

# Disabling the Split: Should Reasonable Accommodations Be Provided to “Regarded as” Disabled Individuals Under the Americans with Disabilities Act (ADA)?

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## I. INTRODUCTION

People with disabilities constitute the largest minority in the United States, with over fifty-four million representatives and growing.<sup>1</sup> Of the twenty-nine million working age adults with disabilities, about two-thirds are unemployed, and about eighty percent of those two-thirds would like to work but have not been given the chance.<sup>2</sup> Congress noted this unemployment after statistics showed “that disabled people are the poorest, least educated and largest minority in America.”<sup>3</sup> As a result, Congress passed the Americans with Disabilities Act (ADA)<sup>4</sup> in 1990, which became effective in 1992.<sup>5</sup> But disabled persons’ desire to work “still may

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\* J.D. (2006), Washington University School of Law. I would like to thank my parents for everything they have done for me. Without my parents, I would not be where I am today. I love you Mom and Dad.

1. WILLIAM J. LAWSON, THE INT’L CTR. FOR DISABILITY RES. ON THE INTERNET, MANAGING DIVERSE EMPLOYEES WITH DISABILITIES ¶3 (2002), <http://www.icdri.org/Employment/managingdivers.htm> (citing U.S. DEP’T OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, NEW FREEDOM INITIATIVE 2002: INDEPENDENCE THROUGH EMPLOYMENT (2002), available at [http://www.dol.gov/odep/pubs/nfi02/finalnfi\\_71802.pdf](http://www.dol.gov/odep/pubs/nfi02/finalnfi_71802.pdf)).

2. *Id.*; see also Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. & EMP. L.J. 345, 362 (1996) (arguing that “regarded as” disabled individuals are denied employment opportunities due to prejudicial attitudes or ignorance).

3. S. REP. NO. 101-116, at 9 (1989) (quoting President Bush).

4. 42 U.S.C. §§ 12101–213 (1994).

5. Allen Dudley, Comment, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for “Regarded as” Disabled Individuals*, 7 GEO. MASON L. REV. 389, 389 (1999).

have to overcome . . . the cultural barrier or innate characteristics of a disabling mental, physical, or emotional barrier.”<sup>6</sup> Such barriers, caused by employers’ and co-workers’ negative attitudes about disabilities, have led to many actions under the ADA, including “regarded as” disabilities cases.

The number of “regarded as”<sup>7</sup> disability cases has risen in recent years.<sup>8</sup> As the number has risen, courts have had the opportunity to interpret the ADA.<sup>9</sup> The Supreme Court’s narrow interpretation of the ADA’s actual disability prong in several recent cases has led many individuals plagued by some sort of impairment to look to the “regarded as” disability prong for protection from employer and co-worker discrimination. The protection many “regarded as” disabled employees seek is accommodation.

Failure to provide reasonable accommodations is the second most frequent type of discrimination alleged under the ADA, trailing only discriminatory discharge claims.<sup>10</sup> Failure to accommodate claims make up twenty-five to twenty-eight percent of all disability claims.<sup>11</sup> Although the exact percentage of these failure to accommodate claims that are “regarded as” disability claims is hard to determine,<sup>12</sup> even greater uncertainty and debate lies within the federal courts concerning the question of whether to reasonably accommodate these “regarded as” disability claimants. There is currently a split among the federal circuit courts regarding whether to provide reasonable accommodations to “regarded as” disabled employees.<sup>13</sup>

This Note considers the ADA’s “regarded as” disability prong, and whether an employee who is “regarded as” disabled by his or her employer is entitled to the ADA’s reasonable accommodation

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6. LAWSON, *supra* note 1, ¶ 3.

7. The terms “regarded as” and “perceived” will be used interchangeably throughout this Note.

8. 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, 987 (2000).

9. Moberly, *Perception or Reality?*, *supra* note 2, at 348 (stating that courts have reached different results when interpreting disability statutes).

10. Travis, *supra* note 8, at 988.

11. *Id.*

12. *Id.*

13. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773 (3d Cir. 2004) (stating that the issue “has occasioned a circuit split”).

remedy. Part II explores the history of the “regarded as” disability prong and its association with reasonable accommodations. Part III discusses different courts’ views on whether to provide accommodations to “regarded as” disabled individuals. Part IV proposes that the “regarded as” disability prong be split into two categories, the first concerning a “regarded as” employee with no impairment and the second concerning a “regarded as” employee with an actual impairment that is not substantially limiting. This Note concludes that a “regarded as” disabled employee who has no actual impairment of any kind should not be entitled to reasonable accommodations. However, a “regarded as” employee who has an actual impairment, although not substantially limiting, should be entitled to the social accommodation of educating the workforce and others about the impairment, but should not be allowed any other accommodation.

## II. HISTORY OF THE “REGARDED AS” DISABILITY PRONG AND ITS ASSOCIATION WITH REASONABLE ACCOMODATIONS

### A. *Rehabilitation Act’s Formation of the “Regarded as” Prong*

The “regarded as” disability definition originated in the Rehabilitation Act of 1973,<sup>14</sup> which provided that a “qualified individual with handicaps” will not be prevented from obtaining employment with a federal agency or through any federal monetary assistance program.<sup>15</sup> The “regarded as” disability term was first included when the definition of “handicapped individual” was broadened in 1974 because Congress concluded that the former definition was “too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the

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14. 29 U.S.C. §§ 701–96 (1988).

15. *Id.* § 794(a); see Moberly, *Perception or Reality?*, *supra* note 2, at 347 n.18 (stating that the Rehabilitation Act of 1973 was the “first broad federal statute aimed at eradicating discrimination against individuals with disabilities” (quoting *Helen L. v. DiDario*, 46 F.3d 325, 330 (3d Cir. 1995))); see also Michael D. Moberly, *Letting Katz out of the Bag: The Employer’s Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 607 (1998) (stating that the Rehabilitation Act prohibits employment discrimination by federal financial assistance recipients and federal agencies).

handicapped.”<sup>16</sup> “Handicapped individual” was redefined as any individual 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 an impairment.”<sup>17</sup>

### *B. The Supreme Court’s Interpretation of the “Regarded as” Prong*

The Supreme Court first interpreted the Rehabilitation Act’s “regarded as” prong in *School Board of Nassau County v. Arline*.<sup>18</sup> The plaintiff, a school teacher, had tuberculosis.<sup>19</sup> She was later terminated solely because she had three relapses within a period of

16. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 278 n.3 (1987) (citing S. REP. NO. 93-1297, at 16, 37–38, 50 (1974)). The Rehabilitation Act’s original definition of handicapped individuals did not include individuals “regarded as having such an impairment.” See S. REP. NO. 93-1297, at 37–39 (1974), as reprinted in 1974 U.S.C.C.A.N. 6373, 6388–90. In 1974, Congress amended the Rehabilitation Act to demonstrate its

intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as [T]itle VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.

*Id.* at 39, as reprinted in 1974 U.S.C.C.A.N. at 6389. Following this amendment, the statute protected “those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within [the first prong] in the new definition.” *Id.* at 39, as reprinted in 1974 U.S.C.C.A.N. at 6389–90.

17. 29 U.S.C. § 706(8)(B) (1988). Thus, the Rehabilitation Act was amended for the purpose of protecting those who are regarded as having a disability. See Moberly, *Perception or Reality?*, *supra* note 2, at 367. The Senate Report supporting the amendment provided:

[T]he new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as [T]itle VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. This subsection includes within the protection of [the Rehabilitation Act] . . . those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities . . . . Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

*Id.* (quoting S. REP. NO. 93-1297 (1974), as reprinted in 1974 U.S.C.C.A.N. 6373, 6389–90).

18. 480 U.S. 273.

19. *Id.* at 276.

two years, as stated by the School Board.<sup>20</sup> The teacher filed a lawsuit claiming that her termination was a violation of the Rehabilitation Act.<sup>21</sup>

The Supreme Court held that the plaintiff was handicapped both because of her record of impairment and because the School Board regarded her as having an impairment.<sup>22</sup> The Court noted that when Congress amended the definition of “handicapped individual” to include those persons who are “regarded as impaired,” it “acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>23</sup>

The Court then considered the question of whether the plaintiff was qualified for her elementary school teacher position, which the Court stated should be determined by an “individualized” investigation into the “findings of fact.”<sup>24</sup> This investigation was important to prevent “prejudice, stereotypes, or unfounded fear” of “handicapped individuals,” but appropriate consideration was given to “significant health and safety risks” also.<sup>25</sup> The Court noted that the next procedure was to determine whether the School Board “could reasonably accommodate the employee under the established standards for that inquiry.”<sup>26</sup> However, the teacher in this case did not seek any accommodation from the School Board because her firing took place due to her relapse.<sup>27</sup> Thus, the only question was to determine whether the School Board’s termination of the plaintiff due to fear of her tuberculosis was a violation of the Rehabilitation Act.

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20. *Id.*

21. *Id.*

22. *Id.* at 284–85.

23. *Id.* at 284 (“Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.”).

24. *Id.* at 287.

25. *Id.*

26. *Id.* at 288.

27. 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, 545 (2003).

The Court held that contagious tuberculosis qualified for protection under the Act.<sup>28</sup>

### C. *The Americans with Disabilities Act*

The Rehabilitation Act was the “model” upon which the Americans with Disabilities Act was created.<sup>29</sup> Congress enacted the Americans with Disabilities Act of 1990 because it found that disabled persons “are a discrete and insular minority” that has been subjected to “restrictions and limitations” resulting from false stereotypes and beliefs about the capability of the disabled to perform in society.<sup>30</sup> Congress wanted to provide “clear and comprehensive national” guidelines to eliminate discrimination against disabled persons.<sup>31</sup>

The ADA forbids a “covered entity”<sup>32</sup> from “discriminat[ing] against a qualified individual” due to that person’s disability in circumstances including “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>33</sup> A “qualified individual” is a person with a disability who can perform the necessary tasks of his or her employment position “with or without reasonable accommodation.”<sup>34</sup> Discrimination occurs when an employer does not provide reasonable

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28. 480 U.S. at 289.

29. Amalia Magdalena Villalba, Comment, *Defining “Disability” Under the Americans with Disabilities Act*, 22 U. BALT. L. REV. 357, 360–61 (1993); see Moberly, *Perception or Reality?*, *supra* note 2, at 347 n.18 (stating that the ADA was created “in part, to address perceived inadequacies in the Rehabilitation Act” (quoting *Fink v. Kitzman*, 881 F. Supp. 1347, 1368 (N.D. Iowa 1995))).

30. 42 U.S.C. § 12101(a)(7) (1994).

31. *Id.* § 12101(b)(1).

32. A “covered entity” means an individual with “15 or more employees” that “engage[s] in an industry affecting commerce.” *Id.* § 12111(2), (5)(A). An employer with less than fifteen employees who discriminates against a “regarded as” individual may still be liable under applicable state statutes if such statutes prohibit regarded as disability discrimination. Moberly, *Perception or Reality?*, *supra* note 2, at 373. However, some state disability discrimination statutes provide an exemption for employers with less than fifteen employees. *Id.* at 372–73.

33. 42 U.S.C. § 12112(a).

34. *Id.* § 12111(8).

accommodations<sup>35</sup> to support “known physical or mental limitations of an otherwise qualified individual with a disability.”<sup>36</sup>

The ADA bans seven forms of discrimination.<sup>37</sup> The ADA provides protection against an additional form of discrimination to the forms covered by Title VII of the Civil Rights Act of 1964 by prohibiting the failure to provide reasonable accommodations.<sup>38</sup> “Reasonable accommodation may include but is not limited to . . . [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; . . . [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; [and] acquisition or modifications of equipment or devices. . . .”<sup>39</sup>

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35. Reasonable accommodations include all alterations or adjustments made to the workplace that would allow a disabled employee the opportunity to perform the job, including “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.” *Id.* § 12111(9)(B); *see also* 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (2004).

36. 42 U.S.C. § 12112(b)(5)(A); *see* Travis, *supra* note 8, at 914 (stating that the failure to provide reasonable accommodations to disabled employees is “a form of disability discrimination”); *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996) (describing the lack of reasonable accommodation as “a separate species of discrimination”).

37. 42 U.S.C. § 12112(b)(1)-(7).

38. *See* Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861, 862, 865 (2004) (stating that Congress included the right to reasonable accommodations in the ADA in addition to the types of discrimination claims provided for in pre-existing anti-discrimination laws, and explaining that reasonable accommodations are “part and parcel of the antidiscrimination project”); *see also* Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systemic Racial Discrimination Cases*, 107 DICK. L. REV. 503, 505 (2003) (arguing that although reasonable accommodation does not apply to discrimination cases “based on race, sex, or national origin,” affirmative action might require giving minorities an equal opportunity in the workforce); Karlan & Rutherglen, *supra* note 36, at 5–6; John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 741 (2000) (comparing and contrasting the ADA and Title VII); Travis, *supra* note 8, at 914–15. Title VII, except for providing accommodations of religious practices, prohibits specific actions, rather than compelling them. Murray & Murray, *supra*, at 741. The ADA “imposes a much heavier burden on employers than the religious accommodation provision of Title VII.” *Id.* at 741–42.

39. 29 C.F.R. § 1630.2(o)(2)(i)–(ii) (2004); *see also* Cannizzaro v. Neiman Marcus, Inc., 979 F. Supp. 465, 475 (N.D. Tex. 1997) (“The ADA does not require an employer to promote a disabled employee, nor must an employer reassign the employee to an occupied position, or to [sic] create a new position to accommodate the disabled worker.”). An employer is also “not

An individual must meet three requirements to reap the benefits of the ADA.<sup>40</sup> The first requirement is that the plaintiff must fall within the ADA's disability definition.<sup>41</sup> The second requirement is that the plaintiff must have the ability to conduct the necessary tasks of his or her employment position.<sup>42</sup> The third requirement is that the plaintiff must have been terminated, either completely or partially, because of his or her disability.<sup>43</sup> The element of concern here is the first element and its definition of "disability."<sup>44</sup> Three alternate definitions are given under 42 U.S.C. § 12102(2): "(A) a physical or mental impairment<sup>45</sup> that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."<sup>46</sup>

Typically, the employee will try to make a case under the first definition (substantially limiting disability), and, if that fails, under the second (record of such an impairment) or third definition (where an employer regards an employee as being disabled even though the employee is not).<sup>47</sup> The "regarded as" prong has been considered by scholars to remove attention from a person's actual limitations and to

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required to 'bump' other employees to create a vacancy so as to reassign" the disabled employee, hire a disabled employee over more qualified applicants, or "alter its job placement procedures." *Id.* "In short, the ADA does not require affirmative action in favor of individuals with disabilities . . . [Instead] it prohibits discrimination against qualified individuals with disabilities, no more and no less." *Id.* (quoting *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)).

40. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1229 (9th Cir. 2003); *Katz v. City Metal Co.*, 87 F.3d 26, 30 (1st Cir. 1996).

41. *Kaplan*, 323 F.3d at 1229; *Katz*, 87 F.3d at 30.

42. *Kaplan*, 323 F.3d at 1229; *Katz*, 87 F.3d at 30.

43. *Kaplan*, 323 F.3d at 1229; *Katz*, 87 F.3d at 30.

