THE STRUGGLE FOR REASONABLE ACCOMMODATION FOR "REGARDED AS" DISABLED INDIVIDUALS

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I. INTRODUCTION

Edward Raymond Williams, a police officer employed with the Philadelphia Housing Authority Police Department (PHA), was terminated as a result of misconceptions about his fitness for duty.[1] Williams had been diagnosed with major, recurrent, and severe depression, and requested leave from work. PHA ordered a psychological evaluation to determine his fitness for duty.[2] The report stated that Williams "should not resume active duty . . . unless he is under the proper care of medical and psychological personnel."[3] Additionally, it stated that Williams could return to work for three months if he was employed in an administrative or clerical position. However, the report indicated that he should not carry a firearm.[4] Williams requested reassignment to the radio dispatch room. PHA refused to accommodate him in such a manner because it interpreted the psychological report to mean that Williams was unfit to work around any firearms.[5] Instead, PHA required Williams to report to uniform patrol duty upon a release to full duty. PHA did not allow Williams the time to recover from his illness, however, and terminated him upon exhaustion of his available leave time.

The discrimination Williams faced is the type Congress attempted to eliminate by passing the Americans with Disabilities Act of 1990 (ADA or the Act). In the United States, fifty percent of disabled individuals are unemployed. Only twenty percent of non-disabled individuals are unemployed, demonstrating that disabled status severely inhibits an individual's ability to obtain and retain employment.[6] The purpose of

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1. Williams v. Phila. Housing Auth. Police Dep't, 380 F.3d 751, 756 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005).

2. *Id*.

3. *Id*. at 757.

4. *Id*.

5. *Id*.

6. U.S. COMM'N ON CIV. RTS., HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT 12 (1999).

the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities"[7] in order to eliminate "discrimination against individuals with disabilities."[8]

Yet, a gray area in the Act has emerged. Employees who are actually disabled and otherwise qualified are entitled to reasonable accommodation under the Act, unless the accommodation would cause the employer undue hardship.[9] A problem arises when the employee is not actually disabled, but is "regarded as" disabled. In these circumstances, circuit courts of appeals are split as to whether such individuals are entitled to reasonable accommodation.

This Comment examines the "regarded as" dilemma in five additional parts. Part II of this Comment discusses the statutory framework of the ADA, including the text of the statute and congressional reports intended to establish that all persons classified as disabled under the Act are entitled to reasonable accommodation. Part III analyzes *School Board of Nassau County v. Arline*,[10] in which the United States Supreme Court suggests reasonable accommodation is required for individuals "regarded as" disabled under the Rehabilitation Act of 1973.[11] Part IV focuses on the current circuit split, including the differences among courts and the reasoning supporting their respective decisions. Part V examines the policies behind affording reasonable accommodation to individuals who are "regarded as" disabled. Finally, Part VI concludes that individuals classified as disabled under the "regarded as" prong are entitled to reasonable accommodation.

II. STATUTORY FRAMEWORK OF THE ADA

A. History of Federal Legislation Protecting Disabled Individuals

Beginning in the early twentieth century, legislatures recognized the need to protect the mentally and physically disabled members of society. In 1920, Congress passed the Fess-Kenyon Act, with the goal of providing for the vocational rehabilitation of disabled persons in industry as well as to aid their return to civil employment.[12] Through the middle of the century, Congress enacted additional legislation in

7. The Americans With Disabilities Act, 42 U.S.C.A. § 12101(b)(2) (2000).
8. 42 U.S.C.A. § 12101(b)(1) (2000).
9. 29 C.F.R. § 1630.15(d) (2003).
10. 480 U.S. 273 (1987).
11. 29 U.S.C.A. § 701 (2000).
12. 41 Stat. 735-37 (1920).

recognition of the need to integrate disabled individuals into American society.[13] In 1968, Congress passed the Architectural Barriers Act,[14] which required federally funded or leased buildings to be handicap accessible. In 1970, Congress passed the Urban Mass Transportation Act,[15] which required accessibility plans for mass transportation systems. The Education for All Handicapped Children Act[16] was passed in 1973 and provided for the free, appropriate, and least restrictive educational environments for disabled children. In 1975, Congress passed the Developmental Disabilities Bill of Rights Act, which provides federal funding for standardized care of individuals with developmental disabilities contingent upon meeting certain minimum standards.[17] In 1984, the Voting Accessibility for the Elderly and Handicapped Act was passed, which attempted to improve access for disabled and elderly individuals at registration and polling places. In 1988, the Fair Housing Amendment Act was passed, which included a provision protecting disabled individuals from discrimination in the rental or sale of private housing.

