROVISIONS OF THE ADA

The ADA's nondiscrimination-in-employment requirement is as follows: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[54] This requirement is easy enough to understand generally, but several of its terms like "disability" and "qualified individual" must be examined and defined in order to apply the statute to real-life scenarios.[55] Furthermore, the complex issue of whether regarded as disabled employees should be entitled to reasonable accommodation is impossible to effectively understand and evaluate without a firm grasp of how the ADA's network of terms allow a plaintiff to make this type of claim. Perhaps just as important to this issue is discovering the source and rationale behind the ADA's provisions.

The authors of many law review articles on the ADA tend to assume that their readers already have this knowledge and proceed to gloss over the definitional material, or figure that the reader will gather the necessary knowledge from case synopses. This Author finds both of these approaches wanting[56] and, accordingly, will lead the faithful reader through the ADA provisions that bear directly on the issue at hand.

54. 42 U.S.C. § 12112(a).

55. As the EEOC has stated:

> Under other laws that prohibit employment discrimination, it usually is a simple matter to know whether an individual is covered because of his or her race, color, sex, national origin or age. But to know whether a person is covered by the employment provisions of the ADA can be more complicated.

A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, *reprinted in* DISABILITY DISCRIMINATION: EMPLOYMENT DISCRIMINATION PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT OF 1990, at II-1 (1998) [hereinafter EEOC TECHNICAL ASSISTANCE].

56. The Author bases this opinion on two observations. First, a complex statute like the ADA is not effectively understood from a mere statement, or a bare-bones definition, of its terms. One must effectively understand how the ADA works, and why Congress designed it this way, to objectively evaluate the issue of reasonable accommodation for the regarded as disabled, which is complex enough in itself. Second, the courts' statement of ADA law is often cursory and funneled towards the claim before the court. In other words, courts are not usually concerned with painting a picture of how the ADA's provisions interrelate, so much as they are interested in deciding the claim(s) at hand in the most efficient way possible. Readers already intimately

A. Definition of Disability

The most important (and most litigated) part of the ADA is its definition of "disability." It is the "gatekeeper" of the statute—to bring a suit under the ADA, an individual must first establish that she has a disability as defined under the statute.[57] In other words, it is the first element of a prima facie case of discrimination under the ADA.[58] "Disability" means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) *being regarded as having such an impairment.*[59]

The first prong of this definition defines what courts have called an "actual" disability,[60] but all three prongs equally and independently define the term "disability" under the ADA.[61] The ADA's statutory language does not define disability any further than this, though "physical impairment" and "substantially limits one or more major life activities" are essential terms for all three prongs of the definition and beg interpretation. The EEOC has issued regulations interpreting these terms, much as the HEW did with the Rehab Act.[62] The EEOC's definition of "physical impairment" broadly includes essentially any internal physiological or mental disorder, cosmetic disfigurement, or anatomical loss, whether or not the condition affects an

familiar with the ADA may wish to advance directly to Part III and refer back to this Part as necessary while proceeding through the case synopses or when evaluating the Author's references to the legislative intent behind various provisions.

57. 42 U.S.C. § 12112(a); Bagenstos, *supra* note 7, at 404.

58. Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999).

59. 42 U.S.C. § 12102(2) (emphasis added). This Article will not explore the "record-of" prong, save to explain that a person who has some record of having an impairment that substantially limited a major life activity, but is not currently so limited, qualifies under this prong of the definition. An example of such a person would be someone who had cancer in the past but does not currently have it. An employer who terminates this individual because of this record of cancer, perhaps because of fear it might return, would violate the ADA. BURGDORF, *supra* note 3, at 151. A person who has a record of an impairment that is misclassified as substantially limiting also qualifies. *Id.*

60. 42 U.S.C. § 12102(2); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 762–66 (3d Cir. 2004) (discussing whether an individual is "actually disabled within the meaning of the ADA").

61. 42 U.S.C. § 12102(2); *see* Sutton v. United Airlines, Inc., 527 U.S. 471, 494 (1999); *Weber*, 186 F.3d at 914.

62. *Williams*, 380 F.3d at 762–63. While the ADA does not explicitly authorize the EEOC to issue implementing regulations (as the Rehab Act did with the HEW), *Sutton*, 527 U.S. at 480, courts have recognized their utility in interpreting the ADA's provisions and have used them to this end. *E.g., Williams*, 380 F.3d at 762 n.7; *Weber*, 186 F.3d at 912–13 (citing the EEOC regulations for interpretations of the ADA's disability definition).

individual's life.[63] External conditions, such as "[e]nvironmental, cultural, or economic disadvantages," are not impairments under the ADA.[64] Additionally, conditions that are "temporary, non-chronic[,] . . . [or] of short duration, with little or no long term or permanent impact" do not qualify as impairments.[65] Common, ordinary physical characteristics and personality traits within the "normal range" are also excluded from the impairment definition.[66] For example, old age, eye or hair color, left-handedness, height, weight, muscle tone, quick temper, and poor judgment are not impairments (unless such are symptoms of an underlying physiological disorder or psychological disease).[67] Next, to qualify as an actual disability, the impairment must substantially limit one or more major life activities. The EEOC defines "major life activities" as "those basic activities that the average person in the general population can perform with little or no difficulty."[68] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[69] An individual with an impairment is "substantially limited" in performing a major life activity if the individual is:

63. The relevant regulations specifically define impairment as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more . . . body systems," Labor, 29 C.F.R. § 1630.2(h)(1) (2004), or "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2); Bagenstos, *supra* note 7, at 407. These regulations are culled directly from the definition of "impairment" in the Rehab Act's regulations. *See* Public Welfare, 45 C.F.R. § 84.3(j)(2) (1977); Bagenstos, *supra*, at 407 n.29.

64. 29 C.F.R. pt. 1630 app. § 1630.2(h); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 519 (2002).

65. Therefore, impermanent conditions like pregnancy, broken bones, concussions, sprained joints, appendicitis, or the common flu are not "impairments." 29 C.F.R. pt. 1630 app. § 1630.2(j); Travis, *supra* note 64, at 525.

66. 29 C.F.R. pt. 1630 app. § 1630.2(h), (j); Travis, *supra* note 64, at 529.

67. 29 C.F.R. pt. 1630 app. § 1630.2(h), (j); Travis, *supra* note 64, at 529. Certain behaviors are explicitly not included as impairments under the ADA. For example, current illegal use of drugs is not protected. 42 U.S.C. § 12210(a) (2000). Homosexuality and bisexuality are explicitly noted as not being impairments under the ADA. 42 U.S.C. § 12211(a) (2000). Also excluded are transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. 42 U.S.C. § 12211(b).

68. 29 C.F.R. pt. 1630 app. § 1630.2(i).

69. 29 C.F.R. § 1630.2(i) (2004); Weber v. Strippit, Inc., 186 F.3d 907, 913–14 (8th Cir. 1999). This list is illustrative—not exhaustive. Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (holding that human reproduction is a major life activity under the ADA); *Weber*, 186 F.3d at 914. Sitting, standing, lifting, reaching, and other analogous activities may also be considered major life activities. *Weber*, 186 F.3d at 914; *see* Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 616 (8th Cir. 1997). Courts, thus, will consider if an activity is sufficiently similar to the EEOC's representative list. *See Bragdon*, 524 U.S. at 638–39. "Working" itself has been

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[70]

This determination must also take into account mitigating measures, such as medicines and assistive devices.[71] For example, a person with eyesight problems that would otherwise constitute an impairment that substantially limits the major life activity of sight loses this status if the individual can wear eyeglasses that would correct this condition.[72]

The EEOC's regulations recognize that Congress adopted the definition of disability from the Rehab Act's definition of the term "individuals with handicaps," and, "[b]y so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA."[73]

1. "Regarded as" Disabled

For an employee to be "regarded as" disabled, it follows that an employer must *perceive* that the employee has an impairment that substantially limits one or more major life activities, i.e., that the employee is actually disabled. The EEOC regulations lay out three situations where this can occur. Under the ADA, an individual is regarded as having a disability if the individual:

> (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

determined by courts as a major life activity. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 762–63 (3d Cir. 2004). Being substantially limited in the major life activity of working is most often the last resort of a plaintiff who is not substantially limited in any other recognized category. Vande Walle, *supra* note 53, at 902 (citing EEOC TECHNICAL ASSISTANCE, *supra* note 55, at § I-2.2(a)(iii)). See *infra* notes 192–94 and accompanying text for a discussion of this major life activity in the context of the *Williams* case.

70. 29 C.F.R. § 1630.2(j)(1); *Williams*, 380 F.3d at 762; *Weber*, 186 F.3d at 913. The nature, severity, and expected duration or impact of the impairment should be considered in determining if it causes an individual to be substantially limited in a major life activity, according to the EEOC regulations. 29 C.F.R. § 1630.2(j)(2).

71. Sutton v. United Air Lines, Inc., 527 U.S. 471, 487–89 (1999); *Weber*, 186 F.3d at 913.

72. *See Sutton*, 527 U.S. at 487–89.

73. 29 C.F.R. pt. 1630 app. § 1630.2(g) (citing S. REP. NO. 116, at 21 (1989)).

> (3) [h]as [no such impairment] but is treated by a covered entity as having a substantially limiting impairment.[74]

The EEOC, in its Technical Assistance Manual, provides examples of all three scenarios. An example of "(1)" would be where an employee had controlled high blood pressure that is not substantially limiting.[75] If an employer reassigns the individual to less taxing work because of an unsubstantiated fear that the individual will suffer a heart attack performing strenuous work, the employer has regarded this employee as disabled.[76] An example of "(2)" would be where an employer promotes an inexperienced new clerk to store manager instead of an experienced assistant manager who has a prominent facial scar.[77] The employer did not think that customers would want to look at the scarred clerk.[78] This action would be discriminatory because the employer perceived and treated the scarred clerk as a person substantially limited in the major life activity of working.[79] An example given for "(3)" is as follows: assume that an employer fires an employee based on an (untrue) rumor that the employee has HIV.[80] The employee, though having no impairment whatsoever, is thus discriminated against based on the employer's erroneous perception.[81]

These three categories should be seen as a guide to recognizing that employer misperceptions can result in discrimination in a variety of circumstances, and courts have used them to this end.[82] The categories do not always define three fully independent scenarios.[83] To the contrary, the lines separating the categories are not always clear-cut.[84] Both "(1)" and "(2)" deal with circumstances in which an individual has a physical or mental

74. 29 CFR § 1630.2(l); *Williams*, 380 F.3d at 766. The line separating these three situations are not always clear-cut, however, their common feature is that a person who does not have an actual disability is treated as having such disability. BURGDORF, *supra* note 3, at 152.

75. 29 C.F.R. pt. 1630 app. § 1630.2(l).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*; *see infra* notes 193–95 and accompanying text for an explanation of the major life activity of working.

80. 29 C.F.R. pt. 1630 app. § 1630.2(l) (2004).

81. *Id.*

82. *See, e.g.*, McKenzie v. Dovala, 242 F.3d 967, 971 (10th Cir. 2001):

> According to the EEOC's interpretive guidelines, if an individual can show that a potential employer refused to hire her based on 'myth, fear, or stereotype,' including concerns regarding safety, insurance, liability, and acceptance by coworkers and the public, the individual will satisfy the 'regarded as' component of the definition of disability.

Id.

83. BURGDORF, *supra* note 3, at 152.

84. *Id*.

impairment, but not one that substantially limits a major life activity.[85] In both instances, an employer treats the individual as if she has a substantially limiting impairment.[86] The difference between the two is that in "(1)," an employer overacts to the impairment, while in "(2)," the individual's activity is truly limited as a result of attitudinal barriers.[87] This distinction appears largely to be a matter of degree—the more the discrimination is based on societal stigma and wide-ranging prejudicial attitudes, the more akin the situation is to category "(2)."[88] The more that the discrimination is an isolated overreaction to an impairment, the more clearly the situation fits in "(1)."[89]

This interchange between the categories highlights commentator Robert Burgdorf's observation that the categories "may serve to overcomplicate what is not, in fact, an inherently complex statutory concept."[90] The categories are derived, as much of the ADA has been, from the HEW's regulations implementing Section 504 of the Rehab Act.[91] While they are reiterated in some of the ADA's legislative history,[92] there is considerable evidence that Congress sought a more straightforward approach to the "regarded as" prong.[93] For instance, the report of the House Judiciary Committee asserted:

> [The "regarded as"] test is intended to cover persons who are treated . . . as having a physical or mental impairment that substantially limits a major life activity. It 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.[94]

Under this approach, a person who is treated as having a substantially limiting impairment is covered under the "regarded as" prong, regardless of any fine distinction about whether the coverage is due to mistake, overestimated impairment, or limitations resulting from the attitudes of others.[95]

85. *Id*. at 153.

86. *Id*.

87. *Id*.

88. BURGDORF, *supra* note 3, at 153.

89. *Id*.

90. *Id*. at 154.

