

# YES, THERE IS A DUTY TO ACCOMMODATE SOMEONE “REGARDED AS” DISABLED UNDER THE ADA

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## INTRODUCTION

Imagine this: You are an attorney who specializes in disability or employment discrimination law. A woman comes to you with a potential claim. She is a police officer who has a mild form of multiple sclerosis (“MS”). The department where she works has learned of her MS and believes it limits her ability to work. In fact her MS is rather mild, and it does not interfere with her work at all. Some of the other police officers on the force have heard about her MS, and they refuse to work with her because they fear she will not be a reliable partner. The police department has fired her. Applying the Americans with Disabilities Act (ADA)<sup>1</sup> to these facts, what should you advise this client? Does the ADA protect her because her employer *regarded her as disabled*?<sup>2</sup>

In fact, the ability to bring a claim for failure to accommodate depends not on a clear and simple application of the law, but rather it depends on *geography*.<sup>3</sup> The United States Courts of Appeals are split, and the Supreme Court has denied certiorari three times on the issue of whether, as a matter of law, there is a duty under the ADA to accommodate a person regarded as disabled.<sup>4</sup> Although the ADA clearly provides protection for the person “regarded as” disabled,<sup>5</sup> it is far from clear what the nature of this protection is.

This Note asserts that, as a matter of law, there should be a duty to accommodate the person “regarded as” disabled under the ADA. This Note first looks at the roots of the ADA, considering the predecessor Rehabilitation Act as well as the legislative history of the ADA itself. Next, this Note examines the cases comprising the current split among the United States Courts of

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<sup>1</sup> 42 U.S.C. §§ 12101-12213 (2000).

<sup>2</sup> This problem is based on a hypothetical presented in *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 167 (E.D.N.Y. 2002).

<sup>3</sup> Philip M. Berkowitz, *Geography Rules Unsettled Questions*, 234 N.Y.L.J. 5, 5 (Sept. 8, 2005).

<sup>4</sup> See Figure 1, *infra*.

<sup>5</sup> 42 U.S.C. § 12102(2)(c) (2000).

Appeal and the reasoning of these courts. The Note concludes by recommending that courts utilize other features inherent to the ADA – namely the reasonableness requirement and undue hardship defense – to protect against possible “bizarre” results from enforcing a duty to accommodate for the “regarded as” plaintiff. Finally, the Note also briefly discusses alternative theories under which a “regarded as” plaintiff may seek relief.

## I. BACKGROUND OF THE “REGARDED AS” DEFINITION OF DISABILITY

### A. *The Rehabilitation Act of 1973 – The Roots of the ADA*

Congress enacted the Americans with Disabilities Act (ADA) in 1990, acknowledging that Civil Rights legislation had not addressed persons with disabilities and that segregation and discrimination based on disability still existed.<sup>6</sup> The ADA recognized that discrimination and prejudice prevented otherwise capable persons from participating fully in work and life,<sup>7</sup> and the Act intended to serve as “a national mandate for the elimination of discrimination against persons with disabilities.”<sup>8</sup>

The ADA followed the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability.<sup>9</sup> Section 501 of the Rehabilitation Act applies to federal agencies and the United States Postal Service;<sup>10</sup> and Section 504 applies to programs that receive federal funding.<sup>11</sup> The ADA extended the prohibition on disability-based discrimination broadly into the private sector.<sup>12</sup> Title I of the ADA prohibits discrimination in employment;<sup>13</sup> Title II prohibits discrimination in public services;<sup>14</sup> and Title III prohibits discrimination in public accommodation.<sup>15</sup>

Both acts rely on the premise that social attitudes can be just as disabling as medical impairments themselves. When Congress initially considered the proposed Rehabilitation Act, testimony in both chambers of Congress supported the notion that negative stereotypes combine with disabilities to result in even greater social handicaps. Congressman Charles Vanik, arguing to the House of Representatives for extending civil rights protections to disabilities, told of a boy with cerebral palsy whom his school excluded from the classroom because his teacher said his appearance nauseated his classmates – even though the boy was competent academically and posed no physical threat.<sup>16</sup> Senator Walter Mondale similarly related the story of a woman with serious arthritis

<sup>6</sup> President George H. W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), available at <http://bushlibrary.tamu.edu/research/papers/1990/90072600.html> [hereinafter Pres. G. H. W. Bush].

<sup>7</sup> 42 U.S.C. § 12101(a)(9) (2000).

<sup>8</sup> *Id.* § 12101(b)(1).

<sup>9</sup> 29 U.S.C. §§ 701-796 (2000).

<sup>10</sup> *Id.* § 791.

<sup>11</sup> *Id.* § 794.

<sup>12</sup> RUTH COLKER ET AL., *THE LAW OF DISABILITY DISCRIMINATION* 32 (4th ed. 2003).

<sup>13</sup> 42 U.S.C. §§ 12111-12117 (2000).

<sup>14</sup> *Id.* §§ 12131-12165.

<sup>15</sup> *Id.* §§ 12181-12189.

<sup>16</sup> 117 CONG. REC. 45,974 (1971).

who was denied a job on a college campus because the school trustees thought "normal students shouldn't see her."<sup>17</sup>

The Rehabilitation Act, then, as codified, protects a broad spectrum of persons, who fall into one of three categories: (1) persons with physical or mental impairments that currently limit them substantially in a major life activity, (2) those with a record of this kind of impairment, (3) and those *regarded as* having such an impairment.<sup>18</sup> Congress recognized that persons "with a record of" or "regarded as" handicapped may not currently experience a life-limiting disability, yet they deliberately provided coverage for such persons under the Rehabilitation Act because of the effect of unfavorable attitudes about disability.<sup>19</sup> Protection from discrimination because of negative prejudices follows Title VII of the 1964 Civil Rights Act, which protects against racial discrimination whether or not the person is actually a member of a racial minority.<sup>20</sup>

In 1987, the Supreme Court explained in *School Board of Nassau County, Florida v. Arline* that, when Congress enacted the Rehabilitation Act in 1979, it demonstrated as much concern for the effect of impairments on others as on the person with an impairment.<sup>21</sup> Supporting this observation, the Supreme Court referred to the implementing regulations, which list "cosmetic disfigurement" as an impairment, inferring that such an impairment would not directly limit employment but only indirectly through its effect on others.<sup>22</sup> The Court explained that

[b]y amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress 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>

In *Arline*, the Court relied on the legislative history of the Rehabilitation Act to conclude that the Act targeted "society's accumulated myths and fears" and "irrational fears or prejudice"<sup>24</sup> about disabilities that stand in the way of

<sup>17</sup> 118 CONG. REC. 36,761 (1972). See also Frances Cooke MacGreggor, *Some Psycho-Social Problems Associated with Facial Deformities*, 16 AM. SOC. REV. 629, 629-30 (1951) (explaining that some impairments do not directly interfere with tasks of daily living, but other people's reactions to an impaired appearance may be indirectly handicapping).

<sup>18</sup> 29 U.S.C. § 705(20)(B) (2000) (stating the Act provides coverage for "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment").

<sup>19</sup> S. REP. NO. 93-1297, at 38-39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6389-90. See also *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

<sup>20</sup> Robert L. Burgdorf, Jr., Nat'l Council on Disability, *Policy Brief Series: Righting the ADA, No. 15: The Supreme Court's Decisions Discussing the "Regarded As" Prong of the ADA Definition of Disability* (2003), available at <http://www.ncd.gov/newsroom/publications/2003/regardedas.htm>.

<sup>21</sup> *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 282 (1987).

<sup>22</sup> *Id.* at 283 n.10 (citing 45 C.F.R. § 84.3(j)(2)(i)(A) (2006)).

<sup>23</sup> *Id.* at 284.