Of these laws, only two were specifically aimed at preventing discrimination against disabled individuals in the private sector.[18] The rest focused on eliminating discrimination in the federal government, against recipients of federal assistance, and by federal contractors.

The most significant step toward alleviating discrimination suffered by disabled individuals prior to enactment of the ADA was the passage of the Rehabilitation Act of 1973.[19] The purposes of the Rehabilitation Act were "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence and inclusion and integration into society"[20] and to increase federal support for vocational

13. H. R. REP. NO. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 448.

14. 42 U.S.C.A. § 4151 (2000).

15. 49 U.S.C.A. § 1612 (2000).

16. 20 U.S.C.A. § 1401 (2000).

17. Such minimum standards include:

> (a) [P]roviding a nourishing well-balanced diet; (b) providing appropriate and sufficient medical and dental services; (c) prohibiting the use of physical restraint unless it is absolutely necessary and is not used as a punishment or as a substitute for a habilitation program; (d) prohibiting the excessive or inappropriate use of chemical restraints; (e) allowing visits by close relatives at reasonable hours without prior notice; and (f) complying with adequate fire and safety standards.

BUREAU OF NATIONAL AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE 19 (Libr. of Cong.) (1990).

18. The two laws, which focused on individuals with disabilities, were the air carrier and housing legislation. *Id.* at 15.

19. Rehabilitation Act of 1973, 29 U.S.C.A. § 701 (2000).

20. 29 U.S.C.A. § 701(b)(1) (2000).

rehabilitation.[21] "Sections 501 and 503 of the act established affirmative action requirements" for federal agencies, departments, and federal contractors.[22] Section 501 is the most important section regarding the rights of the disabled because it prohibits discrimination of any qualified individual with a disability in programs receiving federal assistance.[23] Additionally, Section 504 provides that air carriers receiving federal funds may not discriminate against individuals with disabilities.[24]

Many of the ADA's provisions were modeled after the Rehabilitation Act, with some ADA provisions specifically referring to Rehabilitation Act language.[25] More specifically, the "ADA uses the same 'regarded as' test that was established under the regulations implementing Section 504 of the Rehabilitation Act."[26] The ADA provides "a comprehensive piece of civil rights legislation which promises a new future" for disabled individuals in American society.[27] To reflect changes in social attitudes toward disabled persons, Congress substituted the term "disabled" for "handicapped." This display of respect by Congress mirrors its intent that the ADA "end discrimination against individuals with disabilities and [] bring those individuals into the economic and social mainstream of American life."[28]

B. "Regarded As" Disabled Status Under the ADA

Under the ADA, a disabled individual is one who has a record of "physical or mental impairment that substantially limits one or more" major life activities.[29] However, the ADA also extends disabled status to individuals who are not substantially limited in a major life activity under three circumstances.[30] Individuals fitting into these three categories are "regarded as" disabled.

First, a person is "regarded as" disabled when he has "a physical or mental impairment that does not substantially limit major life activities

21. S. REP. NO. 93-1297, at 37-38, 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373.

22. BUREAU OF NATIONAL AFFAIRS, *supra* note 17, at 20.

23. *Id.* at 21.

24. *Id.* at 23.

25. For example, "[l]ike Sections 501, 503 and 504 of the 1973 Rehabilitation Act, the ADA provides that the employer is not required to provide accommodations if the employer demonstrates that providing such an accommodation will pose an undue hardship on the operation of its business." H.R. REP. NO. 101-485(III) (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N 445, 462-63.

26. BUREAU OF NATIONAL AFFAIRS, *supra* note 17, at 93.

27. H.R. REP. NO. 101-485(III) (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N 445, 449.

28. *Id*. at 446.

29. 42 U.S.C.A. § 12102(2)(A) (2000); *see also* 29 C.F.R. § 1630.2(g)(1)-(2) (2004).