91. 45 C.F.R. § 84.3(j)(2)(iv) (2004); BURGDORF, *supra* note 3, at 154.

92. BURGDORF, *supra* note 3, at 154; *see* H.R. REP. NO. 101–485 (III), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452 [hereinafter House Judiciary Committee Report].

93. BURGDORF, *supra* note 3, at 154.

94. *Id*. (quoting House Judiciary Committee Report, *supra* note 92, at 452).

95. *Id*. Instead of employing the three categorical distinctions, the Supreme Court in *Sutton* simply looked at whether the employer perceived the plaintiffs as having an impairment that substantially limited them in the major life activity of working. Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999); *see infra* notes 192–94 and accompanying text for the Third Circuit's implicit adoption of this approach. One possible way of understanding and applying the "regarded as" prong and its regulations is first to use this more straightforward approach to determine coverage under the prong. Once an employee is so determined, then look at which

The purpose of the "regarded as" prong, as expressed by Congress in the ADA's legislative history, comes from the Supreme Court's ruling in *School Board of Nassau County v. Arline*.[96] In *Arline*, a schoolteacher claimed that her school had fired her based on its misperception that her contagious—but asymptomatic—tuberculosis constituted a handicap.[97] The Court ruled that she did have a valid claim under the "regarded as" classification and, in this context, discussed the reasoning behind the "regarded as" prong.[98] Congress adopted the Supreme Court's analysis of the "regarded as" definition (under the Rehab Act) in introducing the ADA. Congress explained:

> [The objective of the "regarded as" provision of the ADA] was articulated by the Supreme Court in *School Board of Nassau County v. Arline.* The Court noted that although an individual may have an impairment that does not 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."
>
> The Court concluded that, by including this test, "*Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment*."
>
> Thus, a person who [suffers an adverse employment action] because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded-as" prong], whether or not . . . the person's physical or mental condition would be considered a disability under the first or second part of the definition.[99]

regulatory category the employee most closely falls under in order to formulate a remedy for the specific nature of the discrimination (i.e., broad prejudicial attitude vs. individual overestimation of impairment). This approach, as of now, has not been explicitly adopted by the courts. However, it could be more effective in applying the ADA's "regarded as" prong in accordance with its intended purpose. Part IV, Section B, of this Article demonstrates how this approach may be utilized in a "regarded as" claim.

96. 480 U.S. 273 (1987); *see* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774–75 (3d Cir. 2004); 29 C.F.R. pt. 1630 app. § 1630.2(l) (2004).

97. 480 U.S. at 276–77.

98. *Id.* at 282–86. The case was decided under the Rehab Act, so the Court employed that Act's "regarded as" prong, which is identical to the ADA's. *Id.* at 277–78; *see supra* note 27 and accompanying text.

99. House Judiciary Committee Report, *supra* note 92, at 453 (footnotes omitted) (emphasis added); *see Williams*, 380 F.3d at 774. Some courts have read this rationale to mean that only individuals who have impairments that are generally subject to societal myths, fears and stereotypes are covered under the "regarded as" prong. *See id.* at 770 n.14; Travis, *supra* note 64, at 502 n.100. This seems to be an overly restrictive reading of the legislative history. The house report does not say that *only* a person who suffers an adverse action based on myths, etc. would

The *Arline* decision observed that a person's ability to work could be substantially limited as a result of the negative reaction of others to the impairment.[100] Congress's express adoption of this reasoning for the ADA's "regarded as" provision indicates that it intended not simply to deter discrimination in a prophylactic way, i.e., by holding employers liable for *all* discriminatory actions, discrimination against those actually disabled will decrease.[101] Congress was attempting to go one step further. It recognized that discriminatory attitudes and actions can create tangible limitations—limitations that can, in and of themselves, substantially limit an employee's ability to work.[102] The example of the store clerk with the facial scar illustrates such a situation.[103] The discriminatory attitude of the store clerk's employer, in essence, turned the clerk's scar into a substantially limiting impairment. This legislative record indicates that the "regarded as disabled" prong's intended functions are twofold: it should (1) penalize employers who take discriminatory actions (as defined by the ADA), regardless of whether an employee has an actual disability, and (2) attack discriminatory attitudes that hinder an employee's ability to work, as in the case of the scarred clerk.

In summary, the "regarded as" provision springs, as so much of the ADA does, from the Rehab Act, its regulations, and its case law. At its essence, this provision covers a person whose employer regards her as having a substantially limiting impairment. It functions both as an additional deterrent to discriminatory actions against actual disabilities and as a way to attack the prejudices at the heart of such actions. The EEOC implementing regulations' three categories can be used as ways to define and apply this rationale, but, perhaps more effectively, they should be used to identify those situations when

be covered. As EEOC regulations and other legislative history highlight, an individualized overreaction to a specific impairment should be covered as well. *See supra* notes 95–97 and accompanying text. Other courts have adopted this viewpoint. Travis, *supra*, at 503 n.105.

100. 480 U.S. at 283; 1 PHELAN & ARTERTON, *supra* note 48, at 4-108.

101. The "prophylactic" deterrent function is still a major purpose of the "regarded as" provision, and its importance should not be underestimated. Vande Walle, *supra* note 53, at 933–34; 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, 995–96 (2000) [hereinafter *Unfair Advantage*] ("Broad protection of perceived disabilities helps prevent spillover discrimination by employers that might be willing to take a chance that a given individual they think is disabled might not actually be disabled under the technical terms of the ADA's actual disability prong. Although lawmakers generally do not cite this prophylactic benefit as a reason for including perceived disability protection in civil rights statutes, some courts are convinced that a strong prohibition against perceived disability discrimination helps deter discrimination against those with actual disabilities.") (internal citations and quotations omitted); Michael D. Moberly, *Letting Katz Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 640–41 (1998).

102. *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 168 (E.D.N.Y. 2002).

103. *See supra* notes 77-79 and accompanying text.

discrimination itself becomes a substantially limiting impairment or turns an impairment into a substantially limiting one.[104] Part IV will address how these last two situations may require special accommodations.

B. "Qualified Individual" and "Reasonable Accommodation"

Once an individual is determined either "actually disabled" or "regarded as disabled," the individual must still be found "qualified" to be entitled to the ADA's protection. Thus a plaintiff must prove that she is a "qualified individual" as the second element of an ADA employment discrimination claim.[105] This qualification requirement stems from Congress's concern that the ADA not be construed to require the employment of those whose disabilities make it impossible for them to do their jobs.[106] This concept is succinctly summed up by the accepted maxim that an employer "should not have to hire a blind bus driver."[107] So, the qualified individual inquiry ensures that refusing to employ someone because of that person's inability to perform critical job tasks does not constitute discrimination.[108]

The ADA defines a qualified individual as one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[109] To determine if an individual falls under the coverage of this definition, courts have used a two-pronged inquiry suggested by the EEOC regulations.[110] First, courts have examined whether the particular individual satisfies the "requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires."[111] Such requirements must be "job-related" and "consistent with business necessity," as spelled out by the

104. *See supra* note 95.

105. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 768 (3d Cir. 2004); Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999).

106. BURGDORF, *supra* note 3, at 185. The qualified individual requirement comes from the "otherwise qualified" language of Section 504 of the Rehab Act. *Id*. at 188–89. The National Council for the Handicapped argued in its original ADA proposal that the "otherwise qualified" concept was essentially redundant, because it is self-evident that a person who does not meet legitimate qualifications is not subject to discrimination. *Id*. at 189. Despite the non-inclusion of this requirement, Congress decided to again utilize the qualified individual concept in the final draft of the ADA, most likely "to allay fear of the unknown" among lawmakers and the business community. *Id.*

107. *Id*. at 185.

108. *Id*.

109. 42 U.S.C. § 12111(8) (2000); *Williams*, 380 F.3d at 768; *Weber*, 186 F.3d at 916.

110. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 n.17 (1987) (analyzing under the analogous Rehab Act provisions); *Weber*, 186 F.3d at 916; Deane v. Pocono Med. Ctr., 142 F.3d 138, 145 (3d Cir. 1998).

111. *Weber*, 186 F.3d at 916 (quoting *Deane*, 142 F.3d at 145); 29 C.F.R. § 1630.2(m) (2004).

ADA's statutory language.[112] This first determination is used initially in order to weed-out complaints where plaintiffs fail to meet legitimate job requirements that are completely unrelated to disability.[113] For example, the first step in examining whether an accountant with cerebral palsy is qualified for a certified public accountant job is to determine if the person is a licensed CPA, a requirement clearly job-related and consistent with business necessity.[114] This first part of the inquiry has sometimes been referred to as finding if the employee is "otherwise qualified" for the job.[115]

Second, courts have determined whether the individual, "with or without *reasonable accommodation*, can perform the essential functions of the employment position."[116] This determination is the crux of the qualified individual inquiry, as even if a requirement is job-related and consistent with business necessity, if a disabled person can meet it with a reasonable accommodation, she is a "qualified individual."[117] Thus, for both prongs of the inquiry, it is necessary to define what is meant by "essential functions" and "reasonable accommodation."

1. Essential Functions and Reasonable Accommodation

To determine what constitutes the essential functions of a job, employers and courts are expected to take a factual, case-by-case look at each job situation, guided by the ADA's statutory language and the EEOC regulations.[118] The ADA explicitly provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential" and that courts shall consider as evidence of essential functions an employer's written job description, if prepared before advertising or interviewing applicants for the job.[119] The EEOC regulations define essential functions as "the fundamental job duties of the employment position the individual with a disability holds or desires."[120] If an employee can perform the essential

112. 42 U.S.C. § 12112(b)(6); BURGDORF, *supra* note 3, at 223; *see* 29 C.F.R. § 1630.10.

113. *See* EEOC TECHNICAL ASSISTANCE, *supra* note 55, at II-11.

114. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999); EEOC TECHNICAL ASSISTANCE, *supra* note 55, at II-11.

115. *See* EEOC TECHNICAL ASSISTANCE, *supra* note 55, at II-11. This is not to be confused with the Rehab Act's use of the term "otherwise qualified" for the entire two-pronged inquiry. *See supra* note 106.

116. 42 U.S.C. § 12111(8) (emphasis added); *see Weber*, 186 F.3d at 916 (quoting *Deane*, 142 F.3d at 145); 29 C.F.R. § 1630.2(m).

117. *See* EEOC TECHNICAL ASSISTANCE, *supra* note 55, at II-11; BURGDORF, *supra* note 3, at 222–23.

118. 29 C.F.R. pt. 1630 app. § 1630.2(n); BURGDORF, *supra* note 3, at 215.

119. 42 U.S.C. § 12111(8); BURGDORF, *supra* note 3, at 206.

120. 29 C.F.R. § 1630.2(n)(1). An example of an essential function for a secretary job would likely be typing, whereas a non-essential function for a secretary would likely be having the capability to lift heavy objects.

functions of a job (and is "otherwise qualified"), then that employee falls under the protection of the ADA.

If an employee cannot perform the essential functions of the job on her own, her ADA claim is not ruined. If she could do so with reasonable accommodation provided by the employer, her claim survives.[121] If an employer fails to make such reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, it has discriminated in violation of the ADA.[122] So the ADA requires employers to provide reasonable accommodations to disabled employees so that they can successfully perform the essential functions of their jobs.[123] Courts have mostly applied this requirement by obliging employers to provide "operational" (or "traditional") accommodations that restructure physical work environments or job functions to compensate for impairments.[124]

The ADA's reasonable accommodation requirement comes from the HEW regulations issued pursuant to the Rehab Act. These regulations introduced a "reasonable accommodation" requirement for federal programs under Section 504.[125] In order to not discriminate against a disabled individual, an employer has an affirmative obligation to give the individual reasonable accommodation, unless the accommodation would impose an undue hardship.[126]

The Supreme Court recognized that the regulations' reasonable accommodation requirement was key to enforcing Section 504's non-discrimination mandate.[127] This requirement embodied a groundbreaking recognition that the unique nature of disability-based discrimination, as opposed to racial discrimination, necessitated that accommodations be made to

121. *See* 42 U.S.C. § 12111(8).

122. 42 U.S.C. § 12112(b)(5)(A).

123. *See* 42 U.S.C. §§ 12111(8), 12112(b)(5)(A).

124. *See Unfair Advantage*, *supra* note 101, at 906–07. For examples of "traditional" accommodations, *see id.* at 913 n.41 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(i)–(ii) (identifying typical accommodations, including facility modification and job restructuring); 29 C.F.R. pt. 1630 app. § 1630.2(o) (listing other forms of reasonable accommodation, including "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment," and "[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips," or "making employer provided transportation accessible, and providing reserved parking spaces")).

125. Nondiscrimination on Basis of Handicap, 42 Fed. Reg. 22,676, 22,677 (May 4, 1977) (codified at 45 C.F.R. § 84.12 (2004)); BURGDORF, *supra* note 3, at 275.