<sup>24</sup> *Id.* at 284 n.13 (citing Sen. Hubert Humphrey's testimony, 123 CONG. REC. 13,515 (1977)).

full employment. Ultimately, the Court found Arline's employer liable under the Rehabilitation Act for terminating her employment where her tuberculosis was in remission, but the employer erroneously feared contagiousness.<sup>25</sup>

Prior to the enactment of the ADA, there were few cases addressing the duty to accommodate a "regarded as" plaintiff. Indeed, one court remarked that opinions addressing the matter were "hen's-teeth rare."<sup>26</sup> Nonetheless, the *Arline* decision did much to change the meaning of "disability" from an entirely physical or medical issue into one where the full social context matters.<sup>27</sup>

### B. *The ADA Adopts the "Regarded As" Definition*

Congress borrowed heavily from the text of the Rehabilitation Act when drafting the ADA.<sup>28</sup> Wherever possible, Congress used the same "terms of art" as in the Rehabilitation Act (as well as the 1964 Civil Rights Act), so that businesses would have a point of reference for interpreting and implementing the Act.<sup>29</sup> An August 1989 Senate Committee report expressed the need for the "regarded as" definition of disability because of concerns about discrimination based on asymptomatic conditions that are (a) controlled by medical treatment, (b) a medical anomaly, or (c) impairments that affect a person in appearance but not in ability to function:

A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitudes towards disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person's physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.<sup>30</sup>

This Senate report underscores the concern that negative attitudes, reactions, and misconceptions can result in discrimination or exclusion where the impairment itself might not prevent a person from performing or participating fully. House Committee reports reflect the common interest in prohibiting

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<sup>25</sup> *Id.* at 282.

<sup>26</sup> *Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 22 (1st Cir. 1993).

<sup>27</sup> Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, in *BACKLASH AGAINST THE ADA* 122, 127 (Linda Hamilton Krieger ed., 2003).

<sup>28</sup> Ruth Colker, *The ADA's Journey Through Congress*, 39 *WAKE FOREST L. REV.* 1, 37 (2004).

<sup>29</sup> *Id.* at 36 (quoting Rep. Steny Hoyer, a co-sponsor of the Act, 136 *CONG. REC.* 10,856 (1990)).

<sup>30</sup> S. REP. NO. 101-116, at 24 (1989) (citing *Thornhill v. Marsh*, 866 F.2d 1182 (9th Cir. 1989) (holding that under the Rehabilitation Act, an employee was not disqualified from his job merely because an X-ray showed a congenital spine deformity because he had no actual limitation)).

adverse treatment on the basis of disability, regardless of whether there is a real or current underlying impairment.<sup>31</sup>

In 1998, the Supreme Court observed in *Bragdon v. Abbott* that “[t]he ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973 . . . .”<sup>32</sup> The *Bragdon* Court acknowledged the “particular significance” of the original implementing regulations issued by the Department of Health, Education, and Welfare,<sup>33</sup> which contain the “regarded as” definition of disability.<sup>34</sup>

The ADA defines “disability” as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>35</sup>

The Equal Employment Opportunity Commission’s (EEOC) implementing regulations repeats this three-pronged definition of “disability”<sup>36</sup> and, in its interpretative guidance, outlines three ways in which one might be regarded as disabled. First, a person may have an impairment, but it does not substantially limit her – however her employer (or other covered entity) nonetheless perceives her impairment as substantially limiting. Second, a person may have an impairment that has become substantially limiting only as a result of others’ negative attitudes. Finally, a person may not have an impairment at all – however, her employer erroneously regards her as having a substantially limiting impairment.<sup>37</sup> Specifically, the text of the interpretive guidelines states:

There are three different ways in which an individual may satisfy the definition of “being regarded as having a disability”:

- (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
- (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

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<sup>31</sup> Burgdorf, *supra* note 20.

<sup>32</sup> *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). Note that in 1992, the Rehabilitation Act was amended to substitute the word “disability” for the previously-used word “handicap.” Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569 § 102, 106 Stat. 4344, 4348, 4349, 4356-58 (1992).

<sup>33</sup> In 1979, Congress redesignated HEW as the Department of Health and Human Services and created a new Department of Education. These changes became effective in 1980. Department of Education Organization Act, 20 U.S.C. § 3508 (2000).

<sup>34</sup> 45 C.F.R. § 84.3(j)(2)(iv) (2006).

<sup>35</sup> 42 U.S.C. § 12102(2) (2000). This three-pronged definition of disability applies to all three Titles of the ADA.

<sup>36</sup> 29 C.F.R. § 1630.2(g) (2006).

<sup>37</sup> *Id.* Department of Justice regulations for Titles II and III include the three ways in which one may be “regarded as” disabled within the definitions rather than in the interpretive guidelines. Title II guidelines are at 28 C.F.R. § 35.104(4) (2006); Title III guidelines are at 28 C.F.R. § 36.104(4) (2006).

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.<sup>38</sup>

In these scenarios, the substantial limitation is not inherent to the person but rather is a function of others' attitudes. In the first scenario, the person has an impairment that does not substantially limit her in any major life activity, yet the employer (or other covered entity) wrongly believes it does. In the second scenario, the person's impairment alone does not substantially limit a major life activity; however, the person is excluded (and subsequently substantially limited in a major life activity) based on others' negative attitudes about the impairment.<sup>39</sup> Finally, in the third scenario, the person does not have an impairment at all, but the employer or proprietor wrongly believes she does and that it substantially limits her in a major life activity. In these three scenarios, the employer's or proprietor's attitudes either are mistaken about the existence of a substantial limitation on a major life activity (the first and third scenarios) or else actually create the substantial limitation (the second scenario).

## II. THE SUPREME COURT ON "REGARDED AS" DISABLED

The Supreme Court has not specifically decided the issue whether under the ADA there is a duty to accommodate a plaintiff regarded as disabled,<sup>40</sup> however two opinions bear on the issue: *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999). The *Sutton* and *Murphy* decisions mark a qualitative change in how courts decide whether a person has a disability that the ADA covers.<sup>41</sup> These decisions are an important backdrop against which to consider the current state of the law of the "regarded as" plaintiff.

### A. *Sutton v. United Air Lines*

Karen Sutton and her twin sister Kimberly Hinton brought an action under the ADA against United Air Lines for discrimination.<sup>42</sup> The sisters wished to

<sup>38</sup> Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app., 1630.2(l) (2006).

<sup>39</sup> This scenario underscores the intent to ameliorate the affects of harmful attitudes, yet it seems unnecessary. In the second scenario, *there is substantial limitation in a major life activity*, so there is no reason to rely on the "regarded as" definition of disability. Application of the first definition of disability does not turn on where the impairment or limitation arose. Indeed, in *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999), the Supreme Court only reported two ways in which one might be regarded as disabled – the first- and third-listed in the interpretive guidelines.

<sup>40</sup> Three cases decided by Courts of Appeal have petitioned to the Supreme Court for certiorari, and all were denied. *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (holding there is a duty to accommodate a plaintiff regarded as disabled); *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003) (holding there is no duty to accommodate a plaintiff regarded as disabled); *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000) (holding there is no duty to accommodate a plaintiff regarded as disabled).

<sup>41</sup> The Court also decided *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1998), the same day as *Sutton* and *Murphy*. *Kirkingburg* did not include a "regarded as" claim. The *Sutton*, *Murphy*, and *Kirkingburg* decisions are often referred to as "the *Sutton* trilogy."