30. *See* The Americans with Disabilities Act, 42 U.S.C.A. § 12102(2)(C) (2000); *see also* 29 C.F.R. § 1630.2(g)(3) (2003).

but is treated by a covered entity as constituting such limitation."[31] For instance, if an employer mistakenly treats the individual's impairment as more limiting than it actually is, that person is classified as disabled. Second, an individual is "regarded as" disabled if he has an "impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."[32] A person will be classified as disabled under this section "as a result of attitudinal barriers."[33] Finally, an individual has a stigmatized condition and is "regarded as" disabled when he has no physical or mental impairment, yet "is treated by a covered entity as having a substantially limiting impairment."[34] A person will be classified as disabled under this section when the covered entity mistakenly treats the individual as though he were actually disabled.[35] These provisions parallel the regulations providing for "regarded as" disabled status in the Rehabilitation Act of 1973.

C. Congressional Intent Behind "Regarded As" Status

According to a House Report, the rationale behind including "regarded as" status in the ADA is identical to the reasoning behind its inclusion in the Rehabilitation Act of 1973.[36] The United States Supreme Court articulated this rationale in *School Board of Nassau County v. Arline*.[37] In expanding the definition of "disability" to include "regarded as" status, Congress sought to "combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped . . . so as to preclude discrimination against" individuals who are physically or mentally impaired *and* regarded as impaired.[38] Without the inclusion of "regarded as" status, everyone would be open to prejudice and discrimination stemming from "'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to'" challenges faced by disabled individuals.[39]

Additionally, the text of the ADA provides more evidence that "regarded as" employees are equally protected under the statute.

31. 29 C.F.R. § 1630.2(l)(1) (2003).

32. 29 C.F.R. § 1630.2(l)(2) (2003).

33. BUREAU OF NATIONAL AFFAIRS, *supra* note 17, at 94.

34. 29 C.F.R. § 1630.2(l)(3) (2003).

35. BUREAU OF NATIONAL AFFAIRS, *supra* note 17, at 94.

36. The Act was amended in 1974 to include the "regarded as" classification. H.R. REP. NO. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453.

37. 480 U.S. 273 (1987).

38. *Id.* at 279.

39. *Id.* (quoting S. REP. NO. 93-1297, at 50 (1974)).

"Regarded as" status is included under the umbrella of "disability" and is in no manner distinguished from actual disability.[40] Thus, "regarded as" disabled individuals are protected from the discrimination in exactly the same manner as the actually disabled individuals. Moreover, the text of the ADA does not explicitly state that only actually disabled individuals are entitled to the benefits and protections of the statute. The term "regarded as" disabled is only mentioned in the definition of disability, diminishing the possibility that Congress intended "regarded as" disabled individuals to be excluded from the benefits and protections of the statute, including reasonable accommodation.

III. *SCHOOL BOARD OF NASSAU COUNTY V. ARLINE*: SUPREME COURT PRECEDENT CONCERNING "REGARDED AS" DISABLED STATUS AND ITS POTENTIAL EFFECT ON FUTURE DECISIONS CONCERNING REASONABLE ACCOMMODATION

In 1987, the United States Supreme Court granted certiorari to decide *School Board of Nassau County v. Arline*.[41] This case involved a determination of whether the school board's decision to terminate a tuberculosis-positive elementary school teacher violated the Rehabilitation Act.[42] Even though Gene Arline unquestionably suffered a handicap,[43] the district court held that she was not disabled under Section 504 of the Rehabilitation Act.[44] The United States District Court for the Middle District of Florida determined Congress did not intend to include such diseases within the definition of handicap. Additionally, the court stated that even if Arline were handicapped, her infection with a contagious disease would not disqualify her from the position.[45]

The United States Court of Appeals for the Eleventh Circuit disagreed and reversed.[46] It held that Arline fell neatly within the statute's definition of handicapped and remanded the case "for further findings as to whether the risks of infection" rendered her unqualified for her position and "whether it was possible to make some reasonable

40. Buskirk v. Apollo Metals, 307 F.3d 160, 169 n.2 (3rd Cir. 2002).

41. 480 U.S. 273 (1987).

42. *Id.* at 277.

43. The term "handicap" was used in the Rehabilitation Act of 1973. However, Congress amended the Act in 1992 to substitute the term "disability." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-559 (1992).