126. 45 C.F.R. § 84.12(b); BURGDORF, *supra* note 3, at 275. Such accommodation may include: "(1) [m]aking facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." 45 C.F.R. § 84.12(b). See *infra* note 130 for the ADA's definition of "undue hardship."

127. Alexander v. Choate, 469 U.S. 287, 301 (1985); BURGDORF, *supra* note 3, at 277.

allow the disabled to work effectively.[128] Otherwise, employers could simply claim that the disabled could not perform the job. Congress later directly incorporated reasonable accommodation, in substantially similar form as the HEW regulations, into the statutory language of the ADA.[129] The ADA defines reasonable accommodation as a term that may include:

> (A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and
>
> (B) 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.[130]

This example-centered definition, with the "and other similar accommodations" catchall, demonstrates that Congress intended reasonable accommodation to involve a flexible "fact-specific, case-by-case approach."[131] Reasonable accommodation is basically a "modification or adjustment" of any

128. As the United States Commission on Civil Rights stated in a 1983 report: "Discrimination against handicapped people cannot be eliminated if programs, activities and tasks are always structured in the ways people with 'normal' physical and mental abilities customarily undertake them. Adjustments or modification of opportunities to permit handicapped people to participate fully have been broadly termed reasonable accommodation." 1 PHELAN & ARTERTON, *supra* note 48, at 8-2 (quoting U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983)); *see also Unfair Advantage*, *supra* note 101, at 947–48.

129. 42 U.S.C. § 12111(9); BURGDORF, *supra* note 3, at 278.

130. 42 U.S.C. § 12111(9). An employer is *not* required to provide reasonable accommodation if such accommodation would impose an undue hardship on the employer. § 12112(b)(5)(A). The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of several factors laid out by Congress:

> (i) the nature and cost of the accommodation needed under this chapter;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12111(10). For instance, a small business in Minnesota would likely not be required to accommodate an employee who contracts a disorder that requires a warm living environment to live and work out of Florida.

131. BURGDORF, *supra* note 3, at 279.

type that is necessary to enable a disabled person to participate equally in the employment process.[132]

The ADA's reasonable accommodation requirement adds to the law's stated goal of anti-discrimination.[133] It provides a unique way of preventing discrimination by granting a benefit not afforded to all workers equally—only qualified individuals with disabilities are entitled to reasonable accommodation.[134] Accommodations are required for those disabled employees who need them to participate in the workplace with equal opportunity.

III. TAKING SIDES: *WEBER* AND *WILLIAMS*

Perhaps the best way to ground in reality the preceding complex network of statutory definitions is to present how it played out in two cases before federal courts of appeal. The Eighth Circuit in *Weber v. Strippit, Inc.*[135] and the Third Circuit in *Williams v. Philadelphia Housing Authority Police Department*[136] heard ADA claims in which the plaintiff attempted to prove that he had an actual disability *and* that his employer wrongly regarded him as disabled, a common "two bites of the apple" approach.[137] The courts in these

132. *Id.* The EEOC, in an attempt to lay out a "concise and proper" definition of reasonable accommodation, described the term thusly:

> (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 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.

Id. (quoting 29 C.F.R. § 1630.2 (2004)).

133. Congress stated that it is "central to the non-discrimination mandate of the ADA." *Id.* at 279 (quoting H.R. REP. NO. 101-485, pt. 3, at 39 (1990)); EEOC TECHNICAL ASSISTANCE, *supra* note 55, at III-1 ("Reasonable accommodation is a key nondiscrimination requirement of the ADA because of the special nature of discrimination faced by people with disabilities.").

134. *See* EEOC TECHNICAL ASSISTANCE, *supra* note 55, at III-2.

135. 186 F.3d 907 (8th Cir. 1999).

136. 380 F.3d 751 (3d Cir. 2004).

137. *See* WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT: AN OVERVIEW FOR LAWYERS 137 (2000) (recommending that lawyers "[p]lead disability and perceived disability in the alternative"). For instance, if a plaintiff cannot meet the rigorous statutory standard of actual disability, he may turn to the "regarded as" prong to qualify him for ADA coverage. The Third Circuit, for one, has noted that this approach is not inherently contradictory. *Williams*, 380 F.3d at 766 n.10. For example, a jury could either find 1) that an impaired plaintiff was actually disabled under the ADA or 2) that the impaired plaintiff was not

two cases have given the most lucid arguments, to date, for their respective positions on whether plaintiffs who are regarded as disabled by their employers are entitled to reasonable accommodation.

A. Weber v. Strippit, Inc. *(1999)*

The Eighth Circuit entered the fray over "regarded as disabled" reasonable accommodation claims in 1999 with its decision in *Weber*. The case dealt with a sales manager, David Weber, suing his employer, Strippit, Inc., for allegedly firing him because of his heart disease.[138] In the process of denying Weber's claim that he met the ADA's definition of disability, the Eighth Circuit ruled that "regarded as" disabled plaintiffs are not entitled to reasonable accommodation.[139]

In May 1990, Strippit, a manufacturer of tools and machinery used to manipulate sheet metal, hired Weber as an international sales manager.[140] After initial training at Strippit headquarters in Akron, New York, Strippit set up Weber to work out of his home in Minnesota.[141] On February 2, 1993, at age fifty-four, Weber suffered a major heart attack.[142] Weber entered intensive care and stayed there for about nine days, before being released under physical and work restrictions.[143] Between 1993 and 1994, Weber returned to the hospital on numerous occasions for his heart disease, anxiety, hypertension, and related conditions.[144] He continued to perform his job responsibilities during this period, however.[145]

Beginning in October 1993, several months after Weber's return to work following his second hospitalization, Strippit required Weber to complete more training and advised him that he might be relocated to Akron.[146] Starting in May 1994, Strippit told Weber that he must relocate to Akron and eventually gave him an ultimatum: either go to Akron or stay in Minnesota and accept a lower-salaried position as a domestic sales engineer.[147] Weber informed Strippit that his doctor advised him to remain in Minnesota for six months for

disabled within the meaning of the ADA, but that her employer incorrectly viewed her as such. *See id*.

138. *Weber*, 186 F.3d at 910.
139. *Id*. at 912–15, 917.
140. *Id*. at 910.
141. *Id*.
142. *Id*.
143. *Weber*, 186 F.3d at 910.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*.

medical reasons prior to relocating. Refusing to wait the six months, Strippit allegedly terminated Weber's employment.[148]

Weber filed suit in the United States District Court for the District of Minnesota, alleging (among other claims) that Strippit violated the ADA by firing him based on his disability, both actual and perceived.[149] The district court granted Strippit's motion for judgment as a matter of law on Weber's actual disability claim but let Weber's "regarded as disabled" claim proceed to a jury trial.[150] The jury returned a unanimous verdict in favor of Strippit, and Weber appealed.[151]

The Eighth Circuit Court of Appeals affirmed the district court's ruling denying Weber's claim of actual disability on judgment as a matter of law.[152] Next, the Eighth Circuit considered Weber's claim that the district court erred in not instructing the jury to decide whether Strippit violated the ADA by failing to reasonably accommodate Weber's perceived disability.[153] The court considered this issue in depth. First, the Eighth Circuit determined that the district court correctly instructed the jury that in order to find that Strippit regarded Weber as disabled, it must find that Strippit perceived Weber to have an impairment that substantially limited a major life activity.[154] To prove his ADA claim of discrimination, the Eighth Circuit noted that Weber then needed to establish that he was a qualified individual, i.e., an individual who, with or without *reasonable accommodation*, could perform the essential functions of the employment position that he desired.[155]

The Eighth Circuit conceded that the ADA's plain language apparently entitles all plaintiffs who meet the definition of disability (either "actual,"

148. It was not clear to the court whether Strippit actually fired Weber or Weber abandoned his employment, but it took Weber's allegations as true on Strippit's motion for judgment as a matter of law. *See Weber*, 186 F.3d at 910.

149. *See id.*

150. *Id.*

151. *Id.*

152. *Id.* at 914. The Eighth Circuit recognized, and Strippit conceded, that Weber's heart disease constituted an impairment under the ADA. *Id.* at 913. However, the court concluded that his impairment did not rise to a level that substantially limited him in a major life activity. *Id.* at 914. Weber conceded that he was not limited in the major life activity of working, as he continued to work for the majority of the time since his heart attack, but claimed that his heart disease substantially limited him in the major life activities of eating and walking. *Id.* at 913. The court, however, found that Weber's dietary restrictions and "difficulty walking long distances or climbing stairs without getting fatigued" constituted only moderate limitations on major life activities. *Id.* at 914. Thus, Weber's heart disease did not *substantially* limit him in the major life activities of eating and walking—only *moderately*, which is not sufficient to meet the ADA standards for an actual disability. *Id.*

153. *Weber*, 186 F.3d at 915–16.

154. *Id.* at 915.

155. *Id.* at 916.

"regarded as," or "record of") to reasonable accommodation.[156] The court questioned the application of the statute's plain language, however. The court found that the reasonable accommodation requirement "makes considerably less sense" when applied to perceived disabilities than it does when applied to actual disabilities.[157] The court commented: "Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results."[158] Using the facts of this case, the court explained a possible bizarre result: If Weber's heart condition prevented him from relocating to Akron, but did not substantially limit a major life activity, Strippit could fire him without incurring ADA liability.[159] However, if Strippit mistakenly believed that Weber's heart condition *did* substantially limit a major life activity, then it "would be required to reasonably accommodate Weber's condition by, for instance, delaying his relocation to Akron."[160] The court found it bizarre to give Weber this accommodation for a non-disabling impairment, an accommodation that no "similarly situated employees would enjoy."[161]

The Eighth Circuit then turned to the (limited) previous caselaw on the issue, focusing primarily on the Third Circuit's 1998 decision in *Deane v. Pocono Medical Center*.[162] The Third Circuit en banc heard a claim from a nurse, Deane, who tore the cartilage in her wrist, missing nearly a year of work.[163] Deane's doctor released her to light duty but limited her lifting to under twenty pounds.[164] Pocono Medical Center, Deane's employer, determined that it could not accommodate her in any available position and fired her.[165] Deane sued under a theory that Pocono regarded her as disabled and failed to reasonably accommodate her.[166] The Third Circuit decided the case on other grounds but discussed the issue of reasonable accommodation for

156. *See id*. at 914–15.

157. *Id*. at 916. The court stated that the ADA's reasonable accommodation requirement is "easily applied in a case of an actual disability." *Id*. An employer cannot fire an employee who suffers from an actual disability without first making reasonable accommodations that would enable the employee to continue performing the essential functions of his job. *Id*. The court described this provision as "perfectly consistent with the ADA's goal of protecting individuals . . . who nonetheless can, with reasonable efforts on the part of their employers, perform the essential functions of their jobs." *Id.*

158. *Weber*, 186 F.3d at 916.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id.* at 917 (citing Katz v. City Metal Co., 87 F.3d 26, 29 (1st Cir. 1996); Deane v. Pocono Med. Center, 142 F.3d 138, 148–9 n.12 (3d Cir. 1998)).

163. *Weber*, 186 F.3d at 917 (citing *Deane*, 142 F.3d at 141).

164. *Id*. (citing *Deane*, 142 F.3d at 141).

165. *Id*. (citing *Deane*, 142 F.3d at 141).