<sup>42</sup> *Sutton*, 527 U.S. at 475-76.

be commercial airline pilots, but because they were both severely myopic, the airline rejected them for failure to meet vision requirements.<sup>43</sup> Sutton and Hinton claimed they were disabled under two prongs of the ADA's definition of disability: (1) that they were disabled because of an impairment (myopia) that substantially limited them in a major life activity and (2) that United Air Lines regarded them as disabled.<sup>44</sup>

The Supreme Court held that the sisters were not actually substantially limited in a major life activity because with corrective measures (glasses or contact lenses), their vision was normal.<sup>45</sup> The Court found that the sisters did not meet the "regarded as" definition because they had not shown they were substantially limited in a *class* of jobs – but only that they were limited in a *specific* job.<sup>46</sup>

The Court stated there are two ways in which one might be "regarded as" disabled under the ADA: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."<sup>47</sup> Both possibilities rest on a mistake – either about the existence of a limitation or whether it substantially limits a major life activity.<sup>48</sup> Such mistakes result from "society's accumulated myths and fears about disability,"<sup>49</sup> and the purpose of the ADA was specifically to combat the discriminatory effects of these erroneous myths and fears.<sup>50</sup>

#### B. Murphy v. United Parcel Service

Vaughn Murphy had a history of high blood pressure.<sup>51</sup> He controlled his blood pressure with medication so that his hypertension did not generally restrict his activities.<sup>52</sup> Murphy worked as a mechanic for United Parcel Service ("UPS"), and his job occasionally required that he drive commercial vehicles.<sup>53</sup> When Murphy's blood pressure tested high during a medical examination, UPS terminated his employment because his blood pressure did not meet Department of Transportation standards for commercial drivers.<sup>54</sup> Murphy's action against UPS claimed he met the first and third definitions of disability under the ADA – that his impairment substantially limited him in a major life activity, and that UPS regarded him as disabled.<sup>55</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 476.

<sup>45</sup> *Id.* at 488-89.

<sup>46</sup> *Id.* at 493.

<sup>47</sup> *Id.* at 489. The Court did not explain why it does not adopt the regulatory guidelines, which list three ways in which a person may be "regarded as" disabled under the ADA. See 45 C.F.R. § 84.3(j)(2)(iv) (2006).

<sup>48</sup> Sutton v. United Air Lines, 527 U.S. 471, 489 (1999).

<sup>49</sup> *Id.* at 489 (quoting Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987)).

<sup>50</sup> *Id.* (citing the interpretive guidelines, 29 C.F.R. pt. 1630 app., 1630.2(l)).

<sup>51</sup> *Id.* at 519.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 519-20.

<sup>55</sup> *Id.* at 520.

As in *Sutton*, the Court found that Murphy in his mitigated (medicated) state was only precluded from his specific job with UPS, and that he was not substantially limited from working in a broad class of jobs.<sup>56</sup> In looking at the “regarded as” claim, the Court found that Murphy failed to show that UPS regarded him as unable to do a broad class of jobs.<sup>57</sup>

### C. “Regarded As” in the Shadow of *Sutton*

The *Sutton* and *Murphy* holdings require a plaintiff to show that she is substantially limited in a major life activity even when she uses mitigating measures – or that the employer (or proprietor) regards her as disabled even after taking into account mitigating measures. Furthermore, in an employment discrimination action under both the first and third definitions of disability, a plaintiff must show she is actually or “regarded as” being precluded from a broad class of jobs if she is claiming “working” as a major life activity.

*Sutton* and *Murphy* marked the beginning of a judicial trend towards restricting liability under the ADA.<sup>58</sup> In *Arline*, a 1979 case under the Rehabilitation Act, the Court showed great deference to regulatory standards, explaining that “[i]n determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance.”<sup>59</sup> By contrast, in *Sutton*, the Court rejected any notion of deferring to agency guidelines, saying that “the approach adopted by the agency guidelines – that persons are to be evaluated in their hypothetical uncorrected state – is an impermissible interpretation of the ADA.”<sup>60</sup> After *Sutton* and *Murphy*, then, plaintiffs have a much higher hurdle to clear to establish that they are disabled under the ADA. Even an amputee might not now be able establish that she is disabled for purposes of the statute:

Under the majority’s analysis [in *Sutton*], . . . someone whose abilities exceed those of the average person, would surely not be disabled under the ADA. For example, neither the late Terry Fox, who for 144 days ran a marathon (26 miles) a day across Canada on an artificial leg and inspired many other amputees to take up running, nor Heather Mills, who runs half-marathons, snowboards, skis and skates using a prosthesis for half of a leg, would be disabled under the ADA.<sup>61</sup>

In the shadow of *Sutton*, with coverage under the ADA apparently shrinking, could the “regarded as” prong be a “safety valve” for plaintiffs?<sup>62</sup> The *Sutton* trilogy decisions made coverage under the ADA for someone even with

<sup>56</sup> *Id.* at 520-21.

<sup>57</sup> *Id.* at 525.

<sup>58</sup> See Burgdorf, *supra* note 20; Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 154 (2000); Vicki J. Limas, *Practitioner’s Guide to the 1998 – 1990 Supreme Court Term: Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-by-Case Basis*, 35 TULSA L.J. 505, 505 (2000).

<sup>59</sup> Sch. Bd. of Nassau County, Fla. v. *Arline*, 480 U.S. 273, 279 (1987).

<sup>60</sup> *Sutton v. United Airlines*, 527 U.S. 471, 482 (1999).

<sup>61</sup> Limas, *supra* note 58 at 535. Terry Fox was and Heather Mills is an amputee. See The Terry Fox Foundation, About Terry Fox, <http://www.terryfoxrun.org/english/about%20terry%20fox/default.asp?s=1> (last visited Apr. 18, 2007); Heather Mills, About Heather, <http://www.heathermills.org/about.php> (last visited Apr. 18, 2007).

<sup>62</sup> Feldblum, *supra* note 58, at 157.



a severe and permanent impairment much more questionable because of the need to overcome the "mitigating measures" hurdle.<sup>63</sup> The "regarded as" prong might have looked like a more attainable definition of disability for plaintiffs because it does not require *actual* substantial limitation of a major life activity.<sup>64</sup>

### III. DUTY TO ACCOMMODATE A "REGARDED AS" PLAINTIFF UNDER THE ADA

#### A. *Duty to Accommodate Generally*

Satisfying at least one of the definitions of disability is a "gateway" requirement under the ADA,<sup>65</sup> yet there are other elements of a discrimination claim under the ADA. Certainly the plaintiff will first need to show that her defendant is an entity the ADA covers.<sup>66</sup> A plaintiff must also establish that she is "qualified," meaning that she can perform the essential functions of the job either with or without reasonable accommodations (for Title I)<sup>67</sup> or that she meets the essential eligibility requirements for participation or services.<sup>68</sup> Finally, she must show that the defendant discriminated against her on the basis of her disability.<sup>69</sup>

Under Title I, one way an employer may discriminate is by a failure to make reasonable accommodations:

- (A) not making *reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make *reasonable accommodation* to the physical or mental impairments of the employee or applicant . . . .<sup>70</sup>

Also, under Title III, a proprietor discriminates by failing to make reasonable modifications in the business that are necessary to allow someone to use or otherwise take advantage of the business's services (except that fundamental changes to the business are not required).<sup>71</sup> Title III states that one form of discrimination in public accommodation is:

a failure to make *reasonable modifications* in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can

<sup>63</sup> *Id.*, at 93.

<sup>64</sup> See Michael D. Reisman, Note, *Traveling "to the Farthest Reaches of the ADA," or Taking Aim at Employment Discrimination of Perceived Disability?*, 26 CARDOZO L. REV. 2121, 2124-27 (2005).

<sup>65</sup> EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 797 (9th Cir. 2002).

<sup>66</sup> PGA v. Martin, 532 U.S. 661, 675-76 (2001) (stating that whether the defendant is covered under the ADA is a "threshold matter").

<sup>67</sup> 42 U.S.C. § 12111(8) (2000).

<sup>68</sup> *Id.* § 12131.

<sup>69</sup> Title I: *Id.* § 12112(a). Title II: *Id.* § 12132. Title III: *Id.* § 12182(a).

<sup>70</sup> *Id.* § 12112(b)(5) (emphasis added).