44. See Villalba, *supra* note 29, at 357 (stating that the ADA's definition of "disability" is very similar to the Rehabilitation Act's definition of "individual with handicaps"); see also *S. REP. NO. 101-116*, at 21 (1989) (stating that this change of terminology "represents an effort . . . to make use of up-to-date, currently accepted terminology").

45. See 29 C.F.R. § 1630.2(h) (2004) (defining an impairment as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: [listing 11 body systems]; or . . . [a]ny mental or psychological disorder").

46. 42 U.S.C. § 12102(2)(A)-(C) (1994).

47. See *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 156-60 (E.D.N.Y. 2002); see also 29 C.F.R. § 1630.2(1)(1)-(3) (2004); Travis, *supra* note 8, at 987 (stating that as courts limit the reach of the actual disability prong, plaintiffs' lawyers will turn more often to the regarded as disability prong as a "fall-back").

instead place the emphasis and “examination [on] the employer’s policies.”<sup>48</sup>

*D. The Decision in Sutton and its Effect on Litigation Under the “Regarded as” Prong*

Plaintiffs may now seek “regarded as” or “record of” claims of reasonable accommodations that might have been brought under the first disability prong prior to the decision in *Sutton v. United Air Lines, Inc.*<sup>49</sup> *Sutton* limited the scope of the actual disability prong, thus requiring plaintiffs to bring many cases under one of the other two prongs. In *Sutton*, the employer denied twin sisters employment as commercial airline pilots because they suffered from myopia that diminished their eyesight.<sup>50</sup> The twins had 20/20 vision with their glasses, but United stood firm on its minimum vision requirements, which prevented the twins from becoming pilots.<sup>51</sup> The twins then filed a lawsuit claiming that United discriminated against them either because of their actual disability or because United mistakenly regarded their myopia as a disability.<sup>52</sup>

The Supreme Court held that when evaluating an ADA claim, courts must consider mitigating measures, such as glasses that correct vision, in determining whether the plaintiff has an actual disability.<sup>53</sup> Because the twins had 20/20 vision with glasses, the Supreme Court held that they did not fall within the ADA’s actual disability definition.<sup>54</sup> The Court then considered whether United regarded the twins as disabled.<sup>55</sup> The Court stated that there are two instances in which an individual can be considered to be “regarded as” disabled: first, when the person is “regarded as” being disabled but no impairment exists, and second, when the person is not substantially

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48. Arlene B. Mayerson, *Restoring Regard for the “Regarded as” Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 588–89 (1997).

49. 527 U.S. 471 (1999); see also Randal I. Goldstein, Note, *Mental Illness in the Workplace After Sutton v. United Airlines*, 86 CORNELL L. REV. 927, 960 (2001).

50. *Sutton*, 527 U.S. at 475–76.

51. *Id.*

52. *Id.* at 476.

53. *Id.* at 482.

54. *Id.* at 488–89.

55. *Id.* at 490.

limited by his or her impairment but the employer believes him or her to be.<sup>56</sup> The Court then determined that the twins' "regarded as" claim also failed because even if United actually perceived them as unable to be commercial pilots due to their eyesight, this impairment did not substantially limit them from performing a broad range of alternative employment positions.<sup>57</sup> In order for the twins to be substantially limited in the major activity of working, they must have been prevented from performing more than one job.<sup>58</sup> However, several different jobs were available, so the twins still could perform a broad range of employment.<sup>59</sup> The twins did not seek accommodation so the Court did not have to consider the accommodation issue.<sup>60</sup>

#### E. Sutton versus the EEOC's "Regarded as" Disabled Categories

In *Sutton*, the Supreme Court abandoned the Equal Employment Opportunity Commission's (EEOC) third way that an employee could be "regarded as" disabled<sup>61</sup>—that the employee may be substantially limited solely due to the attitudes of others.<sup>62</sup> The EEOC developed this construction from the legislative history of the ADA and the Supreme Court's statement in *Arline*.<sup>63</sup>

In contrast to *Sutton*, the EEOC has stated the three avenues for an individual to be "regarded as" disabled as: (1) the individual experiences an impairment that is not substantially limiting, but the employer treats it as such;<sup>64</sup> (2) the impairment is substantially limiting only because of others' attitudes toward the individual's

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56. *Id.* at 489.

57. *Id.* at 491.

58. *Id.* at 493.

59. *Id.*

60. *See* 527 U.S. 471.

61. *See* Mayerson, *supra* note 48, at 591.

62. Chivukula, *supra* note 27, at 552.

63. *See* Mayerson, *supra* note 48, at 592.

64. 29 C.F.R. § 1630.2(l)(1) (2004). The following is an illustration: "If an employer reassigns the individual [with high blood pressure] to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled." *Id.* pt. 1630 app. § 1630.2(l)(3).

impairment;<sup>65</sup> and (3) an impairment does not exist but the employer regards the employee as having a substantially limiting impairment.<sup>66</sup> The EEOC provided several examples in which an employer “regarded” an employee as being disabled.<sup>67</sup> However, the EEOC provided no examples considering the issue of reasonable accommodation.<sup>68</sup> The primary emphasis of the EEOC’s examples is on the unilateral acts of the employer based on its own biases, the only necessary accommodation for which would be to reinstate the employee and to educate the employer.<sup>69</sup> Although the EEOC has not

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65. *Id.* § 1630.2(l)(2). This second option was omitted from the “regarded as” prong by the Supreme Court in both *Sutton* and *Murphy v. United Parcel Service*. See *Sutton*, 527 U.S. at 489; *Murphy v. United Parcel Service*, 527 U.S. 516, 521–22 (1999); see also *Leading Cases*, 113 HARV. L. REV. 200, 337–38 (1999). An example of the second option is an employer who refuses to hire an applicant with a “prominent facial scar or disfigurement,” or some other appearance-related condition, such as a periodic “involuntary jerk of the head,” because the employer anticipates negative customer reactions. The employer “regards” the applicant or employee as having a covered disability because the applicant is limited in the major life activity of working only as a result of another’s perception or fear of the disabled employee. 29 C.F.R. pt. 1630 app. § 1630.2(l)(3).

66. 29 C.F.R. § 1630.2(l)(3). An example of this third type would occur

if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

29 C.F.R. pt. 1630 app. § 1630.2(l)(3).

The three categories of “regarded as” disabilities have in common that the employee does not actually have a condition that substantially limits any of his or her major life activities. Travis, *supra* note 8, at 912. Thus, “regarded as” disabled employees are similar to other non-disabled employees in that they do not have an actual disability, but are unlike all other non-disabled employees in that they fall under the protection of the ADA. *Id.* The first two categories of perceived disabilities also have in common the fact that the individual must possess some physical or mental “impairment” that may hinder job performance; this is a characteristic shared by many non-disabled employees who have physical or mental impairments that do not rise to the level of being substantially limiting, but that do limit job performance. *Id.*

67. Some of these examples can be found in Chivukula, *supra* note 27, at 549–50.

68. *Id.* at 550.

69. *Id.*; see Travis, *supra* note 8, at 999–1000. Travis argues that education should be provided as an accommodation for “regarded as” employees if negative perceptions of such employees will continue in the future; however, Travis states that job-related remedies, such as promotion, should be provided only if the “regarded as” employee cannot perform the position without “accommodations to the perceptual or social work environment, such as workplace training or education.” *Id.* at 1009.

taken “an official position” on whether reasonable accommodations should be available to “regarded as” employees under the ADA, it has done so under the Rehabilitation Act’s provision that bans discrimination of disabled employees by federal agencies.<sup>70</sup> In that context, the EEOC concluded that “regarded as” employees are not entitled to reasonable accommodations.<sup>71</sup>

*F. Are Accommodations for “Regarded as” Disabled Employees Found Within the ADA’s Text or Legislative History?*

The ADA does not, on its face, state whether a “regarded as” employee should be entitled to reasonable accommodations.<sup>72</sup> Although the EEOC has stated that a “regarded as” employee is not entitled to reasonable accommodations,<sup>73</sup> the courts have been left to debate whether to provide such accommodations. Further, turning to the legislative history provides little help because it is sparse and does not directly address the issue of the “regarded as” disabled prong.<sup>74</sup> Thus, the legal principles pertaining to “regarded as” disabilities have been described as “elusive, at best.”<sup>75</sup>

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70. Travis, *supra* note 8, at 933.

71. *Id.* at 933–34; *see also* Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 625–26 (discussing several cases in which the EEOC concluded that a “regarded as” disabled individual is not entitled to reasonable accommodations under the Rehabilitation Act).

72. *See* Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 641 (stating that reviewing the statutory language of the ADA does not provide an answer as to whether an employer has a duty to accommodate “regarded as” disabled employees).

73. *See id.* at 622 n.145 (stating that the EEOC believes that the ADA does not provide reasonable accommodations for “regarded as” individuals). *But see* Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (stating that the EEOC has provided no direct stance on whether “regarded as” disabled individuals are entitled to reasonable accommodations).

74. *See* Travis, *supra* note 8, at 939–41 (stating that there is no evidence showing Congress considered whether “regarded as” disabilities should be reasonably accommodated, but it did consider the issue with actual disabilities); *see also* Deane, 142 F.3d at 143 n.4 (stating that the ADA is vague with its terminology); Dudley, *supra* note 5, at 393–94 (discussing that the EEOC labeled the ADA as “unusual . . . in that it contains a level of detail more commonly found in regulations, leaving very little room for regulatory discretion” (internal quotation omitted)); *Employment Discrimination*, 109 HARV. L. REV. 1568, 1615 (1996) (“One of the . . . [Act’s] major problems is vagueness. Many of the statute’s terms are ambiguous, leaving employers and disabled individuals uncertain about their rights and responsibilities and requiring costly litigation to resolve the uncertainties.”); Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 610–11 (describing one court’s opinion of the decisional law on “regarded as” disabilities as “hen’s-teeth rare” (quoting Cook v. Rhode Island, 10 F.3d

*G. The History of Reasonable Accommodation Cases Concerning the “Regarded as” Prong*

The circuit courts are split as to whether a “regarded as” disabled employee is entitled to reasonable accommodations under the ADA.<sup>76</sup> Until recently, there were few decisions on the issue,<sup>77</sup> and it is one the Supreme Court has not yet addressed.<sup>78</sup>

Part of the reason there is a split is because of the difficulty of first proving the “regarded as” disabled prong in order to then reach the question of accommodations. Another difficulty with “regarded as” cases is that some courts consider each of the three “regarded as” categories as consistencies that may require a different outcome, although Congress provided no direction in doing so.<sup>79</sup>

The majority opinion of the circuit courts until the August 30, 2005, Eleventh Circuit decision created an equal split among the circuit courts was that an employee who is “regarded as” disabled is not entitled to accommodations under the ADA.<sup>80</sup> This was not always the opinion of the courts, however. In the past, the majority of the circuits found that “regarded as” disabled employees *were* entitled to reasonable accommodations. But this view changed over time to the position that “regarded as” employees should be treated

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17, 22 (1st Cir. 1993))).

75. Moberly, *Perception or Reality?*, *supra* note 2, at 348 (quoting *Fourco Glass Co. v. W. Va. Human Rights Comm’n*, 383 S.E.2d 64, 66 n.\* (W. Va. 1989)).

76. *See Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773 (3d Cir. 2004); *see also Dudley, supra* note 5, at 398 (stating that the vague language of the ADA has led to its various interpretations).

77. *See Moberly, Letting Katz out of the Bag, supra* note 15, at 641 (stating that in 1998, there was “relatively little case law addressing this issue”).

78. Whether “regarded as” individuals are entitled to reasonable accommodations is not the only disagreement among the federal circuits concerning reasonable accommodations; the circuit courts have also disagreed on what triggers an employer’s duty to accommodate and whether an employer has a duty to engage in the interactive process under the ADA. Melissa M. Chureau, Comment, *The Barnett Paradox: Icarus’s Wings*, 6 J. SMALL & EMERGING BUS. L. 395, 405–06 (2002). Nevertheless, this Note will not address the question of what triggers a duty to accommodate and whether an employer has a duty to engage in the interactive process. For articles considering the interactive process duty by an employer, *see Chureau, supra*; Sam Silverman, *The ADA Interactive Process: The Employer and Employee’s Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281 (1998).

79. Travis, *supra* note 8, at 915–16.

80. *See Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231 (9th Cir. 2003).

differently from employees with actual disabilities and not provided reasonable accommodations.<sup>81</sup> The circuit courts have now begun to revert back to the view that “regarded as” disabled employees are entitled to reasonable accommodations.<sup>82</sup>

In 1996, the first circuit to analyze the issue was the First Circuit Court of Appeals in *Katz v. City Metal Co.*<sup>83</sup> In *Katz*, the employee suffered a heart attack after working for the employer for over a year.<sup>84</sup> Thereafter, the employee suffered from several conditions related to the heart attack that kept him from returning to his sales position immediately.<sup>85</sup> After the heart attack, the employer told the employee “not to worry about his customers, and that the main thing was for [the employee] to get well.”<sup>86</sup> However, the employer fired the employee a month later.<sup>87</sup> The employee filed a lawsuit claiming that he was terminated because of both an actual disability and a perceived disability.<sup>88</sup> The court did not decide the actual disability claim because it believed the “regarded as” claim allowed the case to reach the jury.<sup>89</sup> The court stated that when making the “regarded as” definition of disability, Congress most likely intended the definition to apply in situations where an employer underestimates an employee’s “long-term medical condition,” and the employer does not provide reasonable accommodations.<sup>90</sup> However, the court

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81. See Travis, *supra* note 8, at 920–35 (discussing “regarded as” disability cases that first found for reasonable accommodations, but showing how this opinion started to change over time).

82. The last three circuit courts that have ruled on the issue of whether “regarded as” disabled employees are entitled to reasonable accommodations have determined that such employees do have this right. These courts are the Third Circuit on August 26, 2004, in *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004); the Tenth Circuit on June 7, 2005, in *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005); and the Eleventh Circuit on August 30, 2005, in *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005).

83. 87 F.3d 26 (1st Cir. 1996); see also See Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 603 n.\* (stating that *Katz v. City Metal Co.* was “arguably” the first federal circuit court decision to claim that an employer might have to accommodate “regarded as” disabled employees).

84. *Katz*, 87 F.3d at 28.

85. *Id.* at 28–29.

86. *Id.* at 29.

87. *Id.*

88. *Id.* at 32.

89. *Id.*

90. *Id.* at 33.

concluded that the employee could fall under the “regarded as” definition as well.<sup>91</sup> Thus, the court considered the question of whether the “regarded as” disabled employee was entitled to a reasonable accommodation to be a jury question.<sup>92</sup>

The issue of whether “regarded as” disabled individuals are entitled to reasonable accommodations was next mentioned briefly in the 1997 Sixth Circuit case of *Gilday v. Mecosta County*.<sup>93</sup> In dicta, through a footnote without any analysis, the court stated that “[a] person without an actual disability would not need any accommodation.”<sup>94</sup>

The Third Circuit first addressed the issue of accommodations for “regarded as” employees in 1998 in *Deane v. Pocono Medical Center*.<sup>95</sup> However, the court failed to make a decision on the issue.<sup>96</sup> The court listed arguments brought by each party in a footnote, but forcefully asserted that it “express[ed] no position on the accommodation issue.”<sup>97</sup> The court did state that the argument against accommodations has “considerable force.”<sup>98</sup> In addition, Judge Greenberg’s dissent considered the issue and concluded that no accommodation should be provided to a “regarded as” employee.<sup>99</sup> He stated:

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91. *Id.* at 32–33.