44. *Arline*, 480 U.S. at 277.

45. *Id.*

46. Arline v. Sch. Bd. of Nassau County, 772 F.2d 759 (11th Cir. 1985).

accommodation for her in that teaching position."[47]

In order to clarify the standard for disability status under Section 504 of the Rehabilitation Act, the Supreme Court granted certiorari. Under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" by reason of that person's handicap.[48] A handicapped individual under the Rehabilitation Act is defined as a 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 impairment; or (iii) is regarded as having such an impairment."[49] Under this purpose and definition of handicapped, the Court held that Arline's tuberculosis qualified as an impairment and her prior hospitalization established a record of such impairment. Disagreeing with the District Court's contention that contagious diseases are never covered under the Rehabilitation Act, the Supreme Court held that contagious diseases are covered when constituting impairment.

The Court examined the legislative history of the Rehabilitation Act to support its holding, specifically history concerning the inclusion of the "regarded as" prong.

> By 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.[50]

By broadening the definition of handicapped, the Court felt that Congress intended to protect all qualified handicapped individuals, whether "regarded as" or otherwise disabled. "The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments."[51] Thus, excluding all individuals with contagious diseases defeats this purpose by eliminating from coverage individuals who are impaired and otherwise qualified for their positions.

Although the Court found Arline to be handicapped under the actual impairment rather than the "regarded as" prong, this case provides the

47. *Id.*

48. 29 U.S.C.A. § 794(a) (2000).

49. 29 U.S.C.A. § 705(20)(B)(i-iii) (2000).

50. *Arline*, 480 U.S. at 284.

51. *Id.* at 284-85.

current Supreme Court with guidance in deciding the issue central to this Comment. The reasons articulated by the *Arline* Court for inclusion of the "regarded as" prong in the Rehabilitation Act are also pertinent to the ADA.

> As a result of *Arline*, it is clear that individuals can be included under the definition solely because of the negative reactions, prejudiced attitudes, ignorance, misapprehensions, irrational fears or mythology of other people, whether or not the person in question has a mental or physical impairment as defined by either or both of the other two portions of the definition.[52]

By placing heavy weight on preventing misconceptions and prejudices in the Rehabilitation Act, the *Arline* Court set precedent for the current Court. While the *Arline* Court did not specifically address the issue of reasonable accommodation, its interpretation of the Rehabilitation Act in strong favor of preventing misconceptions and misperceptions of disability should influence the current Court in its interpretation of the ADA's entitlements for "regarded as" disabled individuals.

IV. THE CIRCUITS' STRUGGLE: ARE "REGARDED AS" DISABLED PERSONS ENTITLED TO REASONABLE ACCOMMODATION?

A. Reasonable Accommodation Required

1. Third Circuit: *Williams v. Philadelphia Housing Authority Police Department*

The United States Court of Appeals for the Third Circuit decided the issue of reasonable accommodation for "regarded as" disabled employees in *Williams v. Philadelphia Housing Authority Police Department*,[53] although the court had previously approached the issue.[54]

52. BUREAU OF NATIONAL AFFAIRS, *supra* note 17, at 99.

53. 380 F.3d 751 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 1725(2005).

54. Buskirk v. Apollo Metals, Inc., 307 F.3d 160, 168-69 (3rd Cir. 2002) ("Once again, we will reserve the answer to this question for a future case because . . . we conclude that Apollo Metals provided Buskirk with reasonable accommodations. Having reached this conclusion, we need not answer the difficult question of whether Apollo Metals was obligated to do so."); *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3rd Cir. 1999); Padmaja Chivukula, *Is Ignorance Bliss? A Pennsylvania Employer's Obligation to Provide Reasonable Accommodation to Employees it Regards as "Disabled" After* Buskirk v. Apollo Metals, Inc., 41 DUQ. L. REV. 541 (2003) ("The [Third Circuit] declined to resolve the issue, holding instead that the employer had provided reasonable accommodation

In *Williams*, the plaintiff, Edward Raymond Williams, could have been classified as actually disabled under the ADA. However, the court analyzed his claims under the "regarded as" prong in order to answer the looming question of entitlement to reasonable accommodation for "regarded as" disabled individuals. The employer misconceived Williams's disability, considering him "unable to work with, have access to, or be around others carrying, firearms."[55] This resulted in his employer's refusal to reasonably accommodate him by placing him in an administrative position during his illness.