<sup>71</sup> *Id.* § 12182(b)(2)(A)(ii).

demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations . . .<sup>72</sup>

The definition of discrimination as a failure to make reasonable accommodations is also part of Title II, as the implementing regulations reflect:

A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.<sup>73</sup>

### B. *The Circuit Split*

Nothing in the language above distinguishes among the various definitions of disability regarding the duty to make reasonable accommodations (or modifications). Still, there is significant division among the United States Courts of Appeal on this issue. About half of the Circuits have held as a matter of law that there is a duty to accommodate a “regarded as” plaintiff, and the other half have held there is no duty.<sup>74</sup> There are four leading Circuit Court cases on duty to accommodate a person regarded as disabled before *Sutton* and *Murphy*, and six leading Circuit Court cases after the Supreme Court decided these cases. As discussed *infra*, the increased difficulty post-*Sutton* of establishing disability (given the requirement that the court should factor in mitigating circumstances) may have led some plaintiffs to bring their claims under a different definitional prong – the “regarded as” prong.

The figure below summarizes the leading cases from the Circuits in chronological order, with reference to the date of the *Sutton* and *Murphy* decisions. All of the cases are Title I employment cases, and in each, the adverse job action was termination of employment. The impairments across the cases are varied, including physical injuries (*e.g.*, torn cartilage), systemic disease (*e.g.*, cardiovascular disease), and psychological disorders (*e.g.*, major depression).

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<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> 28 C.F.R. § 35.130(7) (2006) (emphasis added).

<sup>74</sup> For other summaries of this circuit split, see Jonathan D. Andrews, Comment, *Reconciling the Split: Affording Reasonable Accommodation to Employees “Regarded As” Disabled Under the ADA – An Exercise in Statutory Interpretation*, 110 PENN. ST. L. REV. 977 (2006); Matthew M. Cannon, Comment, *Mending a Monumental Mountain: Resolving Two Critical Circuit Splits Under the Americans with Disabilities Act for the Sake of Logic, Unity, and the Mentally Disabled*, 2006 BYU L. REV. 529 (2006); Jarad M. Lucan, Note, *Applying the Americans With Disabilities Act: Why Giving Traditional Reasonable Accommodation to “Regarded As” Disabled Individuals Brings About “Bizarre Results”*, 25 QUINNIPIAC L. REV. 417 (2006); Elizabeth Mills, Comment, *How Bizarre? The Application of Reasonable Accommodation to Employees “Regarded As” Disabled Under the ADA Does Not Necessarily Lead to Bizarre Results*, 75 MISS. L.J. 1063 (2006); and Kristopher J. Ring, Note, *Disabling the Split: Should Reasonable Accommodations Be Provided to “Regarded As” Disabled Individuals Under the Americans With Disabilities Act (ADA)?*, 20 WASH. U. J.L. & POL’Y 311 (2006).

FIGURE 1. LEADING UNITED STATES COURTS OF APPEAL CASES RULING ON DUTY TO ACCOMMODATE A "REGARDED AS" PLAINTIFF.<sup>75</sup>

Case	Duty to Accommodate	
	No	Yes
Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996)		X
Deane v. Pocono Medical Center, 142 F.3d 138 (3d Cir. 1998) <sup>76</sup>	X	
Newberry v. East Texas State University, 161 F.3d 276 (5th Cir. 1998) <sup>77</sup>	X	
Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999)	X	
Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999)		
Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000).	X	
Jacques v. DiMarzio, Inc., 200 F.Supp.2d 151 (E.D.N.Y. 2002) <sup>78</sup>		X
Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003), cert. denied, 540 U.S. 1049 (2003)	X	
Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751 (3d Cir. 2004), cert. denied, 125 S.Ct. 1725 (2005)		X
Kelly v. Metallics West, Inc., 410 F.3d 670 (10th Cir. 2005)		X
D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005)		X

In general, the courts have considered three factors in deciding whether there is a duty to accommodate a "regarded as" plaintiff: (1) the language of the statute itself, (2) legislative intent, and (3) policy and practical considerations.<sup>79</sup>

<sup>75</sup> The United States Court of Appeals for the Seventh Circuit considered the issue, but declined to decide whether there is a duty to accommodate a "regarded as" plaintiff. *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 336 (7th Cir. 2004) (stating that "[t]he extent to which employers' errors in appreciating the extent of their workers' real disabilities create obligations to accommodate can be left for another day"). Likewise, the Fourth Circuit has declined to decide the issue. *Betts v. Rector & Visitors of the Univ. of Va.*, 145 F.App'x 7 (4th Cir. 2005) (stating that "we express no opinion on that question").

<sup>76</sup> The *Deane* court did not expressly hold there was no duty to accommodate a "regarded as" plaintiff, but it found "considerable force" in the argument. *Deane v. Pocono Med. Ctr.*, 142 F.3d at 148 n.12.

<sup>77</sup> *But see* *Tullos v. City of Nassau Bay*, 137 F.App'x 638, 650 (5th Cir. 2005) (an unpublished decision upholding a jury verdict because there was sufficient evidence that a reasonable jury could have found he was disabled under the ADA, but not addressing the issue of duty to accommodate directly).

<sup>78</sup> The Second Circuit has not heard this issue directly. The table shows *Jacques v. DiMarzio*, from the Eastern District of New York, as a de facto representative case from the Second Circuit. *Jacques* was heard by the Second Circuit, but this issue was not on appeal. *Jacques v. DiMarzio*, 386 F.3d 192 (2d Cir. 2004). The District Court opinion has been cited by several of the Courts of Appeal.

<sup>79</sup> *Newberry* and *Workman* held there was no duty to accommodate a "regarded as" plaintiff under the ADA without analysis. *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d, 276, 280 (5th Cir. 1998).

### 1. *The Language of the Statute*

The first step in statutory construction is determining if the statutory language has a “plain and unambiguous meaning with regard to the particular dispute in the case.”<sup>80</sup> The cases on point uniformly find that the language of the ADA does not distinguish between duties owed to persons “regarded as” disabled compared with persons who are disabled under another definition.

Looking at the plain language of the statute, the court in *Jacques* also noted there is nothing in the language of the statute that differentiates “regarded as” plaintiffs from plaintiffs disabled under other prongs.<sup>81</sup> The *D’Angelo* court found “no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense.”<sup>82</sup> In *D’Angelo*, the court compared this construction to that in *U.S. Airways, Inc. v. Barnett*, in which the Supreme Court refused to infer any exemption from the duty to accommodate where the ADA was silent about the exempting effect of neutral work rules.<sup>83</sup>

The district court in *Jacques* found that the requirement of a duty to accommodate someone “regarded as” disabled is consistent with the mandatory interactive process:<sup>84</sup>

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.<sup>85</sup>

The *Jacques* court notes that the “vast majority” of courts have held that the interactive process is mandatory.<sup>86</sup> Once an employer knows or believes an employee to be disabled, the employer must engage in a “good faith” interactive process to determine exactly what limitations the employee experiences and what accommodations would be appropriate.<sup>87</sup> This is consistent with the expectation that determining whether a person is disabled under the ADA is “an individualized inquiry” and should not depend on generalities or stereotypes.<sup>88</sup> When an employer has reason to believe an employee is disabled, the employer does not know if that belief is correct until it has checked it out with the employee herself. The EEOC has recommended that employers begin an interactive process any time it knows or has reason to believe there may be a disability issue for an employee, that is, whenever it:

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<sup>80</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

<sup>81</sup> *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) (“the [ADA] statute does not appear to distinguish between disabled and ‘regarded as’ individuals in requiring accommodation.”)).

<sup>82</sup> *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

<sup>83</sup> *Id.* at 1236 (citing *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002)).

<sup>84</sup> 200 F. Supp. 2d at 168-69.

<sup>85</sup> 29 C.F.R. § 1630.2(o)(3) (2006).

<sup>86</sup> 200 F. Supp. 2d at 168.

<sup>87</sup> *Id.* at 169 (citing the Title I interpretive guidelines, 29 C.F.R. § 1630.9).

<sup>88</sup> *Bragdon v. Abbott*, 524 U.S. 624, 657 (1998) (Rehnquist, J., concurring in part and dissenting in part).