92. *Id.* at 33.

93. 124 F.3d 760, 764 n.4 (6th Cir. 1997).

94. *Id.* However, in *Powers v. Tweco Products, Inc.*, 206 F. Supp. 2d 1097 (D. Kan. 2002), the court stated that the “footnote in *Gilday* is, at best, dicta.” *Id.* at 1113.

95. 142 F.3d 138 (3d Cir. 1998).

96. *Id.* at 148–49 n.12.

97. *Id.* Some of the employee’s arguments were: the statute treats “regarded as” employees as “entitled to the same reasonable accommodations . . . as are actually disabled” employees; and the “regarded as” prong is based on the fact that “the perception of disability, socially constructed and reinforced, is difficult to destroy, and . . . merely informing the employer of its misperception will not be enough.” *Id.* The employer responded that “regarded as” employees’ “only disability is the employer’s irrational response to her illusory condition.” *Id.* The employer claimed that it “makes no sense” to accommodate “any physical impairments because, by definition, the impairments are not the statutory cause of the [employee’s] disability.” *Id.* The employer stated that allowing “regarded as” employees to recover would: “(1) permit healthy employees to . . . 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 . . . would nonetheless be entitled to accommodations that their similarly situated co-workers are not.” *Id.*

98. *Id.*

99. *Id.* at 150 (Greenberg, J., dissenting).

I cannot understand how an employee who is not actually disabled can indicate that she must have an accommodation for her work, and then, when the employer takes her at her word but declines to grant the accommodation, [a violation occurs] under the ADA. Congress did not pass the ADA to permit persons without a disability to demand accommodations.<sup>100</sup>

In late 1998, the Fifth Circuit considered whether a “regarded as” disabled employee should be accommodated in *Newberry v. East Texas State University*.<sup>101</sup> The employee was a tenured photography professor who suffered from obsessive compulsive disorder.<sup>102</sup> The employee began skipping meetings and stopped participating in graduate reviews of art students because he wanted the photography program to be moved back to the Department of Journalism and Graphic Arts.<sup>103</sup> The employee threatened the department chair and his supervisor that he would sue them; the employer claimed that the previous department chair left because of the employee’s harassment.<sup>104</sup> The employee was later terminated.<sup>105</sup> There was evidence that administration officials and other faculty at the university believed the employee “had mental problems and suggested counseling.”<sup>106</sup>

The employee sued the employer alleging that he was fired either because he had a disability, a record of disability, or was “perceived” to be disabled.<sup>107</sup> The court did not find an actual disability, and then considered the “regarded as” prong.<sup>108</sup> The court held that the “regarded as” claim was unsupported because the employee was dismissed because of conduct, not because of rumors that he was obsessive compulsive.<sup>109</sup> Even though it did not need to consider whether the employee should be reasonably accommodated, the court

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100. *Id.*

101. 161 F.3d 276 (5th Cir. 1998).

102. *Id.* at 277–78.

103. *Id.* at 277.

104. *Id.*

105. *Id.* at 278.

106. *Id.* at 279.

107. *Id.*

108. *Id.*

109. *Id.* at 279–80.

stated that “an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment.”<sup>110</sup>

The Sixth Circuit was the next federal circuit court to consider the issue in 1999 in *Workman v. Frito-Lay, Inc.*<sup>111</sup> The court did not analyze the accommodations issue, but concluded that an employer does not have to accommodate a “regarded as” disabled employee.<sup>112</sup> The court stated that if a disability was found under the “regarded as” prong, it “would obviate the [employer’s] obligation to reasonably accommodate [the employee].”<sup>113</sup>

The Third Circuit again mentioned the issue in 1999 in *Taylor v. Pathmark Stores, Inc.*<sup>114</sup> The court declined to decide the issue, leaving the decision to the lower court if the employee ultimately prevailed on the “regarded as” claim.<sup>115</sup> The court did, however, mention arguments on both sides:

On the one hand, the statute does not appear to distinguish between disabled and “regarded as” individuals in requiring accommodation. On the other, it seems odd to give an impaired but not disabled person a windfall because of her employer’s erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation.<sup>116</sup>

In addition, the court focused on the definition of “accommodation” instead of what constitutes an “accommodation” by noting that if an employer gives the employee flexibility by providing several ways to complete a job and the employee chooses a certain way, maybe to help an impairment that is less than a disability, then no “accommodation [is] to be involved.”<sup>117</sup>

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110. *Id.* at 280.

111. 165 F.3d 460 (6th Cir. 1999).

112. *Id.* at 467.

113. *Id.*

114. 177 F.3d 180, 195–96 (3d Cir. 1999).

115. *Id.* at 196.

116. *Id.* (citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 149 n.12 (3d Cir. 1998)).

117. *Taylor*, 177 F.3d at 196.

The seminal case of *Weber v. Strippit, Inc.*<sup>118</sup> in 1999 was the first case to squarely address the “regarded as” disability accommodations issue. In *Weber*, the employee was a sales manager who had a heart attack and suffered related conditions that physically limited his work.<sup>119</sup> The employer later required the employee to either relocate or take a lower paying sales position.<sup>120</sup> The employee notified his employer that his doctor advised him to stay at his current location for six months before relocating.<sup>121</sup> However, the employer failed to wait, and either terminated the employee or the employee abandoned his position.<sup>122</sup> The employee filed a lawsuit alleging that his employer fired him because of an actual disability or a “regarded as” disability.<sup>123</sup>

The court of appeals affirmed the district court’s dismissal of the actual disability claim, and focused on the “regarded as” claim.<sup>124</sup> The Eighth Circuit held that “regarded as” disabled employees do not have the right to accommodations.<sup>125</sup> The court reasoned that requiring employers to accommodate “regarded as” disabled employees “would lead to bizarre results.”<sup>126</sup> “The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers’ misperceptions, a right to reasonable accommodations.”<sup>127</sup> The court also cited the *Deane* court’s concerns that providing reasonable accommodations to “regarded as” disabled plaintiffs 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’

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118. 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000).

119. *Id.* at 910.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 912–14.

125. *Id.* at 917.

126. *Id.* at 916.

127. *Id.* at 917.

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.<sup>128</sup>

In 2001, the Tenth Circuit briefly considered the issue in *McKenzie v. Dovala*.<sup>129</sup> The Tenth Circuit held that a “regarded as” disabled employee made out a prima facie case of discrimination based on her employer’s failure to provide a reasonable accommodation for her perceived disability.<sup>130</sup>

A 2002 Second Circuit district court case, *Jacques v. DiMarzio, Inc.*,<sup>131</sup> has had much influence on federal courts’ decisions. The employee worked for the employer as a packager and assembler in the employer’s factory.<sup>132</sup> The employee suffered from bipolar disorder and depression.<sup>133</sup> The employee had several altercations with supervisors while working at the factory, and often complained about safety violations.<sup>134</sup> The employer granted the employee several leaves of absence when she was suffering from uterine hemorrhaging and depression.<sup>135</sup> The employer, due to the employee’s altercations at work, decided to have the employee work from home.<sup>136</sup> During one conversation with the employee, a supervisor stated that the employee “needed help and should see a psychiatrist.”<sup>137</sup> The employer later fired the employee.<sup>138</sup> The employee then brought a lawsuit claiming that she was terminated

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128. *Id.* (quoting *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998)).

129. 242 F.3d 967 (10th Cir. 2001).

130. *Id.* at 975; *see also* *Kelly v. Metallica W., Inc.*, 410 F.3d 670, 675 (10th Cir. 2005) (citing and explaining the *McKenzie* holding, and agreeing that “regarded as” disabled employees are entitled to reasonable accommodations under the ADA).

131. 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

132. *Id.* at 154.

133. *Id.*

134. *Id.* at 154–55.

135. *Id.* at 154.

136. *Id.* at 155.

137. *Id.*

138. *Id.*

because of her bipolar disorder and her complaints about the workplace.<sup>139</sup>

The court first considered the actual disability claim and concluded that the employee's bipolar disorder did not substantially limit her from taking care of herself.<sup>140</sup> The court next turned to whether a record of disability existed, and found that the employee's history of leaves of absence did not establish a record of disability, nor was she able to prove that she was substantially limited in her ability to work.<sup>141</sup> The court lastly considered the issue of whether the employee was "regarded as" disabled by her employer,<sup>142</sup> quoting the two ways to establish disability in *Sutton*.<sup>143</sup> The court stated that the employee fell within the second *Sutton* category—"a covered entity mistakenly believe[d] that an actual, nonlimiting impairment substantially limit[ed] one or more major life activities."<sup>144</sup> The court then considered whether the employee offered evidence supporting her claim that her employer regarded her as unable to interact with others due to a disability.<sup>145</sup> The court then determined that the ability to "interact with others" is a major life activity.<sup>146</sup> Finally, the court found evidence that the employer regarded the employee as unable to "interact with others" based on the employer's letter to the National Labor Relations Board stating that it perceived the employee as an "irrational" and "extremely emotional" person.<sup>147</sup> This created a triable issue of fact as to whether the employer was "regarded as" disabled.<sup>148</sup> Finally, the court considered whether a "regarded as" employee is entitled to reasonable accommodations.<sup>149</sup> The court found that a "regarded as" employee is entitled to reasonable

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139. *Id.*

140. *Id.* at 156–59.

141. *Id.* at 159.

142. *Id.* at 159–61.

143. *Id.* at 160.

144. *Id.* (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

145. *Id.*

146. *Id.*

147. *Id.* at 161.

148. *Id.*

149. *Id.*

accommodations, and stated that whether the employee could perform her job without accommodation was a triable issue.<sup>150</sup>

Later, the *Jacques* court, in a supplemental decision, reconsidered the issue of whether a “regarded as” employee is entitled to reasonable accommodation<sup>151</sup> in light of the *Weber* decision.<sup>152</sup> The court disagreed with *Weber*, and held that “regarded as” employees are entitled to reasonable accommodations based on the plain language of the ADA, the legislative history of the “regarded as” prong, the mandatory interactive process, and an analysis of *Weber*’s reasoning.<sup>153</sup> The court found that the plain language of the statute did not raise a distinction between actually disabled persons and “regarded as” disabled persons in the ADA’s definition of a “qualified individual.”<sup>154</sup> The court stated that if a court denied “regarded as” persons reasonable accommodations, other employees’ “prejudices and biases” could “impermissibly deny an impaired employee” a job because of an error in perceiving the employee as actually disabled.<sup>155</sup> The court believed, although not provided “explicitly” within the statute, that Congress intended for an employer to start an interactive process with any employee who seems to be in need of accommodations.<sup>156</sup> This process is triggered when an employer regards an employee as disabled or the employee asks for an accommodation.<sup>157</sup> An implicit good faith requirement in the ADA keeps employees from demanding “uncalled for accommodations.”<sup>158</sup> The court stated that an employee who is only impaired and one who is both impaired and “regarded as” having a disability are in different situations because the “regarded as” disabled employee may carry the stigma of the disabling attitudes of co-workers.<sup>159</sup>

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150. *Id.*

151. *Id.* at 163.

152. *See supra* notes 118–27 and accompanying text.

153. *Jacques*, 200 F. Supp. 2d at 166.

154. *Id.*

155. *Id.* at 168.

156. *Id.* at 168–70.

157. *Id.* at 169.

158. *Id.* at 170–71.

159. *Id.* at 170.

Whether the Second Circuit Court of Appeals would follow *Jacques* is unknown, but when it mentioned the issue in a footnote in the 2003 case of *Shannon v. New York City Transit Authority*,<sup>160</sup> the court stated that the issue “is not at all clear,” and cited only the *Weber* case.<sup>161</sup> Thus, there is some question as to whether the Second Circuit would follow *Jacques*, which was decided over a year before *Shannon*. However, less than a month after *Shannon*, the Second Circuit discussed the issue in *Cameron v. Community Aid for Retarded Children, Inc.*<sup>162</sup> Without deciding, the court cited to both the *Weber* and *Katz* cases, but gave no indication of its stance.<sup>163</sup>

One scholar has stated that the 2002 Eleventh Circuit case of *Williams v. Motorola, Inc.*<sup>164</sup> ruled that an employer must accommodate a “regarded as” disabled employee.<sup>165</sup> This conclusion must be based on the court’s statement that “[w]e . . . hold that a plaintiff may maintain a claim under the ADA of being perceived as disabled without proof of actually being disabled.”<sup>166</sup> This statement was made after determining that the Eleventh Circuit had not previously considered the issue, but that other courts have held that employees regarded by their employers as disabled could pursue such claims, citing the 1997 Tenth Circuit case of *Roe v. Cheyenne Mountain Conference Resort Inc.*<sup>167</sup> In contrast, the United States District Court for the Middle District of Florida (part of the Eleventh Circuit) has since stated that the Eleventh Circuit has not considered the issue of whether a “regarded as” employee is entitled to reasonable accommodations.<sup>168</sup> Further, the Eleventh Circuit stated in

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160. 332 F.3d 95 (2d Cir. 2003).

161. *Id.* at 104–05 n.3.

162. 335 F.3d 60 (2d Cir. 2003).

163. *Id.* at 64 (discussing the issue and citing cases for both sides, but without taking a stance).

164. 303 F.3d 1284 (11th Cir. 2002).

165. *Individuals Regarded as Having an Impairment*, EMPLOYMENT DISCRIMINATION COORDINATOR, EDC ANAFED § 6:35 n.7 (and accompanying text) (2004).

166. *Motorola*, 303 F.3d at 1290.

167. *Id.* (citing *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997)).

168. See Defendant’s Response in Opposition to Plaintiff’s Motion for Reconsideration at 1–2, *D’Angelo v. ConAgra Foods, Inc.*, No. 8:02-cv-1683-T-27TBM (M.D. Fla. Feb. 5, 2004), 2004 WL 1886362 (“Although the Eleventh Circuit has not yet addressed whether an employee who is not disabled but is regarded as disabled is nonetheless entitled to a reasonable

an August 30, 2005, opinion that it was deciding the issue for the first time.<sup>169</sup> Although the Eleventh Circuit has since stated that the issue of providing reasonable accommodations to “regarded as” disabled employees was not decided until August 30, 2005, the *Williams* case is still worth mentioning.

In 2003, the Ninth Circuit analyzed this issue in *Kaplan v. City of North Las Vegas*.<sup>170</sup> The employee was hired as a deputy marshal, a position that required the employee to use his hands to handcuff and to restrain prisoners.<sup>171</sup> After seriously injuring his right wrist and thumb during training,<sup>172</sup> the employee was assigned to a light duty position.<sup>173</sup> The employee was later misdiagnosed as having rheumatoid arthritis.<sup>174</sup> Due to pain in his thumb, the employee was unable to handle a gun.<sup>175</sup> The employer later fired the employee, stating concern for the employee’s ability to use a handgun.<sup>176</sup> The employee qualified at a gun range six days later, and it was determined that he never suffered from rheumatoid arthritis.<sup>177</sup> The employee filed a lawsuit claiming that he was fired because his employer thought he was permanently disabled by rheumatoid arthritis.<sup>178</sup>

The *Kaplan* court considered whether “regarded as” employees are entitled to accommodations.<sup>179</sup> The court noted that the weight of authority was against interpreting the ADA to require accommodations for “regarded as” employees.<sup>180</sup> After analyzing arguments on both sides, the court held that an employer has no duty to accommodate a “regarded as” employee because the employee is

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accommodation, other circuits have concluded that such employees are not entitled to an accommodation. . . . These decisions are persuasive.” (quoting Summary Judgment at 11, *D’Angelo v. ConAgra Foods, Inc.*, No. 8:02-cv-1683-T-27TBM)).