166. *Id*. (citing *Deane*, 142 F.3d at 142).

those regarded as disabled.[167] The *Weber* court approvingly cited the Third Circuit's arguments against accommodation:

> Among the court's concerns were that adopting plaintiff's interpretation of the ADA would:
>
> "(1) permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of 'reasonable accommodations' for disabilities based upon misperceptions; and
>
> (2) create a windfall for legitimate 'regarded as' disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions."[168]

The Eighth Circuit concluded that these arguments prove that Congress could not have intended to create a disparity in treatment among impaired but non-disabled employees.[169] The court ruled that "'regarded as' disabled plaintiffs are not entitled to reasonable accommodations."[170]

B. Williams v. Philadelphia Housing Authority Police Department *(2004)*

As *Weber* noted, the Third Circuit had discussed reasonable accommodation for the "regarded as" disabled in its 1998 *Deane* decision without ruling on the issue.[171] In *Deane*, it appeared that the Third Circuit was leaning against accommodation in the "regarded as" context.[172] However, in 2004, the case of *Williams v. Philadelphia Housing Authority Police Department* presented the Third Circuit a golden opportunity to rule directly on the issue, and it ruled in favor of accommodation.[173]

Edward Williams was hired by the Philadelphia Housing Authority ("PHA") as a police officer and worked for the PHA for twenty-four years.[174] In May 1998, after reporting for an evening shift in the PHA police department, Williams was requested to report to the sergeant's office.[175] After a superior officer confronted Williams about his "fractious" interactions with his fellow employees, Williams yelled and made multiple threatening remarks.[176] The PHA immediately suspended Williams without pay.[177] Later

167. *Id*. (citing *Deane*, 142 F.3d at 148–49 n.12).
168. *Weber*, 186 F.3d at 917 (quoting *Deane*, 142 F.3d at 149 n.12).
169. *Id*.
170. *Id*.
171. *See supra* notes 163–69 and accompanying text.
172. *Id.*
173. 380 F.3d 751, 776 (3d Cir. 2004).
174. *Id*. at 756.
175. *Id*.
176. *Id*.
177. *Id*.

that evening, Williams called a psychological counselor and remarked, "I understand why people go postal."[178] A PHA officer who later spoke with the counselor testified that Williams talked of "smoking people, going postal, and having the means to do it."[179]

After the PHA directed Williams to return to work on an assignment in the department's radio room, Williams instead began calling in sick on a daily basis.[180] In June 1998, PHA ordered Williams to undergo a psychological examination with its own psychologist, Dr. Finley.[181] In the meantime, Williams requested and received a medical leave of absence.[182] In August and September, Williams saw Dr. Finley three times.[183] Dr. Finley ultimately reported to the PHA regarding these visits that Williams should receive psychological treatment for depression and stress management, that for a three-month period he should be assigned temporary duty during this treatment, and that he should not carry a weapon during this three-month period.[184]

Williams thereafter made requests for temporary assignment to the PHA training unit and the radio room, neither of which were granted.[185] Evidence at trial indicated that PHA's refusal resulted from its belief that Williams' diagnosis prevented him from working around armed police officers in the radio room because of potential access to firearms,[186] despite a report from Dr. Finley that specifically stated Williams could work around firearms.[187] In December 1998, PHA requested that Williams file for medical leave again, as all his leave was exhausted.[188] Williams did not respond, and PHA fired him.[189]

Williams filed a complaint against PHA in the United States District Court for the Eastern District of Pennsylvania asserting an ADA employment discrimination claim based on both actual and perceived disability, among other causes of action.[190] The District Court granted PHA's motion for summary judgment, and Williams appealed to the Third Circuit.[191]

178. *Williams*, 380 F.3d at 756.
179. *Id*.
180. *Id*.
181. *Id*.
182. *Id*.
183. *Williams*, 380 F.3d at 756.
184. *Id*. at 756–57.
185. *Id.* at 757. For the purposes of review of the district court's summary judgment ruling, the Third Circuit court assumed the truth of Williams' allegation that the PHA did not respond to his request for radio room duty, despite conflicting evidence. *Id*. at 757 n.1.
186. *Id*. at 766.
187. *Id*. at 757.
188. *Williams*, 380 F.3d at 758.
189. *Id*.
190. *Id*.
191. *Id.*

The Third Circuit first addressed Williams' claim that PHA discriminated against him on the basis of actual disability.[192] Specifically, Williams asserted that PHA refused to reasonably accommodate him and fired him based on his mental impairment—major depression—that substantially limited him in the major life activity of working.[193] Williams contended that his mental condition prohibited him from carrying a firearm, which precluded him from working in a class of jobs in law enforcement.[194] The court determined that a reasonable juror could find that Williams was (as compared to an average person living in the same geographical region and with similar abilities as Williams) substantially limited in his ability to perform jobs in law enforcement.[195]

Next, the Third Circuit tackled Williams' "regarded as" claim. Williams argued that PHA erroneously regarded him as having a limitation that precluded him from having access to firearms or being around others carrying firearms.[196] This, he contended, was a far greater limitation than what his

192. *Id*. at 761–62.

193. *Williams*, 380 F.3d at 758. The EEOC has seen fit to address the major life activity of working directly in its regulations on the ADA. The regulations provide, with respect to the major life activity of working:

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

29 C.F.R. § 1630.2(j)(3)(i) (2004). Several additional factors may be considered in this analysis:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

§ 1630.2(j)(3)(ii). The Supreme Court has summarized these regulations, holding that:

> [t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Williams, 380 F.3d at 763 (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 493 (1999)).

194. *Williams*, 380 F.3d at 763–64. The EEOC regulations pertaining to having a substantially limitation in the major life activity of working mention "a class of jobs" in its definition. 29 C.F.R. 1630.2(j)(3)(i); *see supra* note 193.

195. *Williams*, 380 F.3d at 764.

196. *See supra* notes 180–87 and accompanying text for the purported factual basis of Williams' allegation. The court took special notice that a PHA administrator testified:

mental impairment actually presented, which was only that he could not carry a firearm himself.[197] Building on its determination concerning Williams' actual disability claim, the court found that the additional limitations perceived by PHA only served to further restrict the jobs Williams could perform in law enforcement.[198] Thus, a reasonable trier of fact could find that PHA regarded Williams as being substantially limited in the major life activity of working, because of its perception that Williams could not hold effectively *any* law enforcement position.[199]

The court then took up the issue of whether Williams was a "qualified individual" under the ADA.[200] The court reiterated the fact that Williams requested a radio room assignment as a reasonable accommodation for his alleged disability.[201] The court noted that the ADA specifically provides that "reasonable accommodation" includes "reassignment to a vacant position."[202] PHA did not contest that Williams could have worked in the radio room without carrying a firearm and that vacant, funded radio room positions were available.[203] Moreover, Williams alleged, and the record indicated to the court, that the radio room position was at or below the level of his former job and that he was qualified to perform the essential duties of the job.[204] In the Third Circuit's view, this showing was sufficient to establish that Williams was a qualified individual, when provided a reasonable accommodation, under the ADA.[205]

This decision by the court opened the door to the controversial question: If a jury could find that Williams was not actually disabled but that PHA did regard him as disabled, may it find PHA liable for not accommodating his perceived disability? In other words: Are "regarded as" disabled plaintiffs

> [a]t all relevant times, PHA assigned *armed police officers* to work in the PHA radio room. Anyone assigned to the radio room would have *access* to firearms . . . PHA did not assign Sergeant Williams to the radio room . . . because . . . Sgt. Williams would have *access* to firearms in the radio room.

Williams, 380 F.3d at 766.

197. *Williams*, 380 F.3d at 766–67.

198. *Id*.

199. *Id*. at 767.

200. *Id*. at 768.

201. *Id*.; *see supra* note 185 and accompanying text.

202. *Williams*, 380 F.3d at 768 (citing 42 U.S.C. § 12111(9)(B) (2000)). The court acknowledged that the EEOC regulations suggest reassignment "'should be considered only when accommodation within the individual's current position would pose an undue hardship.'" *Id*. (quoting 29 C.F.R. § 1630.2(o) (2004)). However, neither party suggested that any accommodation would have been possible in Williams' original position. *Id*. at 768.

203. *Id*.

204. *Id*. at 770. Here the court employed its previously devised burden for a plaintiff to show that a reassignment was reasonable under his specific circumstances. *Id.* at 770 (citing Donahue v. Consol. Rail Corp., 224 F.3d 226, 230 (3d Cir. 2000)).

205. *Id*.

entitled to reasonable accommodations under the ADA? The Third Circuit met this question head-on in the next part of its *Williams* opinion.[206]

The court prefaced its argument with the judicial history of the issue. It noted that the First Circuit, in *Katz v. City Metal Co.*,[207] and the "better-reasoned" district court decisions had ruled that "regarded as" disabled employees are entitled to accommodation.[208] The court also recognized that the Eighth Circuit, in *Weber*, and the Ninth Circuit, in *Kaplan v. City of North Las Vegas*,[209] had refused to recognize accommodation for perceived disabilities.[210] Summarizing both courts' argument that applying the ADA as written would lead to "bizarre results," the Third Circuit declined to reach the same conclusion in *Williams*.[211] The court stated:

> While we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a "regarded as" disabled employee would produce "bizarre results," we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text. Here, and in what seems to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results. Accordingly, we will remain faithful to its directive in this case.[212]

The plain language of the ADA, as the court noted, does not distinguish between actually disabled and regarded as disabled employees in requiring accommodation.[213]

Moving past the plain language of the ADA, the court further based its decision on a mix of legal and practical considerations. The Third Circuit looked to the legislative history of the ADA and the Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[214] The court quoted

206. *Id*. at 772–73.

207. 87 F.3d 26 (1st Cir. 1996).

208. *Williams*, 380 F.3d at 773 (citing Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 163–71 (E.D.N.Y.); Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218–19 (D.Me. 2001); Lorinz v. Turner Const., Co. 2004 WL 1196699, at *8 n.7 (E.D.N.Y May 25, 2004); Miller v. Heritage Prod., Inc., 2004 WL 1087370, at *10 (S.D. Ind. Apr. 21, 2004)). Moreover, the Third Circuit expressly credited Judge Block's analysis in *Jacques* as a blueprint for its own evaluation of this issue. *Id.*

209. 323 F.3d 1226, 1231–33 (9th Cir. 2003). This more recent decision will not be discussed in detail here, as it tracks *Weber*'s analysis and holding. *Id*. (stating: "We find this [*Weber*'s] reasoning persuasive and agree with the Eighth Circuit's analysis and holding.").

210. *Williams*, 380 F.3d at 773.

211. *Id*. at 773–74.

212. *Id*. at 774. The court did not proceed to make explicit why it thought the vast majority of the cases would not produce bizarre results. For an analysis of why this assertion is likely accurate, see *infra* Part IV of this Article.

213. *Id*.

214. *Id*. at 774–75 (discussing Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987)); *see supra* notes 96–100 and accompanying text.

Congress's statement of the rationale behind the "regarded as" provision, where Congress acknowledged that the perception of disability "may prove just as disabling" as actual disability.[215] To the court, the wisdom of this conclusion was demonstrated here as, but for PHA's erroneous perception that Williams could not be around firearms, he would have been eligible for a radio room assignment.[216]

The Third Circuit also directly addressed the *Arline* decision, which dealt with a teacher plaintiff who had a contagious but not substantially limiting form of tuberculosis and sued the school board for firing her.[217] The Supreme Court found that the teacher qualified under the "regarded as" provision of the Rehab Act and remanded the case, directing the district court to determine whether the school board could have reasonably accommodated her.[218] The *Williams* court noted that the "regarded as" sections of both the Rehab Act and the ADA play a "virtually identical role" in each Act's statutory scheme.[219] Additionally, the court cited the "well-established" rule that the ADA must be read to "grant at least as much protection as provided by . . . the Rehabilitation Act."[220] From this backdrop of legislative intent and Supreme Court directive, the "conclusion seem[ed] inescapable" to the Third Circuit that employees regarded as disabled are entitled to reasonable accommodation under the ADA.[221] The court took note that neither the Eighth Circuit in *Weber* nor the Ninth Circuit in *Kaplan* addressed *Arline*.[222]

Finally, the Third Circuit addressed the "windfall proposition" that *Weber* warned against.[223] This windfall theory argues that providing reasonable accommodation to "regarded as" employees gives them a "windfall" accommodation that a similarly situated employee, not perceived as disabled, would not receive under the ADA.[224] The Williams court argued that the record in this case demonstrates the weakness of the windfall theory.[225] Here, contrary to its own psychologist's opinion, PHA refused Williams a radio room assignment based on its erroneous perception that Williams' psychological impairment not only prevented him from carrying a firearm, but

215. *Williams*, 380 F.3d at 774; *see supra* note 99 and accompanying text.

216. *Id*. at 774.

217. *Id*. at 775; *see supra* notes 97–98 and accompanying text.

218. *Id*.

219. *Id*.; *see supra* notes 33–34 and accompanying text.

220. *Williams*, 380 F.3d at 775 (quoting Bragdon v. Abbott, 524 U.S. 624, 632 (1998)); *see supra* note 22.

221. *Williams*, 380 F.3d at 775.

222. *Id*.

223. *Id*.; *see supra* note 168 and accompanying text.

224. *Williams*, 380 F.3d. at 775. Ironically, the windfall theory was first suggested by the Third Circuit itself, in *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998). *See supra* note 168 and accompanying text.

225. *See Williams*, 380 F.3d at 775–76.

that it further precluded him from even working around armed officers.[226] The court emphasized that another employee with a similar impairment as Williams may well have received a radio room assignment, absent the misperception to which Williams was subjected.[227] In simpler terms, "[t]he employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid."[228] Here, instead of providing a windfall, reasonable accommodation would remedy discrimination.[229] To the court, "[t]his is precisely the type of discrimination the 'regarded as' prong literally protects from, as confirmed by the Supreme Court's decision in *Arline* and the legislative history of the ADA."[230] Accordingly, the Third Circuit ruled that Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation.[231]

C. Questions Raised by Weber *and* Williams

The Third Circuit repudiated the Eighth Circuit's reasoning and ruling in *Weber*, but only to a certain extent. Boiled down to its essence, the *Williams* decision criticized *Weber*'s holding as over-broad and not applicable to the facts before the Third Circuit.[232] Thus, a strict reading of *Williams* could confine its holding to these facts. Important questions emerge, then, from the *Williams* decision: How do courts define when and where regarded as disabled employees are entitled to reasonable accommodation? Which sets of facts invoke enforcement of the ADA's plain language and which facts argue against it? The focus of Part IV will be to examine several scenarios where these questions will be pressing and to provide reasoned answers.