(1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.<sup>89</sup>

It makes good business sense to verify that there is a problem and what it entails before taking action.<sup>90</sup> The *Jacques* court further explains that communication between the parties may function to preserve productivity and prevent issues from developing into legal claims:

[T]he interactive process is more of a labor tool than a legal tool, and is a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled. It is clearly a mechanism to allow for early intervention by an employer, outside of the legal forum, for exploring reasonable accommodations for employees who are perceived to be disabled.<sup>91</sup>

It also works to the benefit of the employer/proprietor to discover the exact nature of an issue or perhaps that there is no issue at all.

*Robinson v. Shell* requires that the inquiry into statutory construction go no further if "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"<sup>92</sup> Ordinarily the court should apply the plain meaning of a statute except for rare cases where applying the statute literally would produce a result that is obviously at odds with the drafters' intent.<sup>93</sup> The Ninth Circuit found that the plain language of the statute did not distinguish duties owed to persons "regarded as" disabled from duties owed to others under the ADA; however the *Kaplan* court declined merely to accept the plain language because it concluded that a literal application would produce "bizarre results."<sup>94</sup> Stopping with a plain language analysis without considering the consequences would be an inappropriate exercise in formalism – or so the *Kaplan* court believed.<sup>95</sup> Therefore, the Ninth Circuit's holding rests more on policy and practical considerations (discussed *infra*) than on its reading of the statutory language per se.

## 2. Legislative Intent

Of the cases holding there is no duty to accommodate a "regarded as" plaintiff, none rely on legislative history or intent. The courts in *D'Angelo*, *Jacques*, and *Williams* – which all held there is a duty to accommodate – considered legislative intent behind the ADA as well as Supreme Court decisions in *Arline*, *Bragdon*, and *Barnett* that are consistent with legislative intent.

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<sup>89</sup> EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC Compliance Manual No. 915.002 REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> [hereinafter EEOC, *Reasonable Accommodation and Undue Hardship*].

<sup>90</sup> *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002).

<sup>91</sup> *Id.*

<sup>92</sup> *Robinson v. Shell*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

<sup>93</sup> *Ron Pair*, 489 U.S. at 240.

<sup>94</sup> *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

<sup>95</sup> *Id.* Cf. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (explaining that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice").

Prior to the enactment of the ADA, Senate Report No. 101-116 endorsed a broad duty to make reasonable accommodations under the ADA, consistent with the intent and history of the Rehabilitation Act:

The duty to make reasonable accommodations applies to all employment decisions, not simply hiring and promotion decisions. This duty has been included as a form of non-discrimination on the basis of disability for almost fifteen years under section 501 and section 504 of the Rehabilitation Act of 1973 and under the nondiscrimination section of the regulations implementing section 503 of that Act.<sup>96</sup>

The Senate Report also states the intent that the ADA adopt the standards and obligations under the Rehabilitation Act, specifically noting the duty to make reasonable accommodations.<sup>97</sup>

House Report No. 101-485 referred to the Supreme Court's reasoning in the *Arline* case, noting that people's attitudes and reactions to an impairment can produce disabling effects.<sup>98</sup> Because the intent of both the Rehabilitation Act and the ADA is to eliminate prejudice and stereotypes about disabilities, the House Report concluded that the ADA should provide protection for persons regarded as disabled:

a person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as"] test, whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.<sup>99</sup>

In *Barnett*, the Supreme Court further endorsed the notion that the design of the ADA is to eliminate negative misperceptions about disabilities;<sup>100</sup> and in *Bragdon*, it held that the ADA should provide "at least as much" protection as the Rehabilitation Act.<sup>101</sup> The *D'Angelo* court stated that imposing a duty under the ADA to accommodate a "regarded as" plaintiff follows a "straight-forward reading" of the statute, is consistent with the Supreme Court holding in *Arline*, and is consistent with legislative intent.<sup>102</sup> Therefore, the legislative history, as acknowledged by the courts, supports interpreting the ADA to provide coverage as broadly as the Rehabilitation Act, including protections to persons "regarded as" disabled.

### 3. Policy and Practical Considerations

The cases that have held there is no duty to accommodate have relied largely on an inference that imposing such a duty would lead to "bizarre

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<sup>96</sup> S. REP. NO. 101-116, at 31 (1989) (cited by *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235, 1237 (11th Cir. 2005)).

<sup>97</sup> *Id.* at 2. (stating that "[t]he ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business").

<sup>98</sup> H.R. REP. NO. 101-486, pt. 3, at 30 (1990) (cited by *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 774 (3d Cir. 2004)).

<sup>99</sup> *Id.*

<sup>100</sup> *US Airways, Inc., v. Barnett*, 535 U.S. 391, 401 (2002).

<sup>101</sup> *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

<sup>102</sup> *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1236-37 (11th Cir. 2005).

results."<sup>103</sup> The *Kaplan* court explained that imposing a duty to accommodate someone "regarded as" disabled would lead to the "perverse and troubling" result that people would be treated better when they were incorrectly thought to be disabled than when they were correctly known not to be disabled.<sup>104</sup> Both the *Deane* and *Kaplan* courts described this as a "windfall" to the "regarded as" plaintiff, to whom is owed reasonable accommodation despite having either no impairment or no substantial limitation.<sup>105</sup> The *Weber* court implied this would be illogical and inequitable, creating 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 no more limited than those afforded actually disabled employees.<sup>106</sup>

The "no duty" courts find this paradox unacceptable: under Title I, where an employee is impaired, and her employer does not think she is disabled, her employer may terminate her employment without ADA liability; but, if an employee has no impairment, and the employer mistakenly thinks she is disabled, then the employer would have ADA liability for terminating her employment.

The figure below depicts the inequity that concerns the "no duty" courts:

FIGURE 2. TWO "REGARDED AS" SCENARIOS CONTRASTED.

<p>Employee <i>is</i> impaired + Employer <i>does not think</i> she is disabled = <b>No ADA liability</b> for terminating employment</p>	<p>Employee <i>is not</i> impaired + Employer <i>mistakenly thinks</i> she is disabled = <b>ADA liability</b> for terminating employment</p>
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Were there a duty to accommodate someone "regarded as" disabled, then the employer would bear *no* ADA liability regarding the impaired employee, but *would* bear ADA liability regarding the employee who is not impaired.

There is an inconsistency here that if an individual is impaired and substantially limited in a major life activity, ADA liability does not depend on how others regard her – the fact that her impairment creates a substantial limitation in a major life activity precipitates the duty at least to consider reasonable accommodations. However, if there is a duty to accommodate a person "regarded as" disabled, then if an individual is not impaired (or is impaired but not substantially limited in a major life activity), then ADA liability depends not on any characteristics of the person herself, but only on others' beliefs. Duty to accommodate under the *first* prong is precipitated by *characteristics of the plaintiff*; duty to accommodate under the *third* prong is precipitated by *conduct by the defendant*.

The "no duty" courts also suggest that were there a duty to accommodate the "regarded as" plaintiff, this would run counter to the intent of the statute

<sup>103</sup> *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999); *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003).

<sup>104</sup> 323 F.3d at 1232.

<sup>105</sup> *Id.*; *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n.12 (3d Cir. 1998).

<sup>106</sup> 186 F.3d at 917.

because it would discourage people from correcting misconceptions about disabilities.<sup>107</sup> Employer resources might be “wasted” on persons who were not disabled, leaving fewer resources available for assisting those who are disabled.<sup>108</sup> Employees who were generally healthy would have a motive to litigate or threaten litigation in order to change workplace conditions.<sup>109</sup> These predicted results are not only counter to how these courts viewed legislative intent, but they would also be economically inefficient.