Recognizing that an adverse employment action under the ADA includes "refusing to make reasonable accommodations for a plaintiff's disabilities,"[56] the court faced the question of whether the requirement of reasonable accommodation extends to all categories of disabled individuals. In analyzing this issue, the court focused on the plain language of the ADA, its legislative history, the Supreme Court's decision in *Arline*, and the "windfall" theory.[57]

First, the plain language of the ADA not only includes individuals who are "regarded as" disabled, but "does not in any way 'distinguish between [actually] disabled and "regarded as" individuals in requiring accommodation.'"[58] Thus, no basis exists for denying "regarded as" disabled individuals the reasonable accommodation provided for in the text of the ADA.

Second, "the legislative history of the ADA confirms that Congress meant what its text says."[59] Including the "regarded as" disabled classification recognizes that an individual may not be actually limited by an impairment, but rather by the reactions, myths, and fears of others. Therefore, Congress's intent in defining "regarded as" disabled employees was to grant full disability status under the ADA, and consequently full protection as well.

Third, the court used the Supreme Court's decision in *School Board of Nassau County v. Arline* to support its contention.[60] In *Arline*, the Court reviewed the Rehabilitation Act and determined that "regarded as" disabled individuals were entitled to the full protections of the

to the employee and thus had not violated the ADA.").

55. *Williams*, 380 F.3d at 762.

56. *Id*. at 761.

57. *Id* at 772-77. The "windfall" theory has been asserted as: "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." *Taylor*, 177 F.3d at 196 (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 n.12 (3rd Cir. 1998)).

58. *Williams*, 380 F.3d at 774 (quoting *Taylor*, 177 F.3d at 196).

59. *Id*.

60. *Id*. at 775.

Rehabilitation Act.

> Given that the "regarded as" sections of both Acts play a virtually identical role in the statutory scheme, and the well-established rule that the ADA must be read "to grant at least as much protection as provided by . . . the Rehabilitation Act," the conclusion seems inescapable that "regarded as" employees under the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled.[61]

This quotation coupled with Congress's specific endorsement of the *Arline* approach by including the "regarded as" disabled classification in the ADA provides extensive evidence that it intended such individuals be entitled to reasonable accommodation.

Finally, the court recognized a potential "windfall" in granting reasonable accommodation to "regarded as" employees; however, the discrimination faced by such individuals is "precisely the type of discrimination the 'regarded as' prong literally protects from."[62]

2. First Circuit: *Katz v. City Metal Co.*

Alexander Katz, a salesman employed by City Metal Co., was terminated five weeks after suffering a heart attack.[63] Prior to his termination, Katz performed tasks in the areas of training, outside sales, and customer relations. "Katz did not receive any negative reports or comments about the quality of his performance and was not informed that his job was in jeopardy."[64] About two weeks after his heart attack, Katz arranged a meeting with his supervisor in order to discuss returning to work.[65] Because of the heart attack, Katz was unable to climb stairways, so the meeting was conducted in his car. During the meeting, Katz was encouraged to get well and told not to worry about his position at the company. However, Katz was later informed that his position had been terminated. Katz then "offered to return to work on a part-time basis with a reduction in salary and to accept whatever accommodation[] the company would make."[66] The First Circuit reversed the district court's grant of summary judgment in favor of City Metal because Katz had established a prima facie case of discrimination.[67]

First, the appellate court found Katz to be disabled under the ADA

61. *Id.* (*quoting* Bradgon v. Abbott, 524 U.S. 624, 632 (1998)).
62. *Id.* at 775-76.
63. Katz v. City Metal Co., Inc., 87 F.3d 26, 28 (1st Cir. 1996).
64. *Id.*
65. *Id.* at 29.
66. *Id.* at 29.
67. *Id.* at 34.