IV. SITUATIONS WHERE REASONABLE ACCOMMODATION FOR THOSE REGARDED AS DISABLED IS AT ISSUE

As *Williams* asserted, it can be argued that there is already controlling Supreme Court precedent that recognizes reasonable accommodation for employees regarded as disabled.[233] The Supreme Court in *School Board of Nassau County, Florida v. Arline* instructed the district court on remand to consider if reasonable accommodation should have been provided to the schoolteacher regarded as having substantially limiting tuberculosis.[234] *Williams*' argument is persuasive in that the Supreme Court has recently held

226. *Id*. at 775.

227. *Id*.

228. *Id*.

229. *See id*. at 775–76.

230. *Williams*, 380 F.3d 775–76.

231. *Id.* at 776. In April 2005, the Supreme Court denied PHA's petition for certiorari, which challenged this ruling, without comment. 125 S.Ct. 1725 (U.S. 2005).

232. *See supra* note 212 and accompanying text.

233. *See supra* notes 217–20 and accompanying text.

234. 480 U.S. 273 (1987); *see supra* note 217 and accompanying text.

that rights under the Rehab Act are recognized as the minimum protections afforded by the ADA.[235] More specifically, however, the holding evidences the Court's inclination, at least at the time of *Arline*, to allow a factual determination at the trial court level of whether reasonable accommodation should be afforded to those regarded as disabled.

The *Arline* ruling cannot be seen as an unambiguous verdict on the issue, however. The ruling, issued in 1987, gave no analysis or explanation as to why the regarded as disabled are entitled to reasonable accommodation, and there is no indication that the issue was raised by either party before the Court. It is still necessary then for lower courts to analyze the issue for themselves and come to a conclusion that is both legally and practically sound. As this Part will argue, courts should generally apply the ADA's language as written, i.e., recognize reasonable accommodation in the "regarded as" context, except in circumstances where a factual determination indicates that an inequitable consequence would result.[236] This explains the Third Circuit's conclusion that such a recognition *could* produce bizarre results, but likely will not in the majority of cases. This recognition and case-by-case approach will best achieve the ADA's primary, interrelated goals: (1) attack disability-based discrimination and (2) promote equal opportunity among the disabled.[237] This Part will attempt to guide courts as to the types of scenarios where reasonable accommodation for "regarded as" individuals should or should not be recognized.

235. *See supra* note 23 and accompanying text.

236. Commentator Michelle A. Travis has endorsed this principle by arguing that recognizing accommodation in this context is ill-served by an "all-or-nothing approach." *Unfair Advantage*, *supra* note 101, at 906. However, Travis's groundbreaking study focused primarily on the rationale behind disfavoring "traditional" accommodations for physically impaired, but not actually disabled, individuals. This Part will cover this issue but will primarily seek to present a wider, concrete array of contexts in which reasonable accommodation is at issue for regarded as disabled employees (including claims involving hostile work environments and direct threats) and present additional legal bases for the right's recognition (including the interactive process requirement and the dignitary interest rationale). It may also be important to note that Travis's article was published before *Jacques* and *Williams* made their key arguments in favor of accommodation. For articles that endorse the Eighth Circuit view, that reasonable accommodation should not be recognized at all for perceived disabilities, see Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 267–68 (2004); Allen Dudley, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for "Regarded as" Disabled Individuals*, 7 GEO. MASON L. REV. 389 (1999); Padmaja Chivukula, *Is Ignorance Bliss? A Pennsylvania Employer's Obligation to Provide Reasonable Accommodation to Employees It Regards as "Disabled" after* Buskirk v. Apollo Metals, Inc., 41 DUQ. L. REV. 541 (2003).

237. *See supra* note 53 and accompanying text.

A. Interactive Process Requirement

As the District Court for the Eastern District of New York noted in the *Jacques v. DiMarzio, Inc.* opinion: "[T]he 'vast majority' of courts . . . have held that employers have a mandatory obligation to engage in an interactive process with employees who may be in need of an accommodation for their disabilities."[238] This requirement is not explicitly provided for in the ADA but has been held to be inherent in the statutory obligation to offer reasonable accommodations to an otherwise qualified disabled individual.[239] The ADA's legislative history implies that an interactive process should occur with regard to accommodation, stating that in order to "identify possible accommodations . . . . [e]mployers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation."[240] The fact that the ADA has been held to mandate this interactive process is perhaps the best argument for holding employers liable when they fail to effectively consider reasonable accommodations for employees they regard as disabled.

To enforce the Congressional intent behind the accommodation requirement, the EEOC has issued regulations regarding the interactive process: "[T]he employer must make a reasonable effort to determine the appropriate accommodation . . . . [This] accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability."[241] The interactive process can be triggered either by a request for reasonable accommodation by a disabled employee or by an employer's recognition of the need for accommodation.[242] Once

238. 200 F. Supp. 2d 151, 168 (E.D.N.Y. 2002) (citing Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002)); *see* Barnett v. U.S. Air, Inc., 535 U.S. 391, 407 (Stevens, J., concurring) (opining that the Ninth Circuit held "correctly" regarding the interactive process and that this part of its decision "is untouched by the [Supreme] Court's opinion").

239. *Jacques*, 200 F. Supp. 2d at 168 (citing Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999)). The EEOC regulations recognize that sometimes it will be immediately clear to both employer and employee what accommodation is necessary or that accommodation is impossible. Taylor v. Phoenixville, 184 F.3d 296, 318 n.9 (3d Cir. 1999) (*en banc*) (citing 29 C.F.R. pt. 1630 app. § 1630.9 (2004)). In this event, the interactive process will not be necessary, but most likely some small level of interaction has still taken place.

240. *Jacques*, 200 F. Supp. 2d at 168 (quoting S.REP. NO. 101–116, at 34 (1989)).

241. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 771 (3d Cir. 2004) (quoting 29 C.F.R. pt. 1630 app. § 1630.9).

242. With regard to employer recognition, the EEOC has directed:

> An employer should initiate the . . . interactive process without being asked if the employer:
>
> (1) knows that the employee has a disability,
>
> (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and

triggered, the EEOC has identified four critical steps that the employer should follow:

> (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 both the employee and the employer.[243]

This process requires communication and good faith on the part of both employer and employee, and neither party may delay or obstruct the process.[244]

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(3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Jacques, 200 F. Supp. 2d at 169 (quoting EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, EEOC COMPLIANCE MANUAL at 5459 (1999)). Moreover, courts have held that it is sufficient to trigger the process if the employer had enough information to be put on notice that the employee *might* have had a disability. *Id.* (quoting *Taylor*, 184 F.3d at 314). The Ninth Circuit noted in *Barnett* that nearly all the circuits have held that the interactive process is triggered by employee request or employer recognition. 228 F.3d 1105 at 1112, *rev'd on other grounds*, 535 U.S. 391 (2002) (citing Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 952 (8th Cir. 1999) ("[W]hen the disabled individual requests accommodation, it becomes necessary to initiate the interactive process[.]"); *Midland Brake*, 180 F.3d at 1172 (holding that the duty to engage in the interactive process is triggered once the employee "convey[s] to the employer a desire to remain with the company despite his or her disability and limitations" and that "[t]he obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee"); *Taylor*, 184 F.3d 296 at 314–15 (holding that the employer's duty to engage in the interactive process is triggered "[o]nce the employer knows of the disability and the employee's desire for accommodations" and that the employer must "'meet the employee half-way'" by requesting additional information); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285 (7th Cir. 1996) ("The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help[.]"); Taylor v. Principal Fin. Group Inc., 93 F.3d 155, 165 (5th Cir.1996) ("Thus, it is the employee's initial request for an accommodation which triggers the employer's obligation to participate in the interactive process of determining one[.]")). *But see* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the plaintiff must produce evidence that a reasonable accommodation is available before an employer is obligated to engage in the interactive process).

243. 29 C.F.R. Pt. 1630 app. § 1630.9; *Barnett*, 228 F.3d at 1114.

244. *Barnett*, 228 F.3d at 1114–15.

An employer can demonstrate this good faith by pointing to cooperative actions taken to determine appropriate accommodations.[245] These actions would include attempts to meet with the employee, discuss the employee's limitations, ask what the employee specifically wants, consider the employee's request, and offer and discuss available alternatives when the request is too burdensome.[246]

Once the employer and employee have identified and assessed possible reasonable accommodations, legislative history instructs that "'the expressed choice of the applicant shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity.'"[247] An appropriate reasonable accommodation must effectively enable the employee to perform the duties of the position.[248]

The interactive process requirement, at first glance, seems an eminently reasonable way to further the ADA's goals from both the employee's *and* employer's viewpoints. It certainly assists the disabled employee, in that it directs employers to cooperate with reasonable accommodation requests. But it is also likely the best way for employers to avoid ADA liability and promote positive worker morale at the same time. The interactive process helps an employer. If an employee requests an accommodation, or an employer has reason to believe an employee is disabled and needs one, then the interactive process provides an opportunity for employers to initially assess an employee's possible impairments and to consider if a reasonable accommodation is required. If the employer in good faith determines that the employee is not disabled, the employer has absolved itself from ADA liability (or at the very

245. *Id*. at 1115. Further, the employer need have little worry that a response to an accommodation request will legally establish that the employer regards the requesting employee as disabled under the ADA. Courts have recognized that such a rule "would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time consuming litigation." *Williams*, 380 F.3d at 776–77 n.20 (quoting Thonton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001), *clarified in other respects*, 292 F.3d 1045 (9th Cir. 2002)); *see* Plant v. Morton Int'l, Inc., 212 F.3d 929, 938 (6th Cir. 2000).

246. *Barnett*, 228 F.3d at 115.

247. *Id*. at 1115 (quoting S. REP. NO. 101-116, at 35 (1989)).

248. *Barnett*, 288 F.3d at 1115. At the litigation stage, for an employee to demonstrate than an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process, the employee generally must establish:

> (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.

Williams, 380 F.3d at 771–72. Thus, the disabled employee must show that a reasonable accommodation did exist and that it would have allowed continued employment if not for the employer's actions. *See id*.

least "regarded as" liability). This promotes the ADA's goals of fighting discrimination against truly disabled individuals, preventing adverse actions based on myths and stereotypes, and integrating the disabled into the workplace.[249] In a more basic sense, it also will likely increase worker morale to know that employers will communicate and work with their impaired employees (current or prospective), not ignore them.

Furthermore, the interactive process promotes the ADA's goals without resorting to litigation. As the *Jacques* opinion argued: "The focus of the interactive process . . . [is] that capable employees can remain employed if their medical problems can be accommodated, rather than on sounding a clarion call to legal troops to opine on whether the employee's impairment is an actual disability within the legal nuances of the ADA."[250] It is a way for an employer to take early intervention, outside of the courtroom, for exploring accommodations for employees it suspects, or truly perceives, are disabled.[251] In this way, *Jacques* describes the process as "more of a labor tool than a legal tool" and as "a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled."[252] This last point is important. The reality is that the ADA is not the "be-all and end-all" of the relationship between impaired employees and their employers. If employers and impaired employees can structure environments that are seen as both suitable by the employee *and* reasonable by the employer, people with valuable skills and experience can work successfully without having to claim ADA protection.[253]

As is apparent, the employer's obligation to engage in the interactive process is certainly triggered as soon as the employer regards an employee as disabled.[254] At that point, the employer must communicate with the employee and explore possible reasonable accommodations.[255] The Eighth Circuit's *Weber v. Strippit* ruling, however, directly contradicts this interactive requirement and thereby weakens it. Under *Weber*, the employer who regards an employee disabled does not have to communicate or explore accommodation. This employer faces no liability. Of course, if the employee

249. *See supra* notes 44–53 and accompanying text.

250. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 169 (E.D.N.Y. 2002).

251. *Id.* at 170.

252. *Id*.

253. The Third Circuit in *Taylor v. Phoenixville* aptly summarized this reasoning:

> [T]he interactive process can be thought of as a less formal, less costly form of mediation . . . . Mediated settlements . . . are cheaper than litigation, can help preserve confidentiality, allow the employee to stay on the job, and avoid monetary damages for an employer's initially hostile responses to requests for accommodations. The interactive process achieves these same goals even more effectively.

Id. at 170 (quoting Taylor v. Phoenixville, 184 F.3d 296, 316 n.6 (3d Cir. 1999)).

254. *Id*. at 169.

255. *Jacques*, 200 F. Supp. 2d at 169 (citing *Taylor*, 184 F.3d at 317).

turns out to be actually disabled, the employer is liable, but this will be determined in court only after costly litigation. *Weber*'s ruling frustrates the utility of the interactive process as a labor tool.