Professor Cheryl Anderson has suggested that the fear of creating a “windfall” by imposing a duty to accommodate persons “regarded as” disabled may find its roots in a belief that the ADA impermissibly creates preferential treatment.<sup>110</sup> There is a popular misconception that the ADA is more about creating special advantages than eliminating discrimination, that qualifying as disabled under the Act is like winning the lottery, and it sets one up for “a lifelong buffet of perks, special breaks and procedural protections, a web of entitlement that extends from cradle to grave.”<sup>111</sup> Viewed this way, the ADA is a system to be worked, because even a small disability may qualify one for “special aid” that helps one “get ahead in life.”<sup>112</sup> The result is that some judges may view ADA claimants as “supplicants” waiting for handouts.<sup>113</sup> The focus, then, becomes whether the claimant is deserving (or disabled) enough to qualify for the “handout.”<sup>114</sup> Where the court decides the claimant is not “disabled,” it views her as a healthy person trying to extort privileges from her employer.<sup>115</sup>

This, of course, is an erroneous conception of the Act. Persons with claims under the ADA are not seeking preferential treatment; they are only seeking equal access and the elimination of obstacles created by discrimina-

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<sup>107</sup> Kaplan, 323 F.3d at 1232.

<sup>108</sup> *Id.*

<sup>109</sup> Deane, 142 F.3d at 148 n.12.

<sup>110</sup> Cheryl L. Anderson, *What Is “Because of the Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006).

<sup>111</sup> Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Aug. 25, 1997, at 18.

<sup>112</sup> *Id.* at 19 (see illustration by Vint Lawrence).

<sup>113</sup> Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 49 (2000); Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1304 (2006).

<sup>114</sup> Winegar, *supra* note 113, at 1316.

<sup>115</sup> Anderson, *supra* note 110, at 365. Here, Prof. Anderson cites *Deane v. Pocono Medical Center*, 142 F.3d 138, 148 n.12 (3d Cir. 1998). In *Deane*, the Third Circuit predicted that the effect of imposing a duty to accommodate the “regarded as” claimant would be to

permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of “reasonable accommodations” for disabilities based upon misperceptions; and (2) create a windfall for legitimate “regarded as” disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions.

*Deane*, 142 F.3d, at 148 n.12. See also Lucan, *supra* note 74, at 452 (characterizing persons not “disabled” under ADA criteria as “able-bodied” and that guaranteeing reasonable accommodations to persons “regarded as” disabled would create “unfair advantages”).



tion.<sup>116</sup> This is what the ADA, as a piece of civil rights legislation, is about.<sup>117</sup> The proper focus, then, is on the wrongful conduct of the defendant and how that conduct impermissibly excludes or discriminates against the plaintiff.<sup>118</sup>

By contrast, the courts finding there is a duty to accommodate the "regarded as" plaintiff generally find that any "bizarre" or paradoxical results would likely be anomalous. In any case, even if these results are unusual, these courts do not attempt to second-guess congressional intent:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto . . . . In our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal."<sup>119</sup>

The "duty" courts are not troubled by the contrasted scenarios depicted in Figure 2, *supra*. These courts emphasize the fact that in these scenarios, liability follows attitudes (or prejudice). Whereas the "no duty" courts focus on the fact that the person who is not impaired results in liability to the employer, they ignore the fact that the "non-impaired" person suffers from being not only regarded as disabled, but also incorrectly regarded as well. The *Kelly* court articulated it this way:

We fail to understand the point, for 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. This rationale provides no basis for denying validity to a reasonable accommodation claim.<sup>120</sup>

The scenarios are not equivalent. The language, legislative intent, and policy underlying the ADA all seek to prevent just the sort of unearned negative treatment the "regarded as" plaintiff experiences.<sup>121</sup>

Without a duty to accommodate, the employee who is perceived accurately keeps her job, but the inaccurately perceived employee may have her employment terminated without the employer incurring any liability.<sup>122</sup> Imposing a duty towards the person "regarded as" disabled does not create a

<sup>116</sup> Anderson, *supra* note 110, at 372.

<sup>117</sup> Diller, *supra* note 113, at 31-32; Winegar, *supra* note 113, at 1303. *But see* Anderson, *supra* note 110, at 340 (noting that Title VII of the Civil Rights Act does not generally require employers to make reasonable accommodations except for some cases where religious discrimination is at issue). Anderson further describes reasonable accommodation as "a form of affirmative action, whose validity under statutes like Title VII continues to be hotly debated." *Id.* at 381. However, in *US Airways, Inc. v. Barnett*, the Supreme Court, although acknowledging that "accommodation" is a form of preferential treatment, explained that such individualized modifications were completely "necessary to achieve the Act's basic equal opportunity goal." 535 U.S. 391, 397 (2002).

<sup>118</sup> Diller, *supra* note 113, at 31; Winegar, *supra* note 113, at 1303, 1316.

<sup>119</sup> D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1238 (11th Cir. 2005) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978) (superseded by statute)).

<sup>120</sup> Kelly v. Metallica W., Inc., 410 F.3d 670, 676 (10th Cir. 2005) (emphasis added).

<sup>121</sup> Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996).

<sup>122</sup> Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775-76 (3d Cir. 2004).

“windfall,” but rather corrects an inequity.<sup>123</sup> It also creates a motive for all parties to eliminate misconceptions about impairments and disabilities.<sup>124</sup> Furthermore, employers who cling to stereotypes and prejudices run the risk of seeing limitations that have no factual basis. The Act should hold them responsible for their own biased and faulty perceptions by imposing a duty to accommodate the persons whom they regard as disabled.<sup>125</sup>

Instead of focusing on possible bizarre results, the courts might have invoked the “mischief rule,” looking to the ills the ADA was intended to cure.<sup>126</sup> Rather than looking prospectively and entirely hypothetically, the “mischief rule” would have the court look to the “mischief and defect” that the statute was designed to eradicate.<sup>127</sup> This is essentially what the “duty” courts did, looking to the House and Senate Committee reports’ documentation of the disabling effects of pernicious stereotypes, in addition to the Supreme Court’s analysis in *Arline*.<sup>128</sup>

The “no duty” courts have referred to “regarded as” plaintiffs as “non-disabled.”<sup>129</sup> In characterizing the “regarded as” claimant as *not* disabled, the courts may be confusing the ordinary, lay meaning of “disabled” with the specific, legal definition under the Act.<sup>130</sup> However, one may be “disabled” under the ADA in three different ways, and being “regarded as” disabled is one of those ways. Therefore, the “regarded as” plaintiff is disabled within the meaning of the ADA.<sup>131</sup> Imposing a duty to accommodate the person regarded as disabled cures the mischief.

<sup>123</sup> *Id.*

<sup>124</sup> *Kelly*, 410 F.3d at 676.

<sup>125</sup> Cannon, *supra* note 74, at 562. Cannon also suggests that where courts fail to read the ADA to impose a duty to accommodate persons “regarded as” disabled, the effect may be especially harsh on persons with mental illness. *Id.* at 531. Even persons with an actual mental illness impairment will generally base their claims of discrimination on employer perceptions. *Id.*

<sup>126</sup> See *Elliott Coal Mining Co. v. Dir., Office of Workers’ Comp.*, 17 F.3d 616, 631 (3d Cir. 1994) (citing *Heydon’s Case*, 76 Eng. Rep. 637 (1584)).

<sup>127</sup> *Id.*

<sup>128</sup> Cf. *Gelfo v. Lockheed Martin Corp.*, 43 Cal. Rptr. 3d 874, 894-95 (Cal. Ct. App. 2006). *Gelfo* was a case under California’s Fair Employment and Housing Act in which the court applied reasoning from cases under the ADA to determine whether there was a duty to accommodate a “regarded as” disability claimant under the state statute. *Id.* The court concluded that “[t]o further the societal goal of eliminating discrimination, the statute must be liberally construed to accomplish its purposes and provide individuals with disabilities the greatest protections,” which included imposing a duty to accommodate the “regarded as” claimant. *Id.* In this sense, presumably a “liberal” construction means that which yields the greatest protection.

However, from a strictly textualist point of view – which is often regarded as politically conservative – the ADA makes no distinction in the duties owed to persons under the three definitions (prongs) of disability. See Thomas N. Abbott, Comment, *Kaplan and “Regarded As”*: Does the ADA Discriminate Between Real and Perceived Disability?, 39 *LOY. L.A. L. REV.* 883, 898 (2006).