because City Metal perceived him as disabled because of his heart attack. Second, Katz was terminated because of City Metal's misconception that he could not perform his duties.[68] Finally, since the district court did not inquire into Katz's ability to "perform his job with reasonable accommodations"[69] the question of whether Katz could perform his job duties with or without reasonable accommodation was open. Katz requested reasonable accommodation from City Metal in the form of a salary reduction and a part-time work schedule, but City Metal rejected these suggestions.[70] According to the ADA, "job restructuring" and "part-time or modified work schedule[s]" are reasonable accommodations.[71]

The question of whether Katz could perform his job with reasonable accommodation was left to the jury. More importantly, however, the decision in *Katz* implies that "regarded as" disabled individuals are entitled to reasonable accommodation if it will allow them to perform their job duties. However, the court recognized that City Metal had the opportunity to show Katz's proposed accommodations posed an undue hardship.[72]

B. Reasonable Accommodation Not Required

1. Fifth Circuit: *Newberry v. East Texas State University*

Without lengthy analysis, the Fifth Circuit decided that individuals who are "regarded as" disabled are not entitled to reasonable accommodation under the ADA.[73] *Newberry* involved the termination of a tenured professor from East Texas State University.[74] In 1994, James Newberry was fired as a result of his poor performance and "lack of collegiality."[75] Because of the contentious relationship between Newberry and his colleagues, many did not recommend him for tenure. However, the university granted Newberry tenure in 1984. The tension between Newberry and his colleagues arose because Newberry worked

68. *Id*. at 33 ("The timing of Katz's firing, one month after his heart attack, was circumstantial evidence from which the jury could find that Katz's disability triggered, in whole or in part, his firing by City Metal.").

69. *Id.*

70. *Id*.

71. 42 U.S.C.A. § 12111(9) (2000).

72. *Katz* , 87 F.3d at 33 n.5.

73. Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998).

74. *Id*. at 276.

75. *Id*. at 279.

fewer hours, did not attend faculty meetings, and avoided participation in student art reviews.[76] During a meeting with his department chairman, Newberry requested "a year's paid sick leave, during which he would study art in New York."[77] Months later, Newberry was dismissed with one year paid salary and benefits. Newberry alleged that he was "regarded as" disabled because of his colleagues' perceptions about his depression and thus the university had violated the ADA.[78]

At trial, Newberry's psychiatrist testified that Newberry suffered from obsessive-compulsive traits, which affected his mental and physical functioning. Witnesses for the university did not testify that they perceived Newberry as disabled because of his odd behavior. The jury believed the university's witnesses and did not find Newberry to qualify as disabled under the ADA.[79] The Fifth Circuit agreed, finding that "[a]ll the evidence indicates that the university dismissed him because of his work performance and lack of collegiality."[80] Concerning reasonable accommodation for "regarded as" disabled employees, the court stated, "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."[81] As *Arline* was not mentioned, the court appeared to completely disregard the direct correlation between the Rehabilitation Act and the ADA.

2. Sixth Circuit: *Workman v. Frito-Lay, Inc.*

Frito-Lay, Inc., terminated Joyce Workman after she took leave to recover from surgery to alleviate her irritable bowel syndrome.[82] While working at Frito-Lay, Workman was a packer and floor person.[83] After her surgery, Workman met with her supervisors in an attempt to receive accommodation for her impairment. Workman presented a letter from her physician, which stated that Workman could return to work but needed frequent access to a restroom. Her supervisor informed her that no accommodation was possible and shortly thereafter Workman was

76. *Id*. at 278.
77. *Id*.
78. *Id*.
79. *Id*. at 279.
80. *Id.*
81. *Id*. at 280.
82. Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999).
83. *Id*. at 463.

fired.[84] Workman filed a retaliation and discrimination lawsuit.[85] Workman prevailed at trial and was awarded back pay and reinstatement to the level she would have attained had she not been terminated.[86]

While the Sixth Circuit found no reason to disrupt the jury's finding that Workman was disabled, it agreed with Frito-Lay that if Workman was "regarded as" disabled, such a finding "would obviate the Company's obligation to reasonably accommodate Workman."[87] To support this contention the court cited 39 C.F.R. § 1630.2(l)(1)-(3). However, these provisions contain no language to support the court's holding, only stating what "regarded as having such an impairment" means.[88] Additionally, the court mirrored the Fifth Circuit's oversight and did not include a discussion of *Arline*. The court also failed to provide any reasoning to support its contention that "regarded as" disabled individuals are not entitled to reasonable accommodation.