169. *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

170. 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

171. *Id.* at 1227.

172. *Id.* at 1228.

173. *Id.*

174. *Id.* at 1228–29.

175. *Id.* at 1228.

176. *Id.* at 1229.

177. *Id.*

178. *Id.*

179. *Id.* at 1231.

180. *Id.*

not actually disabled.<sup>181</sup> The court reasoned that to provide such accommodations in “regarded as” cases would allow “impaired employees [to] be better off under the statute if their employers treated them as disabled even if they were not.”<sup>182</sup> This outcome “would be a perverse and troubling result” because the ADA’s purpose is to “decreas[e] ‘stereotypic assumptions not truly indicative of the individual ability’” of disabled persons.<sup>183</sup> The court commented that the employee will overcome stereotypes by showing his or her ability to perform “productive[ly]” in the “workplace notwithstanding impairments.”<sup>184</sup> The court stated that providing accommodations in these situations would not provide an incentive to employees to educate their employers about “their capabilities, and [would] do nothing to encourage the employers to see their employees’ talents clearly.”<sup>185</sup> Instead, accommodations “would improvidently provide those employees a windfall if they perpetuated their employers’ misperception of a disability.”<sup>186</sup> Making employers provide accommodations to employees who are not actually disabled “would . . . waste resources unnecessarily,” instead of using “the employers’ limited resources” to help employees who have actual disabilities and are “in genuine need of accommodation to perform to their potential.”<sup>187</sup> The United States Supreme Court declined review of this case, letting stand a summary judgment award to the employer based on the holding that a “regarded as” disabled employee is not entitled to reasonable accommodations.<sup>188</sup>

The Third Circuit considered the issue in the 2004 case of *Williams v. Philadelphia Housing Authority Police Department*.<sup>189</sup> The employee worked as a police officer for the employer.<sup>190</sup> The employee was suspended after yelling at and using profanity towards a superior when he was “confronted . . . about his fractious

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181. *Id.* at 1232–33.

182. *Id.* at 1232.

183. *Id.* (quoting 42 U.S.C. § 12101(a)(7) (1994)).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. 323 F.3d 1226, *cert. denied*, 540 U.S. 1049 (2003).

189. 380 F.3d 751 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

190. *Id.* at 756.

interactions with other employees.”<sup>191</sup> A few months following the altercation, the employee requested a medical leave of absence due to severe depression.<sup>192</sup> A few months later, the employee’s psychologist wrote the employer and shared that the employee required depression and stress management treatment, but that he could return to a position that did not require carrying a gun, such as a clerical or administrative position.<sup>193</sup> The psychologist also mentioned that the employee could work around others who carried guns, and that he would be reevaluated in three months, at which time the psychologist believed he could return to active duty.<sup>194</sup> The employee requested to be reassigned to the employer’s training unit, but was told that he could not have such a position because he could not carry a gun.<sup>195</sup> One day later, the employee requested reassignment to the radio room, but he did not receive a response until after his termination.<sup>196</sup> After several months of not returning to work, the employer requested that the employee apply for a medical leave of absence, and stated that failure to do so would result in termination.<sup>197</sup> The employee never responded to the request and was subsequently terminated.<sup>198</sup> The employee filed suit claiming several causes of action, including discrimination for failure to accommodate his disability.<sup>199</sup> This action was heard on appeal from summary judgment.<sup>200</sup>

The court considered the discrimination claim and held that the employee could be found to be disabled.<sup>201</sup> The court next took up the issue of whether the employee was a qualified individual, and concluded that a jury could find that the employee was qualified to work in the radio room.<sup>202</sup> The court then considered whether the

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191. *Id.*

192. *Id.*

193. *Id.* at 756–57.

194. *Id.* at 757.

195. *Id.*

196. *Id.*

197. *Id.* at 758.

198. *Id.*

199. *Id.* The employee also filed a claim for retaliation, which the court rejected. *Id.* at 758–61.

200. *Id.* at 758.

201. *Id.* at 761–68.

202. *Id.* at 768–70.

employee experienced an adverse employment action resulting from discrimination.<sup>203</sup> The court concluded that to determine whether an employee has a disability, an employer has a duty to enter into an “interactive process” with the employee who requests an accommodation, even though the ADA does not explicitly mention this. If a disability exists, an employer has a duty to determine what reasonable accommodations can be provided.<sup>204</sup> The court found that there was a material dispute of fact as to whether the employer used good faith in the interactive process, and thus failed to reasonably accommodate the employee.<sup>205</sup>

Lastly, the *Williams* court considered whether an employee who is “regarded as” disabled by an employer is entitled to reasonable accommodations.<sup>206</sup> The court concluded that there is “no basis” to provide an “across-the-board refusal to apply the ADA in accordance with the plain meaning of its text,” yet recognized the possibility that “bizarre results” may ensue.<sup>207</sup> The court determined that the ADA’s text does not distinguish between an actual and a “regarded as” disability.<sup>208</sup> Therefore, the plain language of the ADA requires employers to accommodate employee disabilities, whether actual or perceived. The court also determined that the legislative history supported that the ADA was intended to provide the same protection for both actual and “regarded as” disabled employees,<sup>209</sup> citing to *Arline*’s statement that the definition of disability (formerly “handicapped individual”) was intended to protect “regarded as” employees even though they have no disability.<sup>210</sup> Thus, the court held that employers must provide reasonable accommodations to “regarded as” disabled employees.<sup>211</sup> The employer in this case filed a petition for certiorari to the Supreme Court on December 22, 2004; the petition was denied.<sup>212</sup>

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203. *Id.* at 771–72.

204. *Id.* at 771.

205. *Id.* at 772.

206. *Id.* at 772–76.

207. *Id.* at 774.

208. *Id.*

209. *Id.*

210. *Id.* at 775.

211. *Id.* at 776.

212. 380 F.3d 751, *cert. denied*, 544 U.S. 961 (2005); *see also* Petition for Writ of

On June 7, 2005, the Tenth Circuit considered the issue in *Kelly v. Metallics West, Inc.*<sup>213</sup> This case concerned an employee who worked for several years for her employer, first as a receptionist and then as a customer service supervisor.<sup>214</sup> The employee was hospitalized due to a blood clot in her lung, which made her dependent on supplemental oxygen.<sup>215</sup> The employee tried to return to work without supplemental oxygen, but this resulted in shortness of breath and light-headedness.<sup>216</sup> Thereafter, she returned to work with a note from her doctor stating that she needed to use oxygen while at work.<sup>217</sup> However, the employee testified that her employer informed her that oxygen could not be used on the premises.<sup>218</sup> After trying again to return to work without supplemental oxygen with no success, the employee's doctor advised that the employee could only return to work with oxygen.<sup>219</sup> "There [was] no dispute that with supplemental oxygen, [the employee] was capable of performing the essential functions of her job."<sup>220</sup> The employee tried a second time to obtain her employer's approval to use supplemental oxygen, stating it was the only way that her doctor would allow her to return to work. The employer again refused because it "did not want the responsibility [that] she might 'fall over dead.'"<sup>221</sup> On the same day that the employer made this comment, the employer terminated the employee.<sup>222</sup>

The employee used the "regarded as" disability prong to argue her claim because the district court ruled that the employee's need for oxygen did not constitute an actual disability. The district court's ruling was based on the temporary nature of the impairment and that it could be alleviated by the use of portable oxygen.<sup>223</sup> The Tenth

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Certiorari, Phila. Hous. Auth. Police Dep't v. Williams, No. 04-873 (U.S. Dec. 22, 2004), 2004 WL 3017720.

213. 410 F.3d 670 (10th Cir. 2005).

214. *Id.* at 671–72.

215. *Id.* at 672.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 673.

223. The district court ruling stemmed from *Sutton's* holding that if corrective measures

Circuit considered whether “regarded as” disabled employees are entitled to reasonable accommodations. The court agreed with the First and Third Circuits and held that “regarded as” disabled employees are entitled to reasonable accommodations.<sup>224</sup> The court pointed to the plain language of the ADA, and stated that the definition of “reasonable accommodation” does not distinguish between actually disabled employees and “regarded as” disabled employees.<sup>225</sup> The court countered *Kaplan*’s statement that it would be a “perverse and troubling result” that “impaired [but not actually disabled] employees would be better off under the statute if their employers treated them as disabled even if they were not” by noting that “it is in the nature of *any* ‘regarded as disabled’ claim that an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—‘regarded as’ disabled.”<sup>226</sup>

The court commented that the ADA seeks to protect the employee’s livelihood from perverse actions based on “‘stereotypic assumptions not truly indicative of the individual ability’ of the employee.”<sup>227</sup> The court further stated:

[A]n employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. . . . [T]he ADA encourages employers to become more enlightened about their employees’ capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.<sup>228</sup>

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exist for the limitations created by a condition, then such condition falls outside the actual disability prong. Here corrective measures existed because the employee’s doctor testified that the employee was able to perform “all of life’s major activities” as long as she used supplemental oxygen. *Id.* at 673 n.4.

224. *Id.* at 675.

225. *Id.*

226. *Id.* at 676 (citations omitted).

227. *Id.* (quoting 42 U.S.C. § 12101(a)(7) (1994)).

228. *Id.* at 676.

The most recent case to consider the issue was the Eleventh Circuit on August 30, 2005, in *D'Angelo v. ConAgra Foods, Inc.*<sup>229</sup> The employee was diagnosed with vertigo in September of 1998, just before she was hired by the employer as an assembly line worker.<sup>230</sup> However, the symptoms of vertigo disappeared shortly thereafter.<sup>231</sup> Upon being hired, the employee did not inform her employer of her condition.<sup>232</sup> However, within a few months, she started experiencing vertigo at work.<sup>233</sup> She told her employer and co-workers that working over the spreader belt was making her sick and dizzy.<sup>234</sup> The employee stated that the only time she experienced vertigo was when she was required to stare at a moving belt “[c]ontinuously without a break.”<sup>235</sup> The problem then subsided when she was not required to overlook the belt, and did not arise again for over a year and a half.<sup>236</sup>

The employee’s vertigo resurfaced in September of 2001, when a new supervisor assigned her to monitor a conveyor belt.<sup>237</sup> The employee explained to her supervisor that she was unable to monitor belts because it made her sick and dizzy.<sup>238</sup> The employee provided the plant manager a note from her doctor that explained that she was not to work more than five nights per week, and that she also should avoid overlooking moving objects, such as belts, due to her condition, which could cause her to fall and sustain injury.<sup>239</sup> The next day, the employee was terminated.<sup>240</sup> The termination letter stated that the employee’s position as a product transporter required her to work around moving conveyors and mechanized equipment and required her to work more than five nights per week.<sup>241</sup>

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229. 422 F.3d 1220 (11th Cir. 2005).

230. *Id.* at 1222. Her symptoms of vertigo included dizziness, feelings of sickness, and vomiting. *Id.* at 1223.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1224.

241. *Id.*

The employee filed suit claiming that her employer discriminated against her by firing her, rather than accommodating her by exempting her from working on moving belts. The employee claimed that she was actually disabled as a result of her vertigo condition, and that her employer regarded her as disabled.<sup>242</sup> The court first considered the actual disability claim, and held that the employee's vertigo did not qualify as an actual disability under the ADA because it did not substantially limit at least one of the employee's major life activities.<sup>243</sup>

The court then considered whether the employee was "regarded as" disabled.<sup>244</sup> The employee argued that she qualified for the first of the three EEOC "regarded as" categories because "she ha[d] a physical impairment [vertigo] that [did] not substantially limit her in the major life activity of working, but that was treated by her employer as though it did constitute such a limitation."<sup>245</sup> The court agreed with the district court that the employee presented sufficient evidence to create a genuine issue of material fact as to whether she was regarded by her employer as disabled.<sup>246</sup> The court noted that the employer regarded her as unable to perform any job that would place her in the vicinity of any moving equipment, and thus the employer believed she would be unable to perform every job at the plant.<sup>247</sup>

The court next determined that there was a genuine issue of material fact as to whether the employee was able to perform the essential function of working around moving equipment.<sup>248</sup> The court then considered whether the ADA's reasonable accommodation requirement applies to "regarded as" disabled individuals.<sup>249</sup> The court supported the Third Circuit's decision in *Williams*, and held that "regarded as" disabled individuals are entitled to reasonable accommodations under the ADA.<sup>250</sup> Its conclusion was based on the

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242. *Id.*

243. *Id.* at 1226–27.

244. *Id.* at 1227–28.

245. *Id.* at 1228.

246. *Id.* at 1228–29 n.5.

247. *Id.*

248. *Id.* at 1234.

249. *Id.* at 1234–35.

250. *Id.* at 1235.

fact that the plain language of the ADA does not differentiate between actually disabled employees and “regarded as” disabled individuals.<sup>251</sup> The court also noted that this reading of the ADA is consistent with the Supreme Court’s interpretation of the Rehabilitation Act of 1973 in *Arline*,<sup>252</sup> and with the Supreme Court’s subsequent decision in *Bragdon v. Abbott*.<sup>253</sup>

The Eleventh Circuit also criticized *Kaplan*’s reasoning that accommodations should not be provided to “regarded as” disabled employees because it would create a disparity in treatment among impaired but non-disabled employees, allowing some the right to reasonable accommodations but not others based on employers’ mistaken beliefs.<sup>254</sup> The court found the *Kaplan* reasoning unpersuasive because it “ignore[s] the vital principle that ‘[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.’”<sup>255</sup> The U.S. Constitution gives that

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251. *Id.* The court stated:

[T]he [ADA] plainly prohibits “not making reasonable accommodations” for any qualified individual with a disability, including one who is disabled in the regarded-as sense no less than one who is disabled in the actual-impairment or the record-of-such-an-impairment sense.

The text of [the ADA] simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not.

*Id.* at 1236.

252. *See id.* at 1236–37; *see also* 480 U.S. 273 (1987); *supra* notes 18–28 and accompanying text.

253. *See D’Angelo*, 422 F.3d at 1237; *see also* 524 U.S. 624 (1998). The Eleventh Circuit reiterated *Bragdon*’s explanation:

The ADA’s definition of disability is drawn almost verbatim from the definition of “handicapped individual” included in the Rehabilitation Act of 1973 . . . . Congress’ repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing . . . [not to] “. . . apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title.” The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

*D’Angelo*, 422 F.3d at 1237 (quoting *Bragdon*, 524 U.S. at 631–32) (citations omitted)).

254. *D’Angelo*, 422 F.3d at 1237–38.