<sup>129</sup> See *Weber v. Stripit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999).

<sup>130</sup> Abbott, *supra* note 128, at 903-04, 906.

<sup>131</sup> *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1239 (11th Cir. 2005).

#### IV. AN ALTERNATIVE: APPLYING REASONABLENESS + THE UNDUE HARDSHIP DEFENSE

The "no duty" courts predict that if there were a duty to accommodate a person "regarded as" disabled, the results would be bizarre, perverse, and troubling.<sup>132</sup> These courts foreshorten the analysis by eliminating the duty altogether rather than permitting the duty to lie, and then letting the evidence show whether bizarre situations result. An alternative approach would be to impose the duty to accommodate the "regarded as" plaintiff, but then to utilize the "reasonableness" requirement inherent in the ADA to dismiss claims that might be bizarre. Furthermore, even if a plaintiff establishes that the accommodations she requests are reasonable, the employer (or proprietor) may offer the defense of undue hardship.

Some have argued that the only way to settle the circuit split is for the Supreme Court to decide the issue.<sup>133</sup> Another suggestion is that "regarded as" plaintiffs under the ADA should be allowed more latitude in establishing their prima facie case – allowing them to introduce evidence of pretext at that point rather than waiting until the employer has rebutted the prima facie case.<sup>134</sup> This Note argues that other features of the ADA are available to prevent "bizarre results" or inequities from imposing a duty to accommodate the "regarded as" person: the reasonableness requirement and the undue hardship defense. There is no need for courts to "effectively rewrit[e] and veto[ ] a portion of the ADA"<sup>135</sup> by eliminating wholesale the duty to accommodate this category of claimant.

##### A. *The Reasonableness Requirement*

All three Titles to the ADA have a reasonableness requirement, and the Act requires no employer or proprietor to do anything unreasonable.<sup>136</sup> To make a prima facie case, a plaintiff need only show that the accommodation she requests is reasonable on its face.<sup>137</sup> At a minimum, this might mean that the plaintiff shows that it is at least feasible or plausible for the employer/proprietor to make the accommodation.<sup>138</sup>

In order to show reasonableness, the plaintiff needs to establish that the accommodations she requests are effective and that the costs of the accommodation are not out of line with the associated costs.<sup>139</sup> The requirement essentially poses two questions: (1) will the accommodation allow the plaintiff to do

<sup>132</sup> See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).

<sup>133</sup> Andrews, *supra* note 74, at 1001; Cannon, *supra* note 74, at 531.

<sup>134</sup> Jennifer Schechter Sharret, Note, *Refining the Production Burden for "Regarded As Disabled" Claimants*, 28 CARDOZO L. REV. 991, 994 (2006). Although this approach may have some merit for the true "regarded as" plaintiff, it could have the unwanted effect of encouraging nonmeritorious claims under the "regarded as" prong in order to gain a more favorable burden of proof structure.

<sup>135</sup> Mills, *supra* note 74, at 1082.

<sup>136</sup> Title I: 42 U.S.C. § 12112(b)(5)(A)-(B) (2000); Title II: 42 U.S.C. § 12131(2) (2000); Title III: 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

<sup>137</sup> US Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002).

<sup>138</sup> *Id.* at 402.

<sup>139</sup> Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995).

her job (or to use the public accommodations)?; and (2) are the costs of the accommodation generally in line with the benefits it would achieve?<sup>140</sup> These requirements are not generally onerous, and a plaintiff would only likely risk summary judgment for the defendant where she requested accommodations that were either “clearly ineffective or outlandishly costly.”<sup>141</sup>

### B. *The Undue Hardship Defense*

Where the plaintiff has made a prima facie showing of reasonableness, the burden shifts to the defendant, who may defend by showing that the requested accommodation would place an undue hardship or burden on the entity.<sup>142</sup>

Under the statute, undue hardship is generally an economic matter, weighing the costs and benefits of the requested accommodation. The ADA lists several factors that will aid in determining undue hardship, including the cost of the accommodation, the financial resources of the defendant, the size and nature of the business operation, and administrative or organizational circumstances.<sup>143</sup>

Invocation of the undue hardship defense is liberal, allowing an employer/proprietor to make a case-by-case analysis.<sup>144</sup> Undue hardship is specific to the circumstances so that the same accommodation might be an undue hardship for one employer but not for another – or it might be an undue hardship for an employer under one set of circumstances, but would not be for that employer under different circumstances.<sup>145</sup> Congress appears to have considered the

<sup>140</sup> *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993).

<sup>141</sup> *Borkowski v. Valley Ctr. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995).

<sup>142</sup> *Vande Zande*, 44 F.3d at 543. Under *Vande Zande*, the plaintiff must prove reasonableness, implying that the plaintiff has the burden of proof on that issue. *Id.* However, some courts hold only that the plaintiff has the burden of production on reasonableness, at which point the burden of nonpersuasion shifts to the defendant to show undue hardship. *Borkowski*, 63 F.3d at 138.

<sup>143</sup> 42 U.S.C. § 12111(10) (2000). The statute defines undue hardship as follows:

(A) In general. The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

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

<sup>144</sup> 29 C.F.R. § 1630.15(d) (2006). *But see* J. H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903, 907 (2003) (describing the duty to accommodate under the ADA as “distinctively demanding”).

<sup>145</sup> 29 C.F.R. § 1630.15(d).

need for a flexible standard for undue hardship and intended to create allowances for varying economic or business conditions.<sup>146</sup>

For the most part, an employer may demonstrate undue hardship by a cost/benefit analysis, showing that the costs of the accommodation are disproportionate to the benefits it might achieve.<sup>147</sup> However, undue hardship need not be entirely economic: undue hardship may result from the imposition of excessive administrative difficulty,<sup>148</sup> a change in the fundamental nature of the business,<sup>149</sup> a determination that the accommodation is not necessary for the person requesting it,<sup>150</sup> or an unfair disruption in employees' expectations of benefits or work rules.<sup>151</sup>

Consequently, there is no need to eliminate the duty to accommodate a "regarded as" plaintiff on the basis of predicted "bizarre" results when the law provides for a way to test whether the results would be unreasonable or inappropriate. Where court decisions truncate the analysis before examining whether employer/proprietors' actions are actually discriminatory, they do little to advance the intended goal of the ADA: eliminating discrimination about disabilities.<sup>152</sup> Each time a court narrows a definition or duty under the ADA, it picks meat off the bones of the Act, so that the intended beneficiaries are left with little more than a bare carcass.

### C. *Picking the Appropriate Accommodation*

"Accommodation" is a general term and refers to "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal . . . opportunit[y]." <sup>153</sup> The implementing regulations define reasonable accommodation as:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.<sup>154</sup>

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<sup>146</sup> H.R. REP. NO. 101-485, pt. 3, at 41 (1990) ("By including a number of factors the Committee intends to establish a flexible approach.").

<sup>147</sup> *Borkowski*, 63 F.3d at 138-39.

<sup>148</sup> *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n.17 (1987).

<sup>149</sup> *Id.*; *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 n.38 (2001).

<sup>150</sup> *Martin*, 532 U.S. at 683 n.38.

<sup>151</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404-05 (2002).

<sup>152</sup> *Reisman*, *supra* note 64, at 2149-50.

<sup>153</sup> EEOC, *Reasonable Accommodation and Undue Hardship*, *supra* note 89.

<sup>154</sup> 29 C.F.R. § 1630.2(o)(1)(i)-(iii) (2006).

Examples of reasonable accommodations include job restructuring, policy or training modifications, interpreters or other communications aids, or changes to physical facilities that make them accessible.<sup>155</sup>

To be effective, the parties should tailor the accommodation to the individual and the job or service requirements.<sup>156</sup> An accommodation for a person “regarded as” disabled might be different from what is typical. Under the *first* prong, an accommodation might primarily involve changes to matters *external to both parties* – changes in things, procedures, or policies. Under the *third* prong, an accommodation might primarily involve a *change to the defendant himself* – a change in attitudes or beliefs.