3. Eighth Circuit: *Weber v. Strippit, Inc.*

David Weber, an international sales manager employed with Strippit, Inc., was terminated after suffering a major heart attack.[89] Although Weber continued to perform all of his job responsibilities throughout his recovery, he was informed that his position was subject to termination at any time.[90] A few months later, Strippit informed Weber that he was required to relocate to another city. Because of Weber's health restrictions, he informed Strippit he was unable to move and was terminated.[91]

In determining the issue of reasonable accommodation for individuals with perceived disabilities, the court mentioned other circuit court

84. *Id* at 464.

85. The retaliation charge was dismissed. *Id.*

86. *Id*.

87. *Id*. at 467.

88. 29 C.F.R. § 1630.2(l)(1)-(3) (2005).

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

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

90. *Id*. at 910.

91. *Id*.

decisions.[92] However, it made no reference to the Supreme Court's decision in *Arline*. In the case of reasonable accommodation for an individual with an actual disability, the court said the "requirement is easily applied."[93] However, in the case of a perceived disability, "[t]he reasonable accommodation requirement makes considerably less sense."[94] The court reasoned that "[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results."[95]

Illustrating the "bizarre results," the court posed two hypothetical situations. In the first, the employee is unable to relocate to another city because of a heart condition, which does not substantially limit a major life activity. In this instance, the employer would be able to terminate an employee "without exposing [itself] to liability under the ADA."[96] Conversely, in the second hypothetical, the employer mistakenly believes that the employee's heart condition substantially limits one or more life activities. Under this scenario, the employer would be required to reasonably accommodate the individual by delaying the relocation.[97] The court claimed that this second hypothetical would create a bizarre result in that an employer would be required to reasonably accommodate an individual who is not limited in any major life activity.

Thus, the Eighth Circuit does not require employers to reasonably accommodate individuals who are "regarded as" disabled. The court's decision was not based on the ADA's statutory framework or congressional intent, but rather on the practical implications of such a requirement.

V. POLICY RATIONALES BEHIND THE ENTITLEMENT OF REASONABLE ACCOMMODATION FOR INDIVIDUALS "REGARDED AS" DISABLED

Courts and scholars argue that requiring reasonable accommodation for "regarded as" disabled individuals is impractical and unfair to covered entities.[98] However, denying individuals who fall under the

92. *Id*. at 907. The court cited *Katz*, in which the First Circuit determined that "regarded as" individuals are entitled to reasonable accommodation. *Deane* was also discussed, which is irrelevant for two reasons. First, it was overruled by *Williams*. Second, the court did not decide the issue of reasonable accommodation for "regarded as" disabled individuals. *Id.*

93. *Id*. at 916.

94. *Id*.

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id.* at 916 ("Imposing liability on employers who fail to accommodate non-disabled

statute's definition of disability its full protection is contrary to public policy. Congress passed the ADA and specifically included individuals who are "regarded as" disabled without otherwise limiting their protection under the law. Considering the safeguards built into the ADA designed to protect employers from excessive costs and undue hardship, a judicially created exception excluding "regarded as" disabled individuals from reasonable accommodation is unnecessary and contrary to congressional intent.

A. Safeguards Within the ADA to Protect Against Abuse of the Entitlement of Reasonable Accommodation for "Regarded As" Disabled Individuals

The language of the ADA affords protection against the abuses suggested by granting reasonable accommodation to individuals who are "regarded as" disabled in three ways: first, in the mechanism for determining "regarded as" status; second, in the allocation of reasonable accommodation; and third, in the statutory remedies available to plaintiffs. The establishment of these safeguards also supports the contention that Congress intended to entitle "regarded as" disabled individuals to reasonable accommodation. Otherwise, Congress would not have been so cautious in establishing the requirements for "regarded as" status and affording protections to employers for undue hardships. Additionally, these provisions severely diminish any potential for abuse, and any individual not intended to be protected or accommodated under the Act will be unable to receive an unfair advantage.

1. The Requirements for "Regarded As" Status

Although an individual who is not actually disabled may be protected by the ADA, that person must meet all the requirements for "regarded as" status. Congress intended to prevent employer misconceptions by including the "regarded as" prong. Thus, the main factor in determining whether one falls within that classification is the employer's perception.