What is more, employers who refuse to interact with an employee who is regarded as disabled have acted from a discriminatory mindset. They have rebuffed an employee who, for all they know, has an actual disability. Failing to hold these employers liable pulls the teeth from the ADA's express, and paramount, antidiscrimination function.[256] The lower the liability an employer faces for discriminatory actions, the more likely this behavior will perpetuate, which will result in increased failures to accommodate actual disability.[257] Thus, the deterrent function of the "regarded as" provision is decreased by the Eighth Circuit's ruling in *Weber*. The Eighth Circuit did not address the deterrence issue, perhaps because it failed to address the interactive process requirement, as well.

Although other circuits had recognized the interactive process prior to the *Weber* decision in 1999,[258] the Eighth Circuit did not address it until less than a month after *Weber*, in *Fjellestad v. Pizza Hut of America, Inc*.[259] *Fjellestad* dealt solely with an "actual" disability claim but held that the interactive process is a requirement of the ADA.[260] One wonders if *Weber* would have been decided differently if the Eighth Circuit's recognition of the interactive process had occurred a month earlier. Looking back at the case's facts, the heart-disease-impaired plaintiff Weber appeared to request a delayed relocation to Akron, New York, based on a doctor's advice, as a reasonable accommodation.[261] Weber alleged that his employer Strippit regarded him as disabled when this request was made.[262] Strippit fired Weber soon after the request.[263] Weber could have offered an argument that Strippit refused to engage in an interactive process by failing to consider in good faith his request for delayed relocation and determine if it was truly reasonable and not an undue hardship.[264] If *Fjellestad*'s ruling on the interactive process was already on the books, or if the Supreme Court had explicitly approved of the process, the Eighth Circuit would have had to address Weber's argument and may have given more careful consideration to the reasonable accommodation issue.

A factual analysis may have revealed that Strippit did not act in good faith towards Weber's request. Or it could have revealed that it did communicate

256. *See supra* notes 44–53 and accompanying text.
257. *See supra* note 101 and accompanying text.
258. *See supra* note 242.
259. 188 F.3d 944 (8th Cir. 1999).
260. *Id*. at 951–52.
261. *See* Weber v. Strippit, Inc., 186 F.3d 907, 910 (8th Cir. 1999).
262. *See id.*
263. *See id.*
264. *See id.*

and cooperate with Weber. Or it could have shown that Weber's request would have imposed an undue hardship on Strippit and that no other accommodation existed. In essence, a factual analysis would have explored the true merits of Weber's accommodation claim, and Strippit's response, instead of summarily dismissing accommodation for perceived disabilities.

In *Williams v. Philadelphia Housing Authority Police Department*, the interactive process could have allowed the plaintiff Williams to stay on the job. Williams alleged that PHA failed to accommodate by failing to engage in the interactive process, and the Third Circuit held that there was a genuine issue of material fact to his claim.[265] Taking Williams' allegations as true, if PHA had adequately responded to and considered his transfer request, the two parties may have arranged a mutually acceptable situation where Williams continued his employment—without resorting to litigation. Failing to hold employers liable for refusing to consider such requests when they perceive a disability lessens the likelihood of this ideal outcome.

The existence of the ADA's interactive process requirement is the best argument for recognizing reasonable accommodation for perceived disabilities. Failing to hold employers liable when they refuse to interact with employees who are regarded as disabled frustrates the utility of the interactive process as a practical labor tool, alternative to litigation, deterrent of discrimination, and instrument of integration.[266] When employers do not engage in the interactive process over reasonable accommodation with employees they regard as disabled, courts should hold these employers liable. Any other approach contradicts the ADA's express purposes of antidiscrimination and integration.

B. Residual Discrimination and Hostile Work Environments

One of the ADA's stated goals is to eliminate discrimination against the disabled that is based on "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to,

265. *Williams*, 380 F.3d at 776 n.19.

266. As the Ninth Circuit has well explained:

> The interactive process is the key mechanism for facilitating the integration of disabled employees into the workplace. Employers who reject this core process must face liability when a reasonable accommodation would have been possible. Without the interactive process, many employees will be unable to identify effective reasonable accommodations. Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended.

Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116, *rev'd on other grounds*, 535 U.S. 391 (2002).

society."[267] Congress included the "regarded as" definition of disability to acknowledge that "accumulated myths and fears about disability and diseases are as handicapping as the physical limitations that flow from actual impairment."[268] When a disabled person is discriminated against in employment, termination or a missed raise may not be the only problem. Courts may be faced with an employer or entire workplace that has demonstrated deeply discriminatory attitudes toward an employee in the course of a tangible adverse employment action. Even before a claim reaches the courtroom, employers may be faced with complaints from a disabled employee that his co-workers or superiors are exhibiting clearly discriminatory attitudes towards him.

For example, a man named John gets a job at Salem Timber Mill ("Salem"). John suffers from epilepsy and has had part of his brain removed and a metal plate inserted. John initially does his job effectively, with no complaints about his performance from his supervisors. However, John's manager discovers John's impairments over a lunchroom conversation. John's manager begins to call him names such as "platehead" and refers to him as "stupid" and "not playing with a full deck" because of his impairment and operation. Other co-workers pick up on this and begin doing the same. John's epilepsy does not substantially limit him in a major life activity, but, as the comments indicate, John's manager regards him as substantially limited in the major life activity of thinking. Moreover, John's ability to do his job begins to suffer heavily from the verbal abuse, and he no longer is able to effectively interact with his co-workers and do his job well. John's manager subsequently fires him based on his perception that John's impairment makes him substantially impaired in his ability to think and work in the timber industry.[269]

This example demonstrates that discriminatory attitudes, stereotypic assumptions, and accumulated myths and fears may truly turn an impairment into an ADA-protected disability. John's epilepsy and operation did not necessarily substantially limit him in anything until his co-workers and manager harassed and fired him. Under the EEOC regulations three-part classification of those regarded as disabled, John would fall under "(2)," as an individual who "[h]as a physical or mental impairment that substantially limits

267. *See* 42 U.S.C. § 12101(a)(2)–(3).

268. *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 276–77 (1987).

269. This example has been adapted from the actual case of *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719–21 (8th Cir. 2003), and a hypothetical scenario from *Jacques*. *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 167–68 (E.D.N.Y. 2002). The major life activity of thinking has been judicially recognized. *Shaver*, 350 F.3d at 720; *see* Brown v. Lester E. Cox Med. Ctrs, 286 F.3d 1040, 1044–45 (8th Cir. 2002). For a review of the major life activity of working, *see supra* note 193.

major life activities only as a result of the attitudes of others toward such impairment."[270]

John will likely sue his employer Salem, and win, for firing him based on a perceived disability. John, in this scenario, requests and receives reinstatement as a remedy for this discrimination.[271] After losing the lawsuit, and upon John's return to the job, Salem no longer officially regards John as disabled. It is likely, though, that John will face "residual" (i.e. continuing) discrimination at the worksite based on his employer's original misperceptions and its action against him.[272] The *Jacques* opinion noted that it will not always be sufficient for employees to "merely disabuse their employers of their misperceptions."[273] John's situation is a clear example of this practical outlook. It is unlikely that his lawsuit will be sufficient for John to disabuse his co-workers of their misperception of him as "stupid" or "not playing with a full deck." To the contrary, it may make them more hostile towards him because he sued Salem based on behavior in which they took part.

The ADA provides a remedy for John's dilemma in such a situation. The ADA explicitly provides for reasonable accommodations such as "job restructuring," "modified work schedules," "reassignment," "appropriate adjustment or modifications of . . . training materials or policies," "and other similar accommodations."[274] A model reasonable accommodation request for John would probably first include asking his employers, upon his return to work, to implement sensitivity training for his harassing co-workers as to the true nature of his impairments.[275] John could further request that, until this training was complete, his job at the mill be restructured, his schedule modified, or that he be transferred so that he could avoid the harassers during

270. *See supra* notes 74–81 and accompanying text.

271. The reality is that many employees would not want to return to such an employer, but some may want their jobs back for a variety of reasons. Reinstatement is one form of equitable relief available under the ADA. 42 U.S.C. § 2000(e)-5(g)(1) (2000). The remedies available under the ADA are the same as those available for a violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a). See *infra* notes 316–17 and accompanying text for a discussion of why certain remedies, like restatement, should only apply to plaintiffs facing hostile environments or residual discrimination.

272. The actual facts of *Shaver* indicate a very low possibility that John would return to Salem, but it could happen in another situation where a plaintiff seeks to retain his job after a successful "regarded as" claim.

273. *Jacques*, 200 F. Supp. 2d at 168 (internal quotation omitted).

274. 42 U.S.C. § 12111(9)(b); *Jacques*, 200 F. Supp. 2d at 168; *see supra* note 130 and accompanying text.

275. *See* Moberly, *supra* note 101, at 637–38; Kent v. Derwinski, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (discussing sensitivity training as a possible accommodation for co-workers' discriminatory attitudes directed toward a perceived disability); *see also Unfair Advantage*, *supra* note 101, at 999.

this time. All three of these requests could easily be classified under the ADA's explicit examples of reasonable accommodations.[276]

When a court is considering factual variations of this scenario, as long as there is some connection between an employer's actionable misperception and co-workers' residual discriminatory attitudes, reasonable accommodations which address this residual discrimination should be recognized under the ADA.[277] To determine if such accommodations would be appropriate for an employee regarded as disabled, a court could employ the EEOC's three categories of perceived disabilities.[278] The more an employee appears to fall under category "(2)" or "(3)," the more likely accommodations that attack residual discrimination will be proper.[279] The more an employee seems to fall under "(1)," an individualized exaggeration of impairment, the less likely he will face residual prejudice that could be remedied by accommodations. John, from the hypothetical above, would fall under "(2)," and would likely be served by accommodation to address post-lawsuit discrimination.

276. Commentator Michelle A. Travis agrees with this position, recognizing that the ADA's accommodation requirement is broad enough to provide for these "non-traditional" accommodations in this context. *See Unfair Advantage*, *supra* note 101, at 999–1002.

277. In this way, employers are still accommodating based on their misperception, as required by the ADA. 42 U.S.C. § 12112(b)(5)(A).

278. *See supra* notes 74–81 and accompanying text for the EEOC's categories.

279. Commentator Michael D. Moberly has argued that only employees with physical or mental impairments are entitled to reasonable accommodations under the ADA, based on the statute defining "discrimination" as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A); Moberly, *supra* note 101, at 635–36; *see supra* note 122 and accompanying text. Thus, a regarded as disabled employee would only be entitled to accommodations for residual discrimination if she actually has an impairment recognized under the ADA. This argument is not entirely persuasive. If Congress had wanted to limit accommodations in this way, it could have done so unambiguously by using the statutory term "impairments" instead of "limitations," the term that it actually used. Arguably, the term "limitations" is broad enough to encompass situations where a regarded as disabled employee has a physical or mental condition that does not rise to the level of an impairment. For example, such a condition would be a "limitation" if it provokes a prejudicial reaction from people that adversely affects the employee's ability to work. This interpretation may be a bit of a stretch, but it is not clearly contradictory of the statutory language and furthers Congress's express intent of fighting the myths, fears, and stereotypes associated with disability. While it would stretch the language of § 12112(b)(5)(A) to include an employee who has no physical or mental condition whatsoever, the types of discrimination prohibited under § 12112(b) are not necessarily the *only* types. At least one court, in recognizing ADA hostile work environment claims, has held that § 12112(b)'s list is illustrative, not exhaustive, because it states that "the term 'discriminate' includes" the listed types. Rohan v. Networks Presentation LLC, 192 F. Supp. 2d 434, 436 (D. Md. 2002). Under this interpretation, a court could require that employers give accommodations to fight residual discrimination faced by formerly regarded as disabled employees without "physical or mental limitations." *See* 42 U.S.C. § 12112(b)(5)(A).

Granting these types of accommodations in certain situations before litigation, however, may be the best strategy for employers in the face of evolving ADA liability. In the actual case of *Shaver v. Independent Stave Co.*,[280] John Shaver ("John") sued his employer Salem Wood Products Company ("Salem") under the ADA, claiming that it subjected him to a hostile work environment through his co-workers' harassment.[281] While a hostile work environment claim is not specifically provided for in the ADA, the Eighth, Fifth, and Fourth Circuits have explicitly recognized the claim's existence, and other courts have indicated that such a claim could be cognizable.[282] The claim's basis is found in the ADA's prohibition against discrimination in regard to an employee's "terms, conditions, and privileges of employment."[283] This same phrase is used in Title VII of the Civil Rights Act of 1964, and courts have recognized hostile work environment claims for co-worker harassment under this language in the CRA since 1971.[284] For an employee to have a viable hostile work environment claim under the ADA, the employee generally must establish that:

> (1) he has a disability under the ADA's definition,
>
> (2) he was subject to unwelcome harassment,
>
> (3) the harassment was based on his disability,
>
> (4) the harassment was severe enough to affect a term, condition, or privilege of his employment, and
>
> (5) his employer knew or should have known of the harassment and failed to take prompt remedial action.[285]

Thus, employees meeting the ADA's disability definition may sue employers who subject them to disability-based harassment.