The core problem for the “regarded as” plaintiff is the mistaken beliefs or attitudes by the employer/proprietor.<sup>157</sup> Logically, then, that would be the place to start in determining what the appropriate accommodation would be. Examples of accommodations that might be appropriate where the central “impairment” is actually other people’s beliefs might include training for co-workers or supervisors and “creative marketing plan[s]” focused on changing customers’ expectations or stereotypes.<sup>158</sup> Reasonable and appropriate accommodations should target the various kinds of attitudinal barriers anticipated by the Act: social discomfort at being in the presence of a disabled person, inaccurate and stigmatizing beliefs, and inflated fears of disabled persons posing a higher degree of risk.<sup>159</sup>

Where the target of the Act is at least in part the elimination of pernicious “myths and stereotypes,” the accommodation should focus on them. The parties should not assume that the only correction needed is the employer/proprietor’s attitude adjustment; rather, the parties should utilize the interactive process to correct misunderstandings and communicate their respective needs.<sup>160</sup> However, where the ADA contemplates that an accommodation might involve “any change in the work environment,”<sup>161</sup> this should include attitudinal changes as well as policy or operational changes.<sup>162</sup>

#### D. *Alternative Theories of Recovery*

Plaintiffs in jurisdictions that do not allow a duty to accommodate a person “regarded as” disabled may still have viable causes of action under other theories.

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<sup>155</sup> *Id.* § 1630.2(o)(2)(i-ii).

<sup>156</sup> H.R. REP. NO. 101-485, pt. 3, at 39 (1990) (“A reasonable accommodation should be tailored to the needs of the individual and the requirements of the job.”).

<sup>157</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

<sup>158</sup> Michael D. Moberly, *Letting Katz Out of the Bag: The Employer’s Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 638 (1998).

<sup>159</sup> Linda Hamilton Krieger, *Sociolegal Backlash*, in BACKLASH AGAINST THE ADA, *supra* note 27, at 376.

<sup>160</sup> Cf. *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002).

<sup>161</sup> Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,744 (July 26, 1991) (codified at 29 C.F.R. § 1630.2(o) (2006)).

<sup>162</sup> 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, 1001 (2000).

### 1. Adverse Employment Action

Under Title I, a "regarded as" plaintiff may skip over the duty to accommodate and proceed directly with a claim of discrimination if she has experienced an adverse employment action. The ADA provides that

[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.<sup>163</sup>

Provided the plaintiff can show that disability was a factor in the adverse employment action, she may be able to succeed in her claim.<sup>164</sup>

### 2. Hostile Work Environment

Claims and remedies under Title VII of the Civil Rights Act are also available under the ADA.<sup>165</sup> Where negative attitudes based on disability are so severe and pervasive that they alter working conditions, a Title VII plaintiff may be able to make a claim for hostile work environment.<sup>166</sup> By extension, this same claim is available to a plaintiff covered under the ADA.<sup>167</sup>

Under Title VII, a hostile work environment claim is predicated on the fact that such an environment affects the "terms, conditions, [and] privileges of employment."<sup>168</sup> Congress included these same terms in the ADA,<sup>169</sup> which provides a parallel basis for a hostile work environment claim based on disability discrimination.<sup>170</sup>

Although it may be difficult to prove hostile work environment because it has a high evidentiary bar,<sup>171</sup> in theory it is a logical alternative tool for the "regarded as" plaintiff.

### 3. Summary

Applying the reasonableness requirement and using the interactive process to determine the appropriate accommodation are two features of the ADA that

<sup>163</sup> 42 U.S.C. § 12112(a) (2000).

<sup>164</sup> *Id.* § 2000e-2(m). *See also* *Tullos v. City of Nassau Bay*, 137 F.App'x 638 (S.D. Tex. 2005) (affirming a jury verdict in the district court for a "regarded as" plaintiff whose employment was terminated due to misconceptions about his abilities and limitations).

<sup>165</sup> 42 U.S.C. § 12117(a) (2000).

<sup>166</sup> *Cf. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that a claim for sexual harassment would be actionable where it is "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment'").

<sup>167</sup> *Lanman v. Johnson County, Kan.*, 393 F.3d 1151, 1155 (10th Cir. 2004).

<sup>168</sup> 42 U.S.C. § 2000e-2(a)(1) (2000) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

<sup>169</sup> *Id.* § 12112(a).

<sup>170</sup> *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 720 (8th Cir. 2003). *See also* *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229 (5th Cir. 2001); *Fox v. Gen. Motors Corp.*, 247 F.3d 169 (4th Cir. 2001).

<sup>171</sup> *Mannie v. Potter*, 394 F.3d 977 (7th Cir. 2005) (holding that for a "regarded as" plaintiff to show hostile work environment the hostility must be so severe as to be abusive as judged both objectively and subjectively).

should prevent “bizarre” results without having to resort to nullifying the duty to accommodate the “regarded as” plaintiff. Letting the claim go further in the litigation (or mediation) process may appear more costly in the short run; but if it eliminates barriers to full employment and participation, it will be not only more just but more productive for all parties in the long run. Furthermore, it provides some protection for employers (or proprietors) by restricting the duty to accommodate where it is reasonable and produces no undue hardship on the business.

The Supreme Court need not decide this issue because the elements of the solution are already available within the text of the ADA. This solution employs the whole of the ADA, not merely the definitions of “disabled.” It would not require Congress to amend or revise the Act. If the courts recognized the duty to accommodate persons “regarded as” disabled, and properly limited accommodations by applying the reasonableness requirement and undue hardship defense, then the answer to the question, “Is there a duty to accommodate persons ‘regarded as’ disabled under the ADA?” would no longer depend on geography.

#### CONCLUSION

As he signed the ADA into law in 1990, President George H. W. Bush described the occasion as a “splendid scene of hope.”<sup>172</sup> Fifteen years later, Secretary of Transportation Norman Mineta recalled the “bright promise” of the enactment and recounted the many instances of progress in the intervening years.<sup>173</sup>

Despite a common perception of extraordinary progress, in fact, claims under the ADA rarely succeed: defendants prevail an astonishing 93% of the time at trial on the merits and in 84% of the reported appeals cases.<sup>174</sup> This important piece of civil rights legislation, though broad in its initial conception, has yielded narrow gains for persons with disabilities.<sup>175</sup>

It has been over thirty years since the Rehabilitation Act was enacted, which first sought to eliminate the “myths and stereotypes” about disability. Although many consider the ADA to have been very effective in eliminating disability-based discrimination, others see the work that remains to be done and substantial discrimination that yet remains.<sup>176</sup>

Legislative intent and statutory language both confirm that the design of the ADA was that it be an extension of the Rehabilitation Act. Yet the courts are still at odds over the fundamental question of the duty to accommodate under the “regarded as” definition of disability. Some fear that “many, perhaps most, courts are not enforcing the law, but instead are finding incredibly inven-

<sup>172</sup> Pres. G. H. W. Bush, *supra* note 6.

<sup>173</sup> Norman Mineta, U.S. Secretary of Transportation, Remarks at the ADA 15th Anniversary Symposium (July 26, 2005), available at <http://www.dot.gov/affairs/minetasp072605.htm>.

<sup>174</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999).

<sup>175</sup> Susan Gluck Mezey, *DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT* 166 (2005).

<sup>176</sup> *Id.* at 4.



tive means of interpreting the ADA to achieve the opposite result that the Act was intended to achieve."<sup>177</sup> The fear of "bizarre" results keeps some courts from imposing such a duty, even though the ADA has other features that ensure that only reasonable duties are imposed. If the courts referred to the ADA as a whole – mindful of the underlying purpose of the Act – they would be able to see these built-in protections and would find it unnecessary to eliminate the duty to accommodate.

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<sup>177</sup> Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 338 (2001).