255. *Id.* at 1238 (quoting *Jove Eng’g, Inc. v. IRS*, 92 F.3d 1539, 1552 (11th Cir. 1996)).

power solely to the political branches.<sup>256</sup> The Eleventh Circuit concluded that the courts “are without authority to pass judgment on the wisdom of a congressional enactment” because the ADA is unambiguous.<sup>257</sup>

The court listed two reasons why providing “regarded as” disabled employees with reasonable accommodations does not create a “bizarre” result, as argued by several of its sister circuits. First, the court noted that “regarded as” disabled employees “are *not* ‘impaired but non-disabled’ individuals, but rather *are disabled* within the meaning of the [ADA].”<sup>258</sup> Second, the court noted that it is not bizarre to allow one employee with a particular impairment an accommodation, but to not allow another with the same condition the same accommodation, because the “individuals are not similarly situated.”<sup>259</sup> The “regarded as” disabled employee who is protected under the ADA will have suffered a wrongful adverse employment action, while the other employee has not.<sup>260</sup> Thus, the court held that based on the ADA’s text and the absence of any contrary legislative history, a “regarded as” disabled employee is entitled to reasonable accommodations.<sup>261</sup>

### III. ANALYSIS

After considering the circuit court cases above, it is clear that the circuit split is well-defined. Although not all federal circuits have considered the issue, several federal district courts within those circuits have done so. Two approaches have developed from these cases as to whether a “regarded as” disabled employee is entitled to reasonable accommodations.

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256. *Id.*

257. *Id.*

258. *Id.* at 1239.

259. *Id.*

260. *Id.*

261. *Id.*

### A. The “No Accommodation” Approach

The circuit courts that follow the “no accommodation” approach conclude that a “regarded as” disabled employee is not entitled to reasonable accommodations. Federal courts that follow this view include the Fifth, Sixth, Eighth, and Ninth Circuits.<sup>262</sup> District court decisions in the Fourth Circuit<sup>263</sup> and the Seventh Circuit (majority of decisions) have also found for no accommodations.<sup>264</sup> The Second<sup>265</sup> and Seventh<sup>266</sup> Circuits have considered, but declined to address, the issue.<sup>267</sup> The district courts of the District of Columbia<sup>268</sup> have considered the issue but failed to address it, although the D.C. Circuit itself has not considered the issue.<sup>269</sup>

Many arguments support the “no accommodation” approach. If courts were to provide accommodations to “regarded as” disabled individuals, then healthy employees might demand workplace changes through litigation or the threat of litigation.<sup>270</sup> It seems inappropriate to provide a “windfall” (for example, protection under the ADA)<sup>271</sup> to employees who are mistakenly “regarded as” disabled by the employer when others who are impaired do not receive such

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262. See Appendix A of this Note, *infra*, for these circuits’ decisions on the issue.

263. See *Betts v. Rector & Visitors*, 198 F. Supp. 2d 787, 799 (W.D. Va. 2002) (requiring no accommodation for “regarded as” disabled individuals).

264. See Appendix A of this Note, *infra*, for a complete listing of these circuits’ decisions, along with corresponding district court opinions.

265. See *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 64 (2d Cir. 2003); *Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 104 n.3 (2d Cir. 2003).

266. See *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335–36 (7th Cir. 2004); *Mack v. Great Dane Trailers*, 308 F.3d 776, 783 n.2 (7th Cir. 2002).

267. See Appendix A, *infra*, for these circuits’ decisions, along with corresponding district court opinions; see also *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773 n.18 (3d Cir. 2004) (stating that three circuits have considered the issue but failed to address it and citing to courts from the Second and Seventh Circuit); *Ammons-Lewis v. Metro. Water Reclamation Dist.*, No. 03 C 0885, 2004 WL 2453835, at \*5 (N.D. Ill. Nov. 1, 2004) (“The Seventh Circuit has so far declined to rule on this issue.”).

268. See *Mack v. Strauss*, 134 F. Supp. 2d 103, 111 n.3 (D.D.C. 2001) (“It is doubtful that plaintiff can even claim failure to accommodate given its logical inconsistency with a claim that he was regarded as disabled.”).

269. See Appendix A, *infra*, for this circuit’s consideration of the issue, along with corresponding district court opinions.

270. *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999) (citing *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998)).

271. *Dudley*, *supra* note 5, at 408.

accommodations.<sup>272</sup> This result would advantage the employee who is treated as disabled, even though he or she is not.<sup>273</sup> “Regarded as” disabled employees overcome stereotypes by working “productive[ly]” in the “workplace notwithstanding impairments.”<sup>274</sup> Providing accommodations to “regarded as” disabled employees would decrease employees’ drive to show employers their true capability to perform the functions of the job.<sup>275</sup> Further, accommodating “regarded as” disabled employees is a “waste [of] resources” that could be used to fund the actually disabled employees’ need for workplace accommodations.<sup>276</sup>

One district court has viewed the “no accommodation” approach in a different way, commenting that if an employee concedes that he or she is not disabled, he or she has waived any claim to accommodation.<sup>277</sup> Similarly, one scholar argues that a “[f]ailure to accommodate . . . logically cannot arise when the employee contends that he or she is not presently disabled, i.e., when the basis of the worker’s claim of disability is . . . ‘regarded as’ . . . disability.”<sup>278</sup> Under this approach, if an employee does not claim that there is an actual disability, but only that the employer regards him or her as being disabled, that employee has waived any claim to accommodations. “[C]ommon sense” precludes employees from alleging that although no disability exists, accommodations are appropriate for an unreal disability.<sup>279</sup> It is “completely incongruous” for an employee to “argue to a jury, on the one hand, that he has no disability and, on the other hand, that his disability should have been accommodated.”<sup>280</sup>

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272. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) (citing *Deane*, 142 F.3d at 148–49 n.12).

273. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Powers v. Tweco Prods., Inc.*, 206 F. Supp. 2d 1097, 1114 (D. Kan. 2002) (holding that an employee who admits that no disability exists is not entitled to any accommodation).

278. Marley S. Weiss, *Emerging Issues in Employment Law and Litigation: Review and Preview of the Supreme Court Term: The Supreme Court’s 2002 ADA Cases*, VMD1017 ALI-ABA 79, at \*3 (2002).

279. *Powers*, 206 F. Supp. 2d at 1114.

280. *Bernhard v. Dorskocil Cos.*, 861 F. Supp. 1006, 1013 (D. Kan. 1994).

### *B. The Accommodation Approach*

The circuit courts following the accommodation approach, which holds that “regarded as” disabled employees are entitled to reasonable accommodations, are the First, Third, Tenth,<sup>281</sup> and Eleventh Circuits, along with district courts in the Second Circuit.<sup>282</sup>

The circuit and district courts supporting the view that a “regarded as” disabled employee should receive reasonable accommodations from his or her employer have made several arguments supporting this approach. First, the plain language of the ADA does not distinguish between “regarded as” and actual disabled individuals in its definition of a “qualified individual.”<sup>283</sup> Further, the ADA’s legislative history supports providing reasonable accommodations to “regarded as” disabled individuals in addition to actually disabled individuals. For example, Congress noted remarks made by the Supreme Court in *Arline*: “Congress acknowledged that society’s accumulated myths and fears about disability and diseases are as

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281. The trend towards providing reasonable accommodations can be seen by looking at the Tenth Circuit. Prior to the Tenth Circuit’s decision in *Kelly*, the district courts in the circuit had ruled that “regarded as” disabled employees were not entitled to reasonable accommodations. *See, e.g., Bernhard*, 861 F. Supp. at 1013. However, in June of 2005, the Tenth Circuit held that “regarded as” disabled employees are entitled to reasonable accommodations. An example of a previous district court decision providing no accommodations to “regarded as” disabled employees is *Powers*, 206 F. Supp. 2d at 1114, where the court stated:

[C]ommon sense, if nothing else, would preclude plaintiff from claiming that she was not “disabled” but that she nonetheless was entitled to an accommodation for a nonexistent disability . . . . Plaintiff, by conceding she was not disabled, has essentially waived any claim that [the employer] was required to accommodate her. Therefore, the court holds that plaintiff, who is admittedly not disabled, is not entitled to any accommodation when determining whether she is “qualified.”

*Id.*; *see also Bernhard*, 861 F. Supp. at 1013 (“Plaintiff cannot argue to a jury, on the one hand, that he has no disability and, on the other hand, that his disability should have been accommodated.”). However, *Bernhard* was decided under the Kansas Acts Against Discrimination (which uses the same description of disability as the ADA), *see id.*, and the *Powers* court described *Bernhard* as “merely recogniz[ing] the incredulity that a plaintiff would face from a jury if he were to argue that he was not really disabled but nonetheless needed an accommodation.” *Powers*, 206 F. Supp. 2d at 1113.

282. *See Appendix A, infra*, for these circuits’ decisions, along with corresponding district court opinions.

283. *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002); *see also Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 774 (3d Cir. 2004).

handicapping as are the physical limitations that flow from actual impairment.”<sup>284</sup> The Supreme Court in *Arline* pointed out that the definition of disability (formerly “handicapped individual”) was amended to include a “regarded as” disability, thus suggesting that the expanded definition was to include discrimination against “regarded as” individuals, even if no actual disability existed.<sup>285</sup> If reasonable accommodations were denied to “regarded as” disabled employees across-the-board, negative attitudes and biases by co-workers could “impermissibly” inhibit an impaired employee because of an erroneous belief that the employee has an actual disability.<sup>286</sup> An employer that fails to rid itself of its negative assumptions based on prejudice should be ready to provide an accommodation for the artificial limitations created by its own misperceptions.<sup>287</sup>

Similarly, a “bizarre” result is not created by providing a “regarded as” disabled employee with reasonable accommodations. This is true because an employee who is only impaired and one who is both impaired and “regarded as” having a disability are fundamentally different; the “regarded as” disabled employee is subject to the stigma created by others’ discriminatory and disabling attitudes.<sup>288</sup> Further, the legislature, not the courts, is solely

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284. *Jacques*, 200 F. Supp. 2d at 166 (quoting H.R. REP. No. 101-485 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 453 (quoting Sch. Bd. of Nassau County v. *Arline*, 480 U.S. 273, 284 (1987))).

285. See *Williams*, 380 F.3d at 775.

286. *Jacques*, 200 F. Supp. 2d at 168 (stating that Congress considered that “[c]ategorically denying reasonable accommodations to ‘regarded as’ plaintiffs would allow the prejudices and biases of others to impermissibly deny an impaired employee his or her job because of the mistaken perception that the employee suffers from an actual disability”); see also *Williams*, 380 F.3d at 774 (stating that “across-the-board refusal” to allow reasonable accommodations to “regarded as” disabled individuals would not be supporting “the plain meaning of [the ADA’s] text”).

287. See *Jacques*, 200 F. Supp. 2d at 170.

288. *Id.*; see also *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1239 (11th Cir. 2005) (noting that giving accommodations to “regarded as” disabled employees but not to others who are impaired does not create a bizarre result because those individuals are not similarly situated: “the employee entitled to statutory protection will have suffered some wrongful adverse employment action that the other employee has not”); *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005); *Williams*, 380 F.3d at 775 (“The employee whose limitations are perceived accurately gets to work, while [the plaintiff] is sent home unpaid.”); Kelly C. Timmons, *Limiting “Limitations”: The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 S.C. L. REV. 313, 342 (2005) (stating that “[t]he fact that those outside the protected class receive no protection should not be interpreted as

authorized to amend the statute if it determines that its effects need improvement.<sup>289</sup>

*C. An Analytical Approach to Determine Whether the United States Supreme Court Would Provide Reasonable Accommodations to “Regarded as” Disabled Individuals*

Because the United States Supreme Court has not yet addressed the issue of accommodations for a “regarded as” disability, it is useful to consider how the Justices may view the issue. Several scholars believe that the Supreme Court, if and when it decides to consider whether “regarded as” disabled individuals are entitled to reasonable accommodations, will follow the accommodation approach because of the fact that the ADA’s text does not distinguish between actual and “regarded as” disabilities.<sup>290</sup> These scholars believe that the statutory language will persuade Justices Scalia and Thomas (both literalists) and Justices Breyer and Ginsburg (“‘moderates’ who favor an expansive reading of the ADA”) to hold that “regarded as” employees are entitled to reasonable accommodations, and that a fifth justice will likely follow.<sup>291</sup>

However, another scholar suggests that Justice Scalia would hold against providing reasonable accommodations to a “regarded as” individual because he is against following a statute’s plain meaning if it would create an “absurd result[.]”<sup>292</sup> This scholar argues that an

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reducing the protection received by those within the protected class”).

289. See *D’Angelo*, 422 F.3d at 1238.

290. James O. Castagnera et al., “*Regarded as*” Discrimination Under the ADA & Accommodation Claims, 20 No. 11 Term. of Emp. Bull. 1, at \*3 (2004).

291. *Id.*

292. Dudley, *supra* note 5, at 415. Further, the Supreme Court has stated:

Where the literal reading of a statutory term would “compel an odd result,” [the Court] must search for other evidence of congressional intent to lend the term its proper scope. . . . “[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress’ intention, since the plain-meaning rule is “rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.”

absurd result would ensue if “regarded as” individuals received reasonable accommodations.<sup>293</sup> For example, the *Williams* court characterized accommodations for employees without an actual disability as a “bizarre result[.]”<sup>294</sup> Further, the United States Supreme Court’s 2003 denial of review of the *Kaplan* decision, which affirmed a summary judgment award to the employer by holding that a “regarded as” disabled employee is not entitled to reasonable accommodations, could be seen as a statement by the Court that *Kaplan* reached the right decision.<sup>295</sup> This argument is less persuasive today, however, as the Supreme Court also denied certiorari in *Williams*—a case that provided “regarded as” disabled employees with reasonable accommodations.<sup>296</sup> The United States Supreme Court must resolve this split by granting certiorari on a “regarded as” disability accommodations case.

#### *D. Middle Approach*

No circuit courts have considered a middle approach that might satisfy the statute and the circuit courts’ concerns with both of the other two approaches.<sup>297</sup> The Seventh Circuit seemed to suggest a need for such a middle ground approach in *Cigan v. Chippewa Falls*

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Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 454–55 (1989) (citations omitted).

293. Dudley, *supra* note 5, at 415.

294. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 774 (3d Cir. 2004); *see also supra* note 207 and accompanying text. *But see Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005) (stating that no bizarre result occurs if a reasonable accommodation is provided to a “regarded as” disabled employee because “an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—‘regarded as’ disabled”).

295. *See* Defendant’s Reply to Plaintiff’s Response in Opposition to Defendant’s Motion for Summary Judgment at \*2, *D’Angelo v. ConAgra Foods, Inc.*, No. 8:02-cv-1683-7-27TBM (M.D. Fla. Jan. 8, 2004), 2004 WL 1886356; *see also Kaplan v. City of N. Las Vegas*, 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003). The United States Supreme Court also denied writ of certiorari in *Weber*, giving more weight to the argument that the United States Supreme Court agreed with the “no accommodation” view. *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000).

296. *Williams*, 380 F.3d 751, *cert. denied*, 544 U.S. 961 (2005); *see also supra* notes 206–11 and accompanying text.

297. The need for a middle approach is shown in the *Williams* court’s comment that providing reasonable accommodations to “regarded as” employee may produce “bizarre results,” but the statutory text of the ADA does not support across-the-board refusal. *Williams*, 380 F.3d at 774.

*School District*.<sup>298</sup> There, the court considered “*what* must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee? . . . [I]t is hard to imagine that . . . employer[s] would have to afford [“regarded as” disabled plaintiffs] the sort of accommodations appropriate to a genuine disability.”<sup>299</sup> By taking together the concerns of the legislative history, the “no accommodation” approach, and the accommodation approach, a solution can be formed that will satisfy the worries of each position and of Congress, and that will keep negative attitudes and misperceptions from plaguing employees who are “regarded as” disabled.