In *Shaver*, the Eighth Circuit reversed a summary judgment against John Shaver, holding that a jury could determine that John's co-workers regarded him as disabled and that Salem subjected him to a hostile work environment based on his co-workers' harassing comments and behavior.[286] If Salem had recognized that this harassment was taking place, or if John had requested accommodation during it, Salem may have been able to avoid liability under such a claim. If Salem could establish that it had promptly provided

280. 350 F.3d 716 (8th Cir. 2003).

281. *Id.* at 719.

282. *Id.*; *see* Flowers v. S. Reg'l Physician Serv. Inc., 247 F.3d 229, 232–33 (5th Cir. 2001); *Rohan*, 192 F.Supp. 2d at 436.

283. *Shaver*, 350 F.3d at 720 (citing 42 U.S.C § 12112(a)).

284. *Id.* at 720 (citing 42 U.S.C. § 2000e-2(a)(1)).

285. *See id.*; *Flowers*, 247 F.3d at 235–36.

286. *Shaver*, 350 F.3d at 720–21.

accommodations such as sensitivity training along with a temporary modification of John's schedule, it is unlikely that John could prove the fifth element of a hostile work environment claim (that the employer failed to take prompt remedial action). Thus, providing these types of accommodations early will likely eliminate the threat of litigation and its corresponding burdens for employers.

While providing these accommodations is surely a good preventive strategy in a hostile work environment situation, a tougher question is whether employers would be *required* by the ADA to make such accommodations in this setting. The ADA compels an employer to accommodate disabled employees, including those who it regards as disabled.[287] However, a hostile work environment scenario may only involve co-workers who regard a plaintiff as disabled, as in the actual *Shaver* case, while the employer itself has an accurate perception that the employee is not disabled. The employer could argue that because it did not regard the plaintiff as disabled, it would not be required to accommodate. An employee, though, could make a colorable argument that when co-worker harassment based on a perceived disability goes unaddressed by an employer, the employer itself is subjecting its employee to discrimination, based on a perceived disability, and affecting the conditions of employment. Under this reasoning, an employee could potentially sue on a failure to accommodate theory in a perceived disability hostile work environment scenario. This type of claim, to date, does not appear to have been tested in court;[288] however, the specter of such a claim is at least another reason for employers to make affirmative good-faith efforts to eliminate workplace disability-based harassment by offering appropriate reasonable accommodations.

Reasonable accommodations for employees like John, who face residual discrimination after successful "regarded as" claims or who face hostile work environments, would not be bizarre. In fact, employers who provide such accommodations before litigation could safeguard themselves from hostile work environment liability. A court should hold liable employers who unreasonably deny accommodations that could combat prejudicial attitudes. Otherwise, the disabling myths and stereotypes held anathema by the ADA will be allowed to continue unabated.

C. Perceived Disabilities and the Direct Threat Defense

The ADA provides that an employer may legally have a qualification standard requiring that a disabled employee not pose a "direct threat to the

287. *See supra* note 123 and accompanying text.

288. As evidenced by a search on Westlaw of cases dealing with both ADA hostile work environment claims and reasonable accommodations.

health and safety of other individuals in the workplace."[289] The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[290] The ADA's legislative history indicates that this defense is a codification of the Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*, which ordered a district court to determine whether a plaintiff's contagious tuberculosis made her unqualified for the job under the Rehab Act.[291] The Court indicated that the "duration and severity of Arline's condition . . . [and] the probability that she would transmit the disease" were important factors in this determination.[292] The EEOC adopted and elaborated on this analysis in its ADA regulations, listing as critical factors in evaluating a direct threat: "(1) [t]he duration of the risk[,] (2) [t]he nature and severity of the potential harm[,] (3) [t]he likelihood that the potential harm will occur[,] and (4) [t]he imminence of the potential harm."[293]

The direct threat defense has repeatedly come up in the context of contagious disease.[294] In addition to the *Arline* case, the Supreme Court dealt with a disability claim by an employee with a contagious disease in *Bragdon v. Abbott*.[295] The HIV-infected plaintiff claimed she met the ADA's disability definition, as either being "actually" or "regarded as" disabled. Reasonable accommodation was an issue, but the Supreme Court deftly dodged it by ruling that the plaintiff's HIV was a disability because it substantially limited her in the major life activity of reproduction.[296] This type of ruling has ducked the reasonable accommodation issue along with other contagious diseases. For example, when faced with actual and perceived disability claims by a hepatitis "C" infected employee, a Massachusetts District Court found that hepatitis "C" is an "actual" disability because it substantially limits the major life activities of reproduction and sexual relations.[297]

Other contagious diseases may not so easily qualify as actual disabilities, however. For instance, it would be much more difficult to argue that

289. 42 U.S.C. § 12113(b); 1 PHELAN & ARTERTON, *supra* note 48, at 7–1.

290. 42 U.S.C. § 12111(3); 1 PHELAN & ARTERTON, *supra* note 48, at 7–2.

291. *Arline*, 480 U.S. at 288–89; 1 PHELAN & ARTERTON, *supra* note 48, at 7–2.

292. *Arline*, 480 U.S. at 288; *see* 1 PHELAN & ARTERTON, *supra* note 48, at 7–2.

293. 29 C.F.R § 1630.2(r) (2004); 1 PHELAN & ARTERTON, *supra* note 48, at 7–2.

294. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 622, 649–52 (1998) (evaluating direct threat of employee with HIV); Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1280–84 (11th Cir. 2001) (evaluating direct threat of employee with HIV); Powell v. City of Pittsfield, 143 F.Supp. 2d 94, 131–33 (D. Mass. 2001) (evaluating direct threat of employee with hepatitis "C").

295. 524 U.S. at 624.

296. *Id.* at 640–42.

297. Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 145–148 (D. Mass. 2002) (stating that, because of this ruling, it would be "superfluous to address plaintiff's alternative argument that he was at any rate 'regarded as' having such an impairment").

tuberculosis, or "TB,"[298] would substantially limit reproductive or sexual activity.[299] With such a disease, one that is contagious but does not substantially limit a major life activity, a plaintiff's only chance for ADA protection is a "regarded as" or "record of" claim. Imagine such a scenario: Jamie works as a receptionist at a real estate firm. Jamie discovers that she has TB. Jamie's symptoms are controlled by prescribed drugs, but the risk of contagion exists. Jamie tells a co-worker about her disease in confidence, but the co-worker tells their boss of Jamie's TB. The firm fires Jamie based on an incorrect perception that she is too sick to perform her job as receptionist.

Jamie sues, claiming that her employer violated the ADA by firing her based on a disability. Jamie claims that her TB is an "actual" disability or that her employer fired her because it regarded her as disabled. A federal district court rules that Jamie's TB is a physical impairment but, with its symptoms controlled by medication, it is one that does not substantially limit her in a major life activity.[300] However, the court rules that Jamie's firm did regard her TB as substantially limiting her in the major life activity of working.[301] The firm then presents a direct threat defense. It argues that, even assuming it believed that Jamie's TB substantially limited her in a class of jobs in office work, her contagious impairment still posed a direct threat to the workplace. As part of this defense, the firm must establish that this threat of contagion could not have been "eliminated by reasonable accommodation."[302]

Jamie argues that she could have been reasonably accommodated by her wearing a mouth mask (similar to ones worn by surgeons) to prevent the risk

298. "TB is a disease caused by bacteria called Mycobacterium tuberculosis." DIVISION OF TUBERCULOSIS ELIMINATION: QUESTIONS AND ANSWERS ABOUT TB, *at* http://www.cdc.gov/nchstp/tb/faqs/qa_introduction.htm#Intro2. "The bacteria can attack any part of your body, but they usually attack the lungs." *Id.* "TB is spread through the air from one person to another." *Id.* "The bacteria are put into the air when a person with TB disease of the lungs or throat coughs or sneezes." *Id.* "People nearby may breathe in these bacteria and [become] infected." *Id.* "People with TB are most likely to spread it to people they spend time with every day," including family members, friends, and co-workers. *Id.*

299. *See* Lester v. Trans World Airlines, Inc., No. 95 C 2349, 1997 WL 417814, at *6–7 (N.D. Ill. 1997). In this case, the court heard an ADA disability claim based on symptomatic TB. *Id.* The court determined that the plaintiff's case was temporary, thus failing to establish that it substantially limited any of her life activities. *Id.* It is possible that a plaintiff could successfully argue that even asymptomatic tuberculosis could be transmitted via sexual activity, as plaintiffs have in regard to HIV and Hepatitis C, thus establishing an actual disability and dodging the thorny issue of reasonable accommodation for perceived disability. This argument has not yet been made respecting TB and, in any case, may be less likely to succeed than a "regarded as" or "record of" claim with regard to this contagious disease.

300. See *Lester* for a similar ruling by a court presented with TB that was symptomatic. 1997 WL 417814 at *6–7. See *supra* notes 71–72 and accompanying text for an explanation as to the ADA's coverage regarding corrective measures like medication.

301. *See supra* note 193 for a run-down on the major life activity of working.

302. 42 U.S.C. § 12111(3) (2000).

of contagion. Alternatively, Jamie argues that the firm could have transferred her to a position as a clerk in their out-of-office file repository, in which she would not come in regular contact with co-workers or clients. In this hypothetical, Jamie requested both of these accommodations before litigation, but the firm ignored her requests. The court determines that these accommodations were reasonable under the facts.

If a district court in the Eighth Circuit was hearing this case today, it would be presented with a dilemma. Controlling precedent in the Eighth Circuit's *Weber v. Strippit, Inc.* decision would dictate that regarded as disabled plaintiffs like Jamie are not entitled to reasonable accommodation, despite the plain language of the ADA's disability definition.[303] However, the language of the ADA's direct threat defense explicitly necessitates a showing that a reasonable accommodation could not be given to Jamie. Thus, *Weber*'s ruling contradicts the ADA's plain language a *second* time.

This hypothetical scenario demonstrates the weakness of *Weber*'s analysis in a practical way, as well. Holding the firm liable for failing to consider Jamie's requests for reasonable accommodation is not bizarre. To the contrary, it is perfectly in line with the ADA's purpose. The firm refused to engage in the interactive process regarding a reasonable accommodation, which in fact existed, for an impairment it perceived as disabling. The firm should be held liable for a discriminatory action taken against an employee it thought was disabled. With regard to Jamie, if the firm had perceived her TB correctly, or had considered her requests, she likely would have retained her job. On this basis, Jamie is "entitled" to the compensation she would receive as a result of a court holding her employer liable for its actions.

The Third Circuit's *Williams v. Philadelphia Housing Authority Police Department* case presents a scenario similar to the preceding hypothetical, this time dealing with an impairment other than contagious disease. The Third Circuit pointed out, in a footnote, that PHA could have offered a defense that Williams' psychological disorder constituted a direct threat to others and that no reasonable accommodation existed.[304] The court also stated that this issue would have been left to a jury, in that PHA's refusal to allow Williams to work near armed personnel was contradicted by its own psychologist.[305]

Perhaps PHA did not make this defense because it wanted to keep the burden of proving that the radio room assignment was a reasonable accommodation on Williams,[306] or because using the defense would have

303. *See supra* notes 156, 169–70 and accompanying text.

304. 380 F.3d 751, 770 n.15 (3d Cir. 2004).

305. *Id.* at 771 n.15.

306. Although the direct threat defense is termed a "defense," which usually indicates that a defendant has the burden of proof, the issue of where the burden of proof actually lies with this ADA provision has created a circuit split. *See* McKenzie v. Benton, 388 F.3d 1342, 1353–54

clearly necessitated litigation of the accommodation issue.[307] Regardless, the easy application of the direct threat defense in this situation reinforces the ADA's intention of applying reasonable accommodation to the "regarded as" context.[308] If PHA had utilized a direct threat defense here, it would certainly have had to argue that no accommodation existed for Williams' disability, actual or perceived.[309]

The ADA requires that employers show that reasonable accommodations could not have been provided in order to argue a direct threat defense in a perceived disability context. This is most easily demonstrated with contagious disease, but is true in any direct threat scenario. A court must evaluate whether reasonable accommodation would have been appropriate in these claims and should not simply rule that accommodation is bizarre for all perceived disabilities.

D. Windfalls, Dignitary Interests, and Private Attorneys General

Probably the most difficult problem presented by the recognition of reasonable accommodation for the regarded as disabled is the "windfall theory" posed by the Eighth Circuit in *Weber v. Strippit, Inc.*[310] The theory essentially asserts that it would be bizarre for an employer, disabused of its

(10th Cir. 2004) (citing Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1291–94 (10th Cir. 2000)).

307. This artful dodge tactic may be a reason why this particular issue has not been dealt with directly in a case thus far.

308. The interplay between the provisions here, and the fact that the defense sprung from the *Arline* decision, demonstrates that direct threat is really just a formalized way for a defendant to establish that no reasonable accommodation exists for a plaintiff's disability. The ADA ensures that, if an employer takes an action against an employee based on a threat to workplace safety, it must do so based on a factual, reasonable medical judgment that no reasonable accommodation can alleviate the threat. *See* 29 C.F.R. § 1630.2(r) (2004); 1 PHELAN & ARTERTON, *supra* note 48 at 7-13.

309. One observes that PHA, despite its tactic, still was forced by the Third Circuit to litigate the accommodation issue with respect to its erroneous perception of Williams' impairment. *See supra* notes 206–31 and accompanying text. Also of note, the Tenth Circuit's decision in *McKenzie v. Dovala* approved a "regarded as" claim to go to a jury on a reasonable accommodation argument involving a direct threat scenario. 242 F.3d at 973–76. In the case, McKenzie sued her employer, the Natrona County Sheriff's Department, for failing to rehire her because it regarded her as psychologically disabled. *Id*. at 969. While the sheriff's department did not directly claim direct threat at the summary judgment stage, the court discussed the defense and held that a jury should decide whether another position existed where McKenzie could have been reasonably accommodated and did not pose a threat. *Id.* at 974–76. This factual scenario is remarkably similar to that in *Williams*—a mentally impaired peace officer claiming that another position could have accommodated a perceived disability. In both cases, the courts determined that a jury should decide the interrelated issues of accommodation and direct threat. Both cases thus further reinforce the argument that employers should be held liable for refusing to consider reasonable accommodation for regarded as disabled employees.

310. 186 F.3d 907, 917 (8th Cir. 1999).

incorrect perception, to have to reasonably accommodate an employee who is admittedly non-disabled. This would create a windfall for regarded as disabled employees in that they would be entitled to accommodations that an employee with the same impairment(s), but not perceived as disabled, would not get. In this way, a literal reading of the ADA's statutory text would, in a sense, discriminate between similarly impaired (or "situated" as *Weber* labels) employees. While one is accommodated, the other is not and may even be fired—with no recourse through the ADA. As the argument goes, such a discriminatory result could not have been contemplated by Congress in passing the ADA.[311]

While this windfall theory has some immediate appeal, it rests largely on a questionable assumption. The theory argues that accommodation should not be recognized because an employer, once realizing that an employee is not disabled, may lawfully fire such an employee that is not disabled, who it does not regard as disabled, or who does not have a record of disability. It is true that an employee must meet one of the three prongs of the ADA's disability definition to receive the statute's protection. However, the dire consequence of this argument—termination—relies on the assumption that the employer's desire to fire, or otherwise adversely act against, the employee is unrelated to its perception of the employee's impairment. While the Eighth Circuit in *Weber* considers the regarded as disabled employee and the non-disabled employee to be similarly situated, the Third Circuit in *Williams v. Philadelphia Housing Authority Police Department* recognizes that this is not necessarily so.[312] *Williams*'s argument, more practically, reflects the probability that many adverse employment actions actually hinge on the employer's perception that the employee cannot perform her job based on disability.

For example, if PHA had wanted to fire Williams despite an accurate perception that Williams *could* work in the radio room, it could have done so without incurring ADA liability. However, it is more likely that PHA, in seeking to retain a worker with substantial training and time on its police force (twenty-four years to be exact),[313] would have assigned Williams to the radio room had it not inaccurately perceived Williams' limitations to be greater than they actually were. Had PHA better investigated a possible accommodation in the radio room, it may have discovered that Williams' impairment did not limit him from radio room duty, and thus was not disabling. PHA would have likely then accepted Williams' request to work in the radio room. None of this happened because PHA failed to consider the requested accommodation.

Thus, the argument in both *Williams* and the New York District Court's *Jacques* opinion that those regarded as disabled are not "similarly situated"

311. *Id.*

312. *See supra* notes 227–28 and accompanying text.

313. *See* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 (3d. Cir. 2004).

with other impaired employees—rather, the perceived disability actually places them in a distinctly *dissimilar* position—is more convincing than *Weber*'s contrary reasoning.[314] Indeed, when an employer acts adversely towards a regarded as disabled employee (such as by refusing to consider accommodation and then terminating the employee), the perceived disability places the employee at a disadvantage to those impaired but not regarded as disabled. The Third Circuit demonstrated the soundness of this reasoning with a simple statement: "The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid."[315]

What is gained from this discussion is that reasonable accommodation should be recognized to the extent that it can place, or would have placed, the "regarded as" disabled employee in an equal position to other employees—thereby eliminating discrimination.[316] "Windfalls" would not occur in these situations. Moreover, holding employers liable for refusing to consider accommodations in good faith will likely result in qualified employees like Williams being able to keep their jobs in the first place, instead of having to resort to costly litigation.

It is where employers would be *forced* to give operational accommodations to employees they no longer perceive as disabled that reasonable accommodation should *not* be recognized. This is where the windfall theory holds water. One result implicated by the windfall theory that would be "bizarre" would be forcing an employer to rehire a formerly regarded as disabled employee and then to give this employee operational, or "traditional," accommodations.[317] This approach would handcuff employers and would place formerly regarded as disabled employees in better positions than other employees.[318] Once an employer no longer technically regards an employee as

314. *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002).

315. *See Williams*, 380 F.3d at 775–76.

316. For example, providing sensitivity training for harassing co-workers would simply place the regarded as disabled employee back in the position she would have been if not for her co-workers' misperception and harassment. *See Unfair Advantage*, *supra* note 101, at 999 (recognizing that accommodations for residual discrimination would allow "perceived disability plaintiffs to achieve the position in which they would have been absent the mistaken beliefs").

317. *See supra* note 124 and accompanying text for a discussion of these types of accommodations.

318. The ADA only restricts employers from taking adverse employment actions against those employees qualifying as "disabled." This is the statute's antidiscrimination focus. Any employee who does not meet one of the three prongs can be fired based on their non-disabling impairments, and it is not considered ADA discrimination. If a court would force an employer to rehire and then provide operational accommodations to an employee who no longer meets the disability discrimination, the court has exceeded the ADA's reach. This would be a bizarre result, one that *Weber* warned against and *Williams* acknowledged might exist. Giving remedies such as reinstatement, hiring, promotion, and front pay to perceived disability plaintiffs who need traditional forms of accommodations, as commentator Michelle Travis has noted, would move

disabled, the only accommodations that should affirmatively be provided are ones that will help dispel residual discrimination, as discussed above. Providing operational accommodations that directly address physical or mental impairments which are not actually disabling should not be required by the courts.

These accommodations, including the physical restructuring of the workplace (by providing a more comfortable seat for someone with a degenerative back condition, for example), the restructuring of job tasks (by assigning some lesser tasks to a co-worker of someone physically incapable of doing them), and the restructuring of a work schedule (by giving longer breaks for a person suffering from exhaustion) are not required to remedy the myths, stereotypes, and prejudices that the "regarded as" provision was meant to attack. In *Weber*, for example, even if the defendant Strippit was found liable for not accommodating by failing to engage in the interactive process, it should not have then been forced to rehire Weber and delay his relocation.[319] Because such remedies do not address employer misperceptions, they would not be fighting disability discrimination. Faced with an employee no longer regarded as disabled, Strippit should be able to exercise its prerogative as an employer and fire or refuse to hire Weber based on his non-disabling impairment, or any other legal reason.

The final thrust of the windfall argument, though, goes too far. The windfall theory further asserts reasonable accommodations should be denied here because even compensatory damages will place regarded as disabled employees in an unfairly advantageous position.[320] It has already been argued that these employees, such as Williams, are not inherently similarly situated and that they do suffer harm that can be directly attributed to a failure to accommodate. But, irrespective of any personal claim-of-right that a regarded as disabled employee has to compensation, there are two further reasons to permit these supposed "financial windfalls."

past the ADA's goal of equal opportunity and give advantages to employees simply because they were once regarded as disabled. *Unfair Advantage*, *supra* note 101, at 1001–03. Travis has aptly analogized such a situation to the Supreme Court's "after-acquired evidence" rule. *Id.* at 1003–04 (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 355–56 (1995)). This rule applies when an employer takes an adverse employment action based on an employee's protected status, but the employer later discovers a proper reason for the action. *Id.* at 1004. In order to condemn the initial discriminatory mindset, the rule allows plaintiffs to state a discrimination claim, but forecloses reinstatement as a remedy. *Id.* This rule upholds the deterrent function of discrimination statutes while at the same time allowing employers to exercise "other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *Id.* (quoting *McKennon*, 513 U.S. at 361).

319. *See supra* note 148 and accompanying text.

320. *See* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002).

The 2003 case of *Shaver v. Independent Stave Co.*, an Eighth Circuit case discussed earlier in Section B of this Part,[321] recognized that "the mere fact of discrimination offends the dignitary interest" that the ADA was designed to protect.[322] The plaintiff John Shaver argued that his employer Salem retaliated against him for making his hostile work environment claim.[323] In seeking new employment after being fired by Salem, John named his former supervisor as a reference.[324] The supervisor told prospective employers that he could not recommend John because John had "a get rich quick scheme involving suing companies."[325] The District Court held that John tried to manufacture a retaliation claim by naming the supervisor as a reference and dismissed the claim on this basis.[326] The Eighth Circuit overruled the District Court, analogizing John's claim to that of "tester" cases under the CRA.[327] In these "tester" cases, the Supreme Court and the Seventh Circuit upheld claims where minority applicants applied for jobs or housing, that they had no intention of accepting, for the sole purpose of determining whether the employer or landlord was unlawfully discriminating.[328]

The courts advanced two reasons for allowing tester cases.[329] One was that discrimination offends a dignitary interest that the CRA was designed to protect, "regardless of whether the discrimination worked any direct economic harm to the plaintiffs."[330] The *Shaver* court, citing the ADA's express antidiscrimination purpose[331] as support, held that the ADA has a dignitary interest that must be protected irrespective of a plaintiff's level of economic harm.[332] The second rationale behind the tester cases is that such individuals serve the role of "private attorneys general" in attacking activity illegal under the CRA.[333] The Eighth Circuit saw a similar function served by John in his ADA retaliation claim.[334] Congress gave the possibility of compensatory damages to John and others like him in order to "enlist[] private self-interest in the enforcement of public policy."[335]

321. *See supra* notes 269, 280–81, 286 and accompanying text.
322. 350 F.3d 716, 724 (8th Cir. 2003).
323. *Id*. at 723.
324. *Id*.
325. *Id*.
326. *Id*.
327. *Shaver*, 350 F.3d at 723–24.
328. *Id*. at 724 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000)).
329. *Id*.
330. *Id*. (citing *Kyles*, 222 F.3d at 297).
331. *See supra* notes 44–47 and accompanying text.
332. *Shaver*, 350 F.3d at 724.
333. *Id*. at 724–25.
334. *Id*.
335. *Id*.

Both of these rationales apply here. By allowing regarded as disabled employees to seek and receive compensatory damages where employers fail to accommodate (either by refusing to interact or by refusing residual discrimination accommodation), Congress intended to enlist private attorneys general to protect the nondiscriminatory dignitary interest inherent in the ADA.[336] In this way, disability-based discrimination is punished and the deterrent value of the ADA is increased by recognizing reasonable accommodation for the regarded as disabled. So, this recognition is not a "windfall" that should be discouraged. It is in line with a recognized jurisprudence of antidiscrimination, harnessed by Congress in writing the ADA.

The windfall theory is not completely flawed—operational accommodations (and associated remedies) are windfalls that should not be given in this context. The problem with *Weber*'s understanding of the windfall theory is that it takes the proposition too far, swallowing up the ADA's intended function of attacking all disability-based discrimination and neutering the "regarded as" provision's specific function of fighting myths, stereotypes, and prejudices. Therefore, while courts should *not* force employers to rehire regarded as disabled employees in need of operational accommodations, courts *should* (1) attack disability discrimination, preserve the integrity of the ADA, and encourage non-litigious dispute resolution by holding employers liable for failing to accommodate perceived disabilities and (2) require reasonable accommodations to combat residual discrimination.

V. CONCLUSION

Recognizing reasonable accommodation for perceived disabilities under certain conditions is consistent with a practical view of the employer–employee relationship and is essential to further the ADA's goal of nondiscrimination. While the judicial debate thus far has explored the central arguments on both sides of this issue, it really has only touched the tip of . . . well, maybe not an iceberg. However, issues relating to this dispute clearly have implications for the continuing importance and viability of the ADA. Properly adjudicating reasonable accommodation claims by those regarded as disabled will help ensure that the ADA continues its goals of prohibiting discrimination and providing equal opportunity to the disabled without creating inequalities or overburdening employers. On this immense statute's fifteenth anniversary, an in-depth analysis of a seemingly small issue such as this one

336. See Vande Walle, *supra* note 53, at 931–34, for a common-sense reason for holding employers liable under the "regarded as" provision. (asking: "Why should we shield the employer from liability just because of her lucky mistake when she is engaging in exactly the kind of behavior prohibited by the statute?").

may remind the judicial system, and perhaps all Americans, what the ADA was, is, and should be to our society.

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