#### IV. EDUCATION FOR IMPAIRMENT PROPOSAL

Much debate surrounds whether reasonable accommodations should be provided to “regarded as” disabled employees. But much of this debate may be caused because the courts have not broken down the categories of “regarded as” disabilities. *Sutton* refers to only two categories,<sup>300</sup> while the EEOC has stated that there are three categories.<sup>301</sup> Thus, the second group of accommodations, discussed below, will be limited to the employer’s perceptions category of “regarded as” disabilities if the EEOC’s third category that involves others’ attitudes toward “regarded as” disabled employees is not added to *Sutton*’s categories.

The EEOC has suggested that there are three categories of “regarded as” disabilities: (1) an individual experiences an impairment that is not substantially limiting, but the employer treats it as such; (2) an individual’s impairment is substantially limiting only because of others’ attitudes toward the impairment; and (3) an impairment does not exist, but the employer treats the employee as having a substantially limiting impairment.<sup>302</sup> Two of the “regarded as” disability categories include some sort of actual “physiological,

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298. 388 F.3d 331 (7th Cir. 2004).

299. *Id.* at 335–36.

300. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999); *see supra* notes 56, 62 and accompanying text.

301. Chivukula, *supra* note 27, at 552; *see supra* notes 62–66 and accompanying text.

302. 29 C.F.R. § 1630.2(l)(1)–(3) (2004); *see supra* notes 63–66 and accompanying text.

mental or psychological disorder or condition, cosmetic disfigurement, or anatomical loss,” although the actual impairment is not severe enough to fall within the actual disability prong.<sup>303</sup> However, the third “regarded as” disability category does not anticipate any sort of actual impairment.<sup>304</sup> It seems that the ADA requires employers to accommodate only “regarded as” disabled individuals who actually have physical or mental impairments.<sup>305</sup> The EEOC defines “physical and mental impairment,” not defined by the ADA, as “physiological, mental or psychological disorders or conditions, cosmetic disfigurements, or anatomical losses.”<sup>306</sup> But one must keep in mind:

[I]f any barrier to the disabled individual’s job performance is either totally unrelated to his disability or flows solely from functional limitations associated with his impairment, then removal of that barrier—while it may help the disabled individual become or remain employed—will not function to remedy disability discrimination and should not be deemed a “reasonable” accommodation.<sup>307</sup>

Thus, an individual who has an impairment that the employer misperceives to be disabling, although not an actual disability, is entitled to some sort of accommodation.<sup>308</sup> However, if an individual with none of these impairments is perceived as disabled by the employer, the individual is apparently not entitled to any accommodations under the ADA.<sup>309</sup> The three EEOC categories should therefore be examined separately by distinguishing no impairment from an actually limiting impairment.

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303. Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 635–36.

304. *See* 29 C.F.R. § 1630.2(l)(3).

305. Moberly, *Letting Katz Out of the Bag*, *supra* note 15, at 636.

306. *Id.* at 635–36 nn. 243–45.

307. Crossley, *supra* note 38, at 948 (footnote omitted).

308. One must consider, however, that not every accommodation would fix the problem, and some might cause an unfair advantage.

309. Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 636.

A. *The “Regarded as” Disabled Category with No Impairment*

The first category that should be examined is the third listed by the EEOC, which concerns an employee who does not have an impairment in any form, but who the employer regards as having a substantially limiting impairment.<sup>310</sup> This category is different from the other two in that the employee has no impairment of any sort.<sup>311</sup> The other two categories have some sort of actual impairments but the impairment does not substantially limit the employee’s job performance (which is a requirement under the actual disability prong).<sup>312</sup> None of the stereotypes associated with that impairment will affect the employee because he or she is not faced with any physical or mental limitation; thus, no accommodation is needed in such a circumstance.<sup>313</sup> To provide an accommodation to a “regarded as” disabled employee who has no impairment at all would be “expand[ing] liability beyond that supported by” the language of the ADA<sup>314</sup> and its legislative history. No “myth” about an employee without any impairment will hinder the employee after he or she informs the co-worker or employer that no such impairment actually exists (and if the misperception about such impairment still lingers, it should not affect that “regarded as” disabled employee because he or she does not have that impairment in the first place).<sup>315</sup> This argument contravenes the legislative history that is often touted by the courts that agree with the accommodation approach, which states that the ADA was written to protect “regarded as” disabled employees from perceptions that “may prove just as disabling” as actual disabilities.<sup>316</sup>

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310. See *supra* note 66 and accompanying text.

311. Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 636.

312. *Id.* at 635–37.

313. *Id.* at 636 (explaining that there is no duty to accommodate a regarded as disabled individual who does not suffer from any “impairment at all,” because “there is no physical or mental limitation for the employer to accommodate”).

314. See Moberly, *Perception or Reality?*, *supra* note 2, at 379.

315. Consider the situation of one employee making ethnic slurs toward another employee who is not part of the referenced ethnic group. Such slurs should not affect that worker any more than they affect the other workers who are not of that ethnicity.

316. H.R. REP. NO. 101-485(III), at 30 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 453.

Because the only reason for the employee's inequality is the employer's misperception, such inequality can be eliminated by informing the employer of his or her erroneous belief. Any accommodation thereafter would cause a favorable advantage for that employee.<sup>317</sup> To accommodate employees who have no impairment would create "bizarre results"<sup>318</sup> and cause a "windfall,"<sup>319</sup> as stated in *Weber* and *Kaplan*. Employees who are only "regarded as" disabled, but in all actuality have no impairment of any sort, are similar to other employees who can perform the functions required without any modifications to the traditional workplace and who are in good health without any physical or mental limitations for the employer to accommodate.<sup>320</sup> To accommodate them would not create the equal employment opportunity protected by the ADA.<sup>321</sup> "[H]ealthy employees" might be permitted to demand workplace accommodations through litigation or the threat of litigation if courts were to provide reasonable accommodations to "regarded as" employees<sup>322</sup> with no impairments. Thus, "regarded as" disabled employees without an actual impairment of any kind should not be entitled to accommodations of any sort.

*B. The "Regarded as" Disabled Categories with Actual Impairments That Are Not Substantially Limiting*

The last two categories of "regarded as" disabilities have several commonalities. These two categories include when an impairment experienced by an individual is not substantially limiting, but the employer perceives it as such,<sup>323</sup> and when an impairment is

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317. Travis, *supra* note 8, at 996–97.

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

319. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003); *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (stating that those without disabilities should not receive windfalls).

320. *See* Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 636 (stating that there is no duty to accommodate when there is no limitation to be accommodated) (internal quotation omitted).

321. *See* Travis, *supra* note 8, at 956–57 (explaining that the ADA is equal employment legislation).

322. *Id.* at 992 (quoting *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 149 n.12 (3d Cir. 1998) (en banc)).

323. *See supra* note 64 and accompanying text.

substantially limiting only because of others' attitudes toward the individual's impairment.<sup>324</sup> One of the similarities is that in both instances, the employee has an actual impairment, although it is not substantially limiting on its own.<sup>325</sup> Thus, these two categories are different from the category described above, in which the employee has no impairment at all.<sup>326</sup> However, these categories should not receive traditional workplace accommodations because only disabling traits must be accommodated when constructing a workplace.<sup>327</sup> If "regarded as" disabled employees with impairments were given "traditional accommodations that adapt workplace operations to the employee's characteristics,"<sup>328</sup> such employees would still receive "a windfall if they perpetuated their employers' misperception of a disability."<sup>329</sup> The reasonable accommodation rule under the ADA did not intend for "[d]ifferential treatment" to include "preferential treatment."<sup>330</sup> Further, preferential treatment could not be corrected by co-workers suing for "reverse disability discrimination," because a non-disabled worker cannot sue under the ADA in the event of any perceived "reverse disability discrimination."<sup>331</sup>

Even though numerous studies have shown that most accommodations cost very little, and that they may be even less for "regarded as" employees who have non-disabling impairments,<sup>332</sup>

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324. See *supra* note 65 and accompanying text.

325. Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 636.

326. *Id.*

327. Travis, *supra* note 8, at 998.

328. *Id.* (stating that "regarded as" disabled "plaintiffs possess no vocationally relevant traits that systematically were ignored by the unstated norm underlying conventional workplace design," and that giving "traditional accommodations that adapt workplace operations to the employee's characteristics would still provide a windfall").

329. *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

330. Travis, *supra* note 8, at 959.

331. Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1631 (1991) (stating that "[t]he ADA does not guarantee equal treatment regardless of disability, so a worker who feels harmed by accommodation occupies a different position than a person adversely affected by race- or sex-based affirmative action plans").

332. See Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 349 n.99 (2000) (stating that "69% of employers that provided accommodations spent nothing or less than \$500, 9% spent between \$2,001 and \$5,000, and 3% spent over \$5,000") (citations omitted); Travis, *supra* note 8, at 989; John M.

that money should nonetheless be used only for those individuals with actual disabilities. Traditionally accommodating “regarded as” disabled employees with non-disabling impairments may cost only a small amount of money, but the perception of preferential treatment created by other non-disabled employees and those with actual disabilities may negatively affect economics in other ways. This might include decreased morale of employees who notice the changes, who accurately view the “regarded as” employee as non-disabled, and who see such accommodations as a reward for “regarded as” disabled employees who do not deserve the accommodations more than any other workers.<sup>333</sup> Decreased employee morale may lead to an increase in absences and slower employee output.<sup>334</sup>

Although traditional accommodations are not needed, education may be needed to eliminate the stereotypes held by the employer and others who misperceive the employee as disabled.<sup>335</sup> Education would likely not lower employee morale because the “regarded as” employee is not accommodated in a way that would give him or her an advantage over other employees.<sup>336</sup> In the first category, where there is no actual impairment, informing the employer of the general

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Vande Walle, Note, *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, 922 (1998) (stating that “common sense tells us that the duty of reasonable accommodation in perceived disability cases is not likely to be a heavy burden on the employer because the impairments involved are not, by definition, disabling” and “[a]ny accommodation is either unnecessary or minor”). *But see supra* note 187 and accompanying text (stating that providing accommodations to employees that are not actually disabled “would . . . waste resources unnecessarily”).

333. Travis, *supra* note 8, at 989–91 (explaining that accommodations given to perceived disabled plaintiffs may decrease co-workers’ morale when they accurately view plaintiffs as having the same non-disabled impairment as themselves).

334. *Id.*

335. See Chivukula, *supra* note 27, at 564 (stating that the “only ‘accommodation’ that a ‘regarded as’ disabled employee requires or is entitled to under the ADA is their employer’s education”).

336. Most likely, co-workers would not see workforce education regarding the impairment as a benefit or advantage to the “regarded as” disabled employee because the “regarded as” disabled employee would not be reassigned and his or her workload would stay the same, as would his or her hours of work. Thus, the co-workers will not have an increased load or feel that the accommodation is something that they would want in the first place. Further, education may benefit others with the same impairment who apply for employment with the same employer in the future.

misperception will be enough to correct the problem. But with the two categories that concern an actual impairment that is not substantially limiting, there may remain a lingering effect that must be corrected.<sup>337</sup> However, in some cases, informing the employer and other employees of their misperceptions may fix the problem. “Dispelling stereotypes about disabilities will often come from the employees themselves” by showing their ability to productively complete their workplace assignments “notwithstanding impairments.”<sup>338</sup> This situation requires a case-by-case examination by courts to determine whether further education is needed to fix any lingering misperceptions about the “regarded as” disabled employee;<sup>339</sup> this is the approach advocated by the EEOC regulations and the *Williams* court.<sup>340</sup>

If there is a risk that the lingering effects of the misperceptions are still present among either the employer or other employees,<sup>341</sup> courts should consider education as a reasonable accommodation.<sup>342</sup> If the misperception is brought on by the employer, the employer should initiate educational training to correct the misperception. If the employer’s erroneous belief surfaced from the assumptions of co-

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337. See Travis, *supra* note 8, at 997 (explaining that if the employee informed the employer of a misperception, it may not fix the employer’s or other employees’ reactions to the employee’s conduct); see also Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 635–37 (explaining that a “regarded as” disabled employee who has an impairment that does not amount to an actual disability requires an accommodation, while a “regarded as” disabled employee without an impairment does not require any accommodations).

338. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).

339. See Nakis v. Potter, No. 01 Civ. 10047 (HBP), 2004 U.S. Dist. LEXIS 25250, at \*46 (S.D.N.Y. Nov. 30, 2004) (citations omitted) (“Whether a requested accommodation is reasonable depends on the specific circumstances of the case, and is ordinarily a question of fact.”).

340. See Dudley, *supra* note 5, at 416 (stating that the EEOC “advocate[s]” the case-by-case approach); see also Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 774 (3d Cir. 2004) (explaining that the ADA does not support “an across-the-board refusal” of reasonable accommodations to “regarded as” disabled individuals).

341. Other co-workers’ misperceptions are only considered under the EEOC’s approach; under *Sutton*, co-workers’ misperceptions do not fall under the “regarded as” prong, and therefore do not need any kind of accommodation.

342. See Travis, *supra* note 8, at 999 (explaining that if the employer’s prior perception may affect future employment interactions, education may be needed); see also Chivukula, *supra* note 27, at 564 (stating that education would “give full effect to the intent of the ‘regarded as’ prong of the ADA, namely, to combat the disabling nature of discriminatory attitudes”).

workers, mandatory sensitivity training might be required as a social workplace accommodation.<sup>343</sup> If customer perceptions cause the employer's mistaken belief, a special marketing plan may be needed to correct any irrational consumer desires.<sup>344</sup>

"Regarded as" disabled employees are only limited from reaching their full potentials and from gaining equality by obstacles "in other people's minds."<sup>345</sup> Therefore, education through the above three approaches would solve this inequality and satisfy the purpose of the accommodations rule by removing the obstacles that stand in the way of "regarded as" employees.<sup>346</sup> Thus, the ADA's goal of "encourag[ing] employers to become more enlightened about their employees' capabilities" can be accomplished through education.<sup>347</sup> Education will allow the employee who was previously treated in a negative manner compared to others with the same impairment to obtain equal opportunities, and will prevent one employee from "get[ting] to work, while [the other employee who is "regarded as" disabled] is sent home unpaid."<sup>348</sup> Although traditional or structural changes to the workplace are not needed to accommodate any "regarded as" disabilities, workplace education may be required to assuage lingering effects of prior misperceptions about the "regarded as" disabled employee.

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343. See Travis, *supra* note 8, at 999 (stating that mandatory sensitivity training can correct employers' misperceptions created by co-workers' prejudices); see also Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 638 (explaining that "mandatory sensitivity training may succeed in educating" co-workers of the correct way to deal with "regarded as" disabled persons).

344. See Travis, *supra* note 8, at 999 (discussing the need for a creative marketing plan when the employer's misperceptions stem from customers' irrational beliefs); see also Moberly, *Letting Katz out of the Bag*, *supra* note 15, at 638 (explaining that a creative marketing plan may help lower customer dissatisfaction with "regarded as" disabled workers by "altering customer preferences").

345. Travis, *supra* note 8, at 1000-01 (internal quotation omitted).

346. See *id.* at 1000 (stating that "[t]he accommodations rule was designed broadly 'to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities' as the non-disabled workforce") (internal quotation omitted).

347. Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005).

348. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004).

*C. The Effect of Sutton on the Education for Impairment Approach*

The Supreme Court in *Sutton* has adopted only two of the EEOC's three ways that an employee can be "regarded as" disabled, leaving out the instance in which an employee's impairment is substantially limiting due to other employees' attitudes.<sup>349</sup> Under this approach, the only perceptions that matter are those of the employer; fellow employees and customers are left out of the picture.<sup>350</sup> But it would make sense for an employer to be responsible also for employees, just as an employer is held liable for employees' sexual harassment under Title VII and for intentional torts performed by employees while acting within the scope of the employer's business.<sup>351</sup> Also, Congress mentioned in its hearings on the ADA that acceptance by co-workers and customers are common barriers experienced by "regarded as" employees.<sup>352</sup> Because the Supreme Court has listed only two categories of "regarded as" disabilities, breaking down the analysis into two groups considering the three categories should not affect the Court's view. If the *Sutton* Court's view remains in effect and the employer's perception, not those of the co-workers or customers, matters to the analysis of an actual impairment that is not substantially limiting, the only accommodation required in such a situation would be education of the employer, but not education of

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349. See *supra* note 62 and accompanying text.

350. See *id.*

351. See *Sparks v. Jay's A.C. & Refrigeration, Inc.*, 971 F. Supp. 1433, 1436 (M.D. Fla. 1997); see also *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) (noting that a plaintiff establishes respondeat superior liability under Title VII by showing that "the employer knew or should have known of the harassment and failed to take prompt action to remedy the violation," or directly if the harassing employee is the employer's "agent"); *Blount v. Sterling Healthcare Group, Inc.*, 934 F. Supp. 1365, 1372 (S.D. Fla. 1996) (holding that an employer will be liable for respondeat superior under Florida law for the intentional torts committed by an employee if the alleged wrongs were performed within the scope of the employer's business).

352. In rationalizing the "regarded as" prong, Congress stated that "[s]ociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding . . . acceptance by co-workers and customers." *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 167 (E.D.N.Y. 2002) (quoting H.R. REP. No. 101-485 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 453) (emphasis added) (ellipses in original). Congress considered that "[c]ategorically denying reasonable accommodations to 'regarded as' plaintiffs would allow the prejudices and biases of others to impermissibly deny an impaired employee his or her job because of the mistaken perception that the employee suffers from an actual disability." *Id.* at 168.

others, through such approaches as sensitivity training and special marketing plans. Thus, co-workers or customers would not be educated about the correct perception of the actual, but not substantially limiting, impairment.

*D. Application of Accommodations to the “Regarded as” Disability Categories Combined*

Traditional accommodations should not apply to any of the “regarded as” categories. If courts were to find that “regarded as” disabled employees are entitled to traditional accommodations, employees that are impaired would be better off if their employers treated them as disabled under the ADA than if their employers did not.<sup>353</sup> However, although traditional accommodations should not be provided to “regarded as” disabled employees, education should be provided for those individuals who fall within the two categories that require some actual, erroneously-perceived impairment that continues to have lingering negative effects after the employee informs his or her employer or others of the misperception. This socially accommodating education (whether through an educational program, sensitivity training, special marketing plan, or otherwise) may be needed for those “regarded as” employees who have an actual impairment that is not substantially limiting.<sup>354</sup> This proposal will be referred to as the “education for impairment” approach.

Although traditional workplace accommodations should not be provided to any of the three categories of “regarded as” disabled individuals, other claims besides failure to accommodate are available that are better suited to deter employers from forming false perceptions, such as discriminatory treatment for employees who can demonstrate that their employers regarded them as disabled.<sup>355</sup>

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353. *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999).

354. *See Moberly, Perception or Reality?*, *supra* note 2, at 364–65 (noting the argument that “regarded as” disabled individuals with some sort of impairment but not an actual disability should receive ADA protections, but if no impairment at all exists no ADA protections should apply).

355. *See Cebertowicz v. Motorola, Inc.*, 178 F. Supp. 2d 949, 954 (N.D. Ill. 2001); *see also* *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998) (“[I]f it turns out that a ‘regarded as’ plaintiff who cannot perform the essential functions of her job is not entitled to accommodation . . . he or she need not necessarily be without remedy. The plaintiff still might

“Regarded as” discrimination claims are analogous to claims based on race, sex and other offensive discrimination because they prevent individuals from exploiting opportunities of employment due to erroneous fears and myths.<sup>356</sup> The ADA includes Title VII remedies as amended by the Civil Rights Act of 1991.<sup>357</sup> The amended Title VII allows a court to provide several remedies for discrimination, including “limited compensatory and punitive damages, reasonable attorneys’ fees and costs, an injunction against the unlawful employment practice,” and affirmative action procedures such as “reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.”<sup>358</sup> However, if the employer has reinstated the “regarded as” disabled employee and the workforce no longer misperceives his or her impairment, there is “no need for additional remedies.”<sup>359</sup> Education and discrimination claims will help keep the force of the “regarded as” disability prong from being reduced due to the elimination of the right of traditional accommodations, and will keep an employer from making employment decisions based on improper motives because such decisions will not be without legal consequences.<sup>360</sup>

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be entitled to injunctive relief against future discrimination . . .”).

356. See Travis, *supra* note 8, at 949. Judge Richard Posner, discussing the “regarded as” disability definition, stated:

[A]t first glance peculiar, [it] actually makes a better fit with the elaborate preamble to the [ADA], in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. Wisconsin, 44 F.3d 538, 541 (7th Cir. 1995).

357. Travis, *supra* note 8, at 1008.

358. *Id.* at 1008–09 (quoting 42 U.S.C. § 2000e-5(g)(1) (1994) (emphasis omitted)).

359. See Buskirk v. Apollo Metals, 307 F.3d 160, 171 (3d Cir. 2002) (stating that “because [the employer] ha[d] reinstated [the employee] and no longer misperceive[d] his medical condition” there was “no need for any additional remedies”); see also Ammons-Lewis v. Metro. Water Reclamation Dist., No. 03 C 0885, 2004 U.S. Dist. LEXIS 21917, at \*16 (N.D. Ill. Nov. 1, 2004) (holding that an employee with a “non-existent ADA disability” should not receive an accommodation because her employer “did not fire, demote, or in any way discriminate against her because of her allergy”).

360. See Travis, *supra* note 8, at 994 (explaining that if the perceived disability prong’s scope did not provide any accommodation rights, there would “be a greater number of

*E. Applying the Education for Impairment Approach to the Federal Courts' Analyses*

The education for impairment approach considers both the “no accommodation” and accommodation approaches, while also taking into consideration the legislative history and statutory language of the ADA. Such an approach must be examined in light of the concerns of the federal courts in finding for or against reasonable accommodations for “regarded as” disabled individuals.

The “no accommodation” decisions, including *Weber* and *Kaplan*, are correct in holding that traditional accommodations should not be provided to “regarded as” disabled employees. However, in cases in which the plaintiff has at least an actual impairment that is not substantially limiting, such as *Williams*<sup>361</sup> and *Jacques*,<sup>362</sup> something must be provided to rid the workplace of the social misconceptions about the “regarded as” disabled employee. Traditional accommodations, however, are not the answer because a “windfall” to the “regarded as” disabled employees would occur.<sup>363</sup> The better approach would be to provide education on behalf of “regarded as” disabled employees who have actual impairments that are not substantially limiting, but who continue to face negativity in the workplace.

Education would provide no “windfall” because it does not afford the “regarded as” disabled employee any type of structural accommodation that would lighten the load or shift extra work to another employee. The only benefit would be to eliminate the

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improperly motivated employment decisions that are not legally actionable”); *see also* *Custer v. Penn State Geisinger Health Sys.*, No. 00-CV-1860, 2004 WL 3088616, at \*6 (M.D. Pa. Dec. 27, 2004) (stating that “to decide that an employer cannot be liable when they regard a non-disabled person as disabled, the result would be that the employer could discriminate on the basis of a perceived impairment so long as the individual denied the perceived disability”); *Moberly, Perception or Reality?*, *supra* note 2, at 365–66 (arguing that whether an employee has an actual disability is “inconsequential” because the employer has already discriminated against the “regarded as” disabled employee, which is prohibited by law (quoting *Sanchez v. Lagoudakis*, 486 N.W.2d 657, 660 (Mich. 1992))).

361. In *Williams*, the employee suffered from the mental impairment of depression. *See supra* note 192 and accompanying text.

362. In *Jacques*, the employee suffered from the mental impairment of bipolar disorder. *See supra* note 133 and accompanying text.

363. *See supra* note 127 and accompanying text.

specific harassment and harms faced by the “regarded as” disabled employee. Further, the costs of education would be justified,<sup>364</sup> and would probably not be as costly as traditional accommodations. This system would answer *Kaplan*’s concern by allowing “limited resources” to still help the actually disabled workforce. Although the ADA and its legislative history does not distinguish between actually and “regarded as” disabled individuals, as *Williams* points out,<sup>365</sup> the ADA also does not demand the same accommodation for every scenario—different cases demand different remedies.<sup>366</sup> Therefore, education provided only to “regarded as” employees with some sort of actual impairment will prevent the “bizarre results” that *Williams* feared if reasonable accommodations were provided to all “regarded as” disabled individuals, and will prevent an “across-the-board refusal” that is not supported by the ADA’s text.<sup>367</sup>

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364. See John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1601–02 (1992) (stating that worker productivity or economic value to employers may be increased if antidiscrimination employment laws succeed in lowering attitudinal discrimination, and commenting that the economic benefits of even small gains in employee performance may drastically offset the direct or indirect costs of implementing the particular antidiscrimination law); Barbara Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1, 22 (1986) (explaining that the social costs of disability accommodations are “far outweighed by the benefits of maximizing the employability of all work-capable individuals, whether handicapped or erroneously perceived as handicapped”). Chances are that if an employer has a misperception about a certain impairment that is not an actual disability in one employee, the employer will have that same view when another employee arrives with the same impairment. Education regarding an impairment will therefore not only help the present “regarded as” disabled employee, but all other employees (who both currently are or will in the future be employed) with the same impairment.

365. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 774 (3d Cir. 2004).

366. The ADA provides a case-by-case approach to “regarded as” cases. See *supra* notes 75, 204, 314–12 and accompanying text.

367. The *Williams* 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 seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results.

*Williams*, 380 F.3d at 774; see also *Nakis v. Potter*, No. 01 Civ. 10047, 2004 U.S. Dist. LEXIS 25250, at \*46 (S.D.N.Y. Nov. 30, 2004) (“[T]he ADA does not obligate an employer to provide a disabled employee every accommodation on his wish list.” (quoting *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996))).

An educational accommodation also addresses *Pathmark's* concern that it would be "odd" to provide an employee accommodations just because he or she is misperceived by the employer or co-workers, when other impaired employees do not receive the same advantage. Education gives no advantage over other co-workers because education only makes others aware of the misperception. The education for impairment approach also answers the *Jacques* court's concern that an employee who is only impaired and one who is both impaired and "regarded as" having a disability are fundamentally different situations.<sup>368</sup> The stigma caused by the disabling attitudes of others will be corrected with education, making the two situations equal. Equality between employees is the goal of the ADA.<sup>369</sup> Those who have an impairment and who are "regarded as" disabled will have misperceptions corrected by education, which will in turn create equality in the workforce.

Finally, the education for impairment approach answers Judge Easterbrook's question in *Cigan v. Chippewa Falls School District*.<sup>370</sup> Assuming an employer is required to accommodate a "regarded as" disabled employee, "what must be accommodated: any condition that the employer (wrongly) supposes to exist, or only those disabilities that actually afflict the employee?"<sup>371</sup> The only "regarded as" disability that may receive accommodation is an actual impairment that is not substantially limiting, but that causes a lingering effect on the employee's work production and capabilities because of the negative stereotypes and myths of the employer and/or co-workers. Further, the accommodation that may be granted (education) is not an accommodation in the traditional sense, but is only one that will fix the lingering stereotypes and myths. This social workplace accommodation educates the employer, co-workers, or customers, depending on the factual circumstances of each particular case.<sup>372</sup>

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368. See *supra* note 159 and accompanying text.

369. See *Alexander v. Pathfinder, Inc.*, 906 F. Supp. 502, 507 (E.D. Ark. 1995) ("The purpose of the A.D.A. . . . is to ensure opportunity to take part.").

370. 388 F.3d 331 (7th Cir. 2004).

371. *Id.* at 335; see *supra* note 299 and accompanying text.

372. See *supra* notes 353–51 and accompanying text.

## V. CONCLUSION

The issue of whether to accommodate “regarded as” disabled individuals does not have a clear answer in the language of the ADA or within its legislative history. The federal circuits are split on the issue,<sup>373</sup> with half of the circuits stating that a reasonable accommodation should not be provided to “regarded as” disabled individuals,<sup>374</sup> an approach that is shared by the EEOC. This Note agrees that accommodations in the traditional sense should not be provided to “regarded as” disabled individuals. However, if the “regarded as” disabled individual has some sort of impairment that does not rise to the caliber of an actual disability, that individual should be accommodated by means of educating others who misperceive his or her impairment. However, “regarded as” disabled individuals who do not have an actual impairment at all should not be provided the accommodation of education or any other accommodation. Such an approach meets the concerns of the circuit and district courts that have heard the issue, and is consistent with the text and legislative history of the ADA.

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373. *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 773 (3d Cir. 2004).

374. *See supra* notes 262–67 and accompanying text.

## APPENDIX A

The following is an overview of federal court cases discussing whether an employer is required to provide a reasonable accommodation to a “regarded as” disabled employee under the Americans with Disabilities Act.

## I. U.S. SUPREME COURT

There are no Supreme Court discussions or decisions on this issue.

## II. 1ST CIRCUIT

*A. Ruling for Accommodations*

1) *Katz v. City Metal Co.*, 87 F.3d 26, 33 (1st Cir. 1996) (concluding that the employee could present the issue of whether he was perceived as disabled by his employer because “the language and policy of the [ADA] seem to . . . offer protection . . . to one who is . . . wrongly perceived” just as it does for one who is “actually disabled”).

*B. District Courts*

## 1. Ruling for Accommodations

1) *Jewell v. Reid’s Confectionary Co.*, 172 F. Supp. 2d 212, 218 (D. Me. 2001) (stating that “[a]lthough the court in *Katz* did not engage in a substantive analysis of the legislation and case law, as the *Weber* court did, the Court is bound by the higher court’s ruling”).

## III. 2ND CIRCUIT

*A. Discussing the Issue but Failing to Decide*

1) *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 64 (2d Cir. 2003) (discussing the issue and citing cases for both sides, but without deciding).

2) *Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 104–05 n.3 (2d Cir. 2003) (stating without deciding that “[i]t is not at all clear that a reasonable accommodation can ever be required in a ‘regarded as’ case (such as this one) in which it is undisputed that the plaintiff was not, in fact, disabled”).

## B. *District Courts*

### 1. Ruling for Accommodations

1) *Lorinz v. Turner Constr. Co.*, No. 00 CV 6123SJ, 2004 WL 1196699, at \*8 n.7 (E.D.N.Y. May 25, 2004). In a footnote, the court stated:

Although not addressed by counsel for either party, the Court notes that although there is some dispute as to whether “regarded as” disabled plaintiffs are entitled to reasonable accommodations under the ADA, the Court finds Judge Block’s reasoning in *Jacques* persuasive that “regarded as” disabled plaintiffs are entitled to accommodations under the ADA.

*Id.* (citing *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 163–71 (E.D.N.Y. 2002)).

2) *Jacques*, 200 F. Supp. 2d at 166–71 (deciding that “regarded as” disabled individuals are entitled to reasonable accommodations after considering the plain language of the ADA, its legislative history, and the mandatory interactive process, and after critiquing *Weber*’s underlying rationale).

## IV. 3RD CIRCUIT

### A. *Ruling for Accommodations*

1) *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 774-76 (3d Cir. 2004) (determining after looking at the plain language of the ADA, the legislative history, the Supreme Court’s decision in *Arline*, and the “windfall” proposition that a “regarded as” disabled individual is entitled to reasonable accommodations).

### B. *Discussing the Issue but Failing to Decide*

1) *Buskirk v. Apollo Metals*, 307 F.3d 160, 170–71 (3d Cir. 2002) (considering whether an employer is required to reasonably accommodate an employee, but concluding that an accommodation had already been provided so no decision on the issue was needed).

2) *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 n.2 (3d Cir. 1999) (commenting that extending a duty to accommodate to “record of” claims implicates the same concerns as allowing a duty to accommodate claim to a “regarded as” plaintiff, but expressly not deciding the issue).

3) *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 195–96 (3d Cir. 1999) (discussing whether an employer is required to provide reasonable accommodations to a “regarded as” disabled employee and mentioning arguments for both sides, but failing to make a decision on the issue).

4) *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148–49 n.12 (3d Cir. 1998) (en banc) (considering arguments on both sides but not deciding the issue).

### C. District Courts

#### 1. Ruling Against Accommodations

1) *Danyluk-Coyle v. St. Mary’s Med. Ctr.*, No. C.A. 00-5943, 2001 WL 771048, at \*3 (E.D. Pa. Apr. 5, 2001) (concluding that “non-disabled employees perceived as disabled by their employers are not entitled to reasonable accommodations under the ADA”).

2) *Balliett v. Heydt*, Nos. Civ.A. 95-5184, Civ.A. 95-7182, 1997 WL 611609, at \*6 (E.D. Pa. Sept. 25, 1997) (concluding that an employer is “not required to provide [a] reasonable accommodation for ‘regarding’ [an employee] as disabled”).

#### 2. Ruling for Accommodations

1) *Custer v. Penn State Geisinger Health Sys.*, No. 00-CV-1860, 2004 WL 3088616 (M.D. Pa. Dec. 27, 2004).

Although other Circuit Courts have reached contrary rulings, holding that “regarded as” plaintiffs do not have standing to seek reasonable accommodations, we are bound by the precedent set by our Third Circuit . . . [B]ecause the statute defines “disabled” as, *inter alia*, “being regarded as having an . . . impairment[]”, [the court] would find it difficult to reach a conclusion to the contrary, even if [the court] were not bound by precedent.

*Id.* at \*5–6 (citations omitted).

#### V. 4TH CIRCUIT

There are no Fourth Circuit Court of Appeals discussions or decisions on this issue.

##### A. *District Courts*

###### 1. Ruling Against Accommodations

1) *Betts v. Rector & Visitors*, 198 F. Supp. 2d 787, 799 (W.D. Va. 2002) (concluding that only actually disabled individuals, not “regarded as” disabled individuals, are entitled to reasonable accommodations).

#### VI. 5TH CIRCUIT

##### A. *Ruling Against Accommodations*

1) *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998) (concluding that “an employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment”).

##### B. *District Courts*

###### 1. Ruling Against Accommodations

1) *Bradshaw v. Mktg. Specialists Sales Co.*, No. 3:98-CV-1312-D, 2001 U.S. Dist. LEXIS 6316, at \*55-56 (N.D. Tex. Mar. 29, 2001) (“Under the ADA, only individuals with disabilities are entitled to reasonable accommodations.”).

2) *Price v. City of Terrell*, No. CIV.A.3:99-CV-0269-D, 2000 WL 1872081, at \*5 (N.D. Tex. Dec. 20, 2000) (“A person who is merely regarded as disabled is not entitled to reasonable accommodation.”).

3) *Matlock v. City of Dallas*, No. Civ.A. 3:97-CV-2735, 1999 WL 1032601, at \*5 (N.D. Tex. Nov. 12, 1999) (citing *Weber* and *Cannizzaro* for support of its conclusion that “regarded as” disabled employees are not entitled to reasonable accommodations).

4) *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 475 (N.D. Tex. 1997) (“[T]he duty to make a reasonable accommodation arises only when the individual is disabled; no such duty arises when the individual merely is ‘regarded as’ being disabled as defined under the ADA.”).

## VII. 6TH CIRCUIT

### A. *Ruling Against Accommodations*

1) *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (stating that if a disability is found under the “regarded as” prong, it “would obviate the Company’s obligation to reasonably accommodate [the employee]”).

2) *Gilday v. Mecosta County*, 124 F.3d 760, 764 n.4 (6th Cir. 1997) (opining in a footnote that a “person without an actual disability would not need any accommodation”). However, another district court has stated that “the Sixth Circuit’s footnote in *Gilday* is, at best, dicta.” *Powers v. Tweco Prods., Inc.*, 206 F. Supp. 2d 1097, 1113 (D. Kan. 2002).

### B. *District Courts*

#### 1. Ruling for Accommodations

1) *Spath v. Berry Plastics Corp.*, 900 F. Supp. 893 (N.D. Ohio 1995). The *Spath* court seems to follow the view that “regarded as” disabled individuals are entitled to reasonable accommodations. “[Employer] . . . has produced no evidence of its inability to accommodate [employee]’s perceived disability,” thus employer’s motion for summary judgment was denied. *Id.* at 904.

## VIII. 7TH CIRCUIT

### A. *Discussing the Issue but Failing to Decide*

1) *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335–36 (7th Cir. 2004) (“Because the record would not permit a reasonable trier of fact to conclude that the [employer] regarded [the employee] as ‘disabled,’ we need not decide whether the ADA requires an employer to accommodate the demands of a person who is regarded as disabled but lacks an actual disability.”).

2) *Mack v. Great Dane Trailers*, 308 F.3d 776, 783 n.2 (7th Cir. 2002) (stating after discussing the issue briefly and citing to circuit courts deciding both ways that “[w]hether there is any duty to accommodate an employee who is not actually disabled but is regarded as disabled is a question we need not decide today”).

3) *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (strongly suggesting without deciding that a reasonable accommodation should be provided to employees with a record of disability).

## B. *District Courts*

### 1. Ruling Against Accommodations

1) *Cebertowicz v. Motorola, Inc.*, 178 F. Supp. 2d 949, 953–54 (N.D. Ill. 2001) (“[T]his Court joins those courts that have held an employer has no duty under the Act to provide a viewed-as-disabled (but not actually disabled) employee with *any* accommodation.”).

2) *Ross v. Matthews Employment*, No. 00 C 1420, 2000 WL 1644584, at \*5 (N.D. Ill. Oct. 27, 2000) (“Non-disabled employees perceived as disabled by their employers are not entitled to reasonable accommodations under the ADA.”).

### 2. Ruling for Accommodations

1) *Shaw v. GDX N. Am.*, No. 3:05-CV-94-RM, 2005 WL 2614938 (N.D. Ind. Oct. 13, 2005) (stating that it was not persuaded that “there are no possible circumstances under which the ADA can ever require an employer to accommodate a person the employer mistakenly believes to be disabled”).

2) *Miller v. Heritage Prods., Inc.*, No. 1:02-CV-1345-DFH, 2004 WL 1087370, at \*10 (S.D. Ind. Apr. 21, 2004) (finding the argument that “regarded as” disabled individuals are entitled to reasonable accommodations “more persuasive”).

### 3. Discussing the Issue but Failing to Decide

1) *Green v. Pace Suburban Bus*, No. 02 C 3031, 2004 U.S. Dist. LEXIS 12956, at \*38–40 (N.D. Ill. July 9, 2004) (discussing the issue and cases that have decided both ways, but failing to decide).

2) *Ragan v. Jeffboat*, 149 F. Supp. 2d 1053, 1069 n.11 (S.D. Ind. 2001) (discussing the issue and cases that have decided both ways, but not ruling).

3) *Huizenga v. Elkay Mfg.*, No. 99 C 50287, 2001 U.S. Dist. LEXIS 7543, at \*23 n.5 (N.D. Ill. June 5, 2001) (discussing the issue and citing cases that have found no accommodation for “regarded as” disabled individuals, but not deciding).

4) *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1119 (N.D. Ind. 1998) (commenting that “logic dictates that if the evidence supports a regarded as theory of disability, the case must then proceed under a disparate treatment, not a reasonable accommodation, theory”).

## IX. 8TH CIRCUIT

A. *Ruling Against Accommodations*

1) *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999) (holding that “‘regarded as’ disabled plaintiffs are not entitled to reasonable accommodations”).

B. *District Courts*1. *Ruling Against Accommodations*

1) *Bishop v. Nu-Way Serv. Stations, Inc.*, 340 F. Supp. 2d 1008, 1013–14 (E.D. Mo. 2004) (ruling that a “‘regarded as” disabled employee is not entitled to reasonable accommodations).

2) *Nuzum v. Ozark Auto. Distribs., Inc.*, 320 F. Supp. 2d 852, 870 n.16 (S.D. Iowa 2004) (stating that “it is well established in the Eighth Circuit that the ADA does not impose upon an employer a duty to accommodate a ‘regarded as’ disabled plaintiff”).

3) *Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002) (“The ADA does not impose upon an employer the duty to accommodate a qualified ‘disabled’ employee when the employee is statutorily disabled within the meaning of 42 U.S.C. § 12102(B) (record of impairment) or 42 U.S.C. § 12102(C) (regarded as disabled).” (quoting *Barnes v. Nw. Iowa Health Ctr.*, 238 F. Supp. 2d 1053, 1090 (N.D. Iowa 2002))).

4) *Barnes*, 238 F. Supp. 2d at 1090 (holding no accommodations for “regarded as” disability).

## X. 9TH CIRCUIT

A. *Ruling Against Accommodations*

1) *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1233 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003) (“[T]here is no duty to accommodate an employee in an ‘as regarded’ case.”).

B. *District Courts*1. *Ruling Against Accommodations*

1) *Whitehall v. City of Santa Rosa*, No. C 03-3186 SBA, 2004 WL 2359863, at \*3 (N.D. Cal. Oct. 19, 2004) (“Reasonable accommodation is not available for a perceived disability claim.”).

2) *Bass v. County of Butte*, No. CIV-S-02-2443 DFL/CG, 2004 WL 1925468, at \*5 (E.D. Cal. Aug. 6, 2004) (“[A]n employer has no duty to accommodate a ‘regarded as’ plaintiff, as opposed to a plaintiff who is actually disabled.”).

3) *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at \*4 (D. Ariz. June 3, 2004) (citing *Kaplan* and concluding that employers do not have to accommodate “regarded as” disabled individuals).

4) *Deppe v. United Airlines*, No. C 96-02941 CRB, 2001 WL 902648, at \*6 (N.D. Cal. July 31, 2001) (finding the *Fontanilla* court reasoning persuasive and determining that “regarded as” disabled employees are not entitled to reasonable accommodations).

5) *Fontanilla v. City & County of S.F.*, No. C-96-3916 JCS, 2001 WL 513395, at \*15–16 (N.D. Cal. Feb. 28, 2001) (concluding that an employer is not required to accommodate a “regarded as” disabled employee based on the case law, statutory language, and the EEOC regulations).

## XI. 10TH CIRCUIT

### A. *Ruling for Accommodations*

1) *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005) (holding that an employer must provide reasonable accommodations to a “regarded as” disabled employee based on the plain language of the ADA).

### B. *District Courts*

#### 1. *Ruling Against Accommodations*

1) *Powers v. Tweco Prods., Inc.*, 206 F. Supp. 2d 1097 (D. Kan. 2002).

[C]ommon sense, if nothing else, would preclude plaintiff from claiming that she was not “disabled” but that she nonetheless was entitled to an accommodation for a nonexistent disability . . . . Plaintiff, by conceding she was not disabled, has essentially waived any claim that [employer] was required to accommodate her. Therefore, the court holds that plaintiff, who is admittedly not disabled, is not entitled to any accommodation when determining whether she is “qualified.”

*Id.* at 1114.

2) *Bernhard v. Dorskocil Cos.*, 861 F. Supp. 1006, 1013 (D. Kan. 1994) (“Plaintiff cannot argue to a jury, on the one hand, that he has no disability and, on the other hand, that his disability should have been accommodated.”). However, *Bernhard* was decided under the

Kansas Acts Against Discrimination (describing disability the same as the ADA); moreover, *Powers* described *Bernhard* as “merely recogniz[ing] the incredulity that a plaintiff would face from a jury if he were to argue that he was not really disabled but nonetheless needed an accommodation.” *Powers*, 206 F. Supp. 2d at 1113.

## XII. 11TH CIRCUIT

### A. *Ruling for Accommodations*

1) *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005) (concluding that based on the plain language of the ADA an employer is required to reasonably accommodate “regarded as” disabled employees).

2) *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th Cir. 2002) (“We . . . hold that a plaintiff may maintain a claim under the ADA of being perceived as disabled without proof of actually being disabled.”). One scholar stated that this case held that a “regarded as” disabled individual is entitled to reasonable accommodations. *Individuals Regarded as Having an Impairment*, EMPLOYMENT DISCRIMINATION COORDINATOR, EDC ANAFED § 6:35 n.7 (and accompanying text) (2004). However, the Eleventh Circuit in *D’Angelo*, decided three years after *Williams*, stated that the issue of whether to provide reasonable accommodations to “regarded as” disabled employees was an “issue of first impression in this Circuit.” *D’Angelo*, 422 F.3d at 1235.

### B. *District Courts*

#### 1. Briefs for Accommodations

1) Defendant’s Response in Opposition to Plaintiff’s Motion for Reconsideration, *D’Angelo v. ConAgra Foods, Inc.*, No. 8:02-cv-1683-T-27TBM (M.D. Fla. Feb. 5, 2004), 2004 WL 1886362.

2) Defendant’s Reply to Plaintiff’s Response in Opposition to Defendant’s Motion for Summary Judgment, *D’Angelo v. ConAgra Foods, Inc.*, No. 8:02-cv-1683-T-27TBM (M.D. Fla. Jan. 8, 2004), 2004 WL 1886356.

3) Defendant’s Points and Authorities in Support of Motion for a Judgment as a Matter of Law re: Failure to Accommodate, *Bell v. Am. Med. Response*, No. 8:01-CV-861-T-TBM (M.D. Fla. June 24, 2003), 2003 WL 23729418.

### XIII. DISTRICT OF COLUMBIA CIRCUIT

There are no District of Columbia Circuit Court of Appeals discussions or decisions on this issue.

#### A. *District Courts*

##### 1. Discussing the Issue but Failing to Decide

1) Mack v. Strauss, 134 F. Supp. 2d 103, 111 n.3 (D.D.C. 2001) (“It is doubtful that plaintiff can even claim failure to accommodate given its logical inconsistency with a claim that he was regarded as disabled.”).