An individual may be "regarded as" disabled in three circumstances. The first circumstance occurs when an individual has an impairment that does not substantially limit major life activities, yet is treated by a

employees who are simply regarded as disabled would lead to bizarre results."). *See also* Allen Dudley, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act For "Regarded As" Disabled Individuals*, 7 GEO. MASON L. REV. 389 (1999) (arguing that the "regarded as" prong was not intended to benefit such persons in the form of requiring reasonable accommodation and that doing so would complicate the employee-employer relationship and yield absurd results unintended by Congress); *see also infra* note 107.

covered entity as substantially limited.[99] An example of this is a person with an observable impairment who is not limited in any of the major life activities of "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[100] The second instance occurs when an individual has an impairment that does not substantially limit one of the above-listed major life activities but is considered disabled because of others' attitudes toward the impairment.[101] Finally, an individual will be "regarded as" disabled where the employer treats the employee as disabled, even though the individual is in no way impaired.[102] For example, an individual who is discharged or otherwise treated adversely because of an unfounded rumor that the individual is infected with the Human Immunodeficiency Virus (HIV) would qualify as disabled under this subsection.[103]

Under each of these circumstances, the controlling factor is others' perceptions of the individual. Therefore, an individual will not be "regarded as" disabled and the question of reasonable accommodation will not present itself so long as employers are non-discriminatory in their behavior and attitudes towards all employees. For example, in *Newberry v. East Texas State University*, a professor suffering from obsessive-compulsive disorder was not regarded as disabled because his colleagues and superiors neither treated nor perceived him to be disabled.[104] Therefore, as intended by Congress in including the "regarded as" prong, one will not be "regarded as" disabled if that individual is not treated as such.

The argument against requiring reasonable accommodation for those individuals who are "regarded as" disabled is that requiring employers to accommodate for nonexistent disabilities is absurd. However, it is not so absurd to hold employers accountable for their actions by requiring reasonable accommodation when an employer perceives an employee to be disabled. Allowing employers to treat an employee as disabled, yet not requiring reasonable accommodation is inconsistent with the purpose of the ADA. Since Congress decided to extend protection to people with perceived disabilities, it would indeed be an absurd result to allow discriminating employers escape liability under the statute. Anything less would be unfair to individuals who are "regarded as" disabled, inconsistent with congressional intent, and ineffective in achieving the

99. 29 C.F.R. § 1630.2(l)(1) (2003).

100. 29 C.F.R. § 1630.2(i) (2003).

101. 29 C.F.R. § 1630.2(l)(2) (2003).

102. 29 C.F.R. § 1630.2(l)(3) (2003).

103. Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

104. *Id*.

goals of eliminating stereotypes, avoiding misconceptions, and preventing discrimination.

Additionally, reasonable accommodation may be an employee's only remedy against discrimination. If an employer is wrongfully treating an employee as disabled, that employee has few options. Correcting misconceptions is not a task easily undertaken by any individual, much less an individual who is at the mercy of an employer with predispositions about that individual's abilities. According to a Department of Labor study, the major obstacle in making workplace changes for disabled individuals was changing the attitudes of co-workers and supervisors.[105] Allowing one to tap into the remedy of reasonable accommodation provides a means of correcting wrongs previously suffered as well as preventing future discrimination. It is necessary to take a firm stance to prevent these difficult-to-change misconceptions in the workplace by increasing the costs of forming negative perceptions.

An employer faced with the possibility of having to fund an accommodation for an individual who is not actually disabled, but disabled due to that employer's own actions and misconceptions, will have an incentive to change its behavior toward that individual. Additionally, requiring accommodations to correct employer misconceptions will provide incentive for employers to be more cautious in the manner in which they treat employees who may be disabled.

Therefore, allowing "regarded as" disabled individuals the right to reasonable accommodations will prevent employer misconceptions about disabled individuals, which satisfies Congress's reasons for including the "regarded as" prong in the text of the ADA.

2. Manner in which Accommodation is Requested and Determined

Another safeguard protecting employers from abuse of the reasonable accommodation entitlement is the condition that disabled employees must first request reasonable accommodation.[106] By requiring the disabled or "regarded as" disabled employee to request the accommodation from the employer before taking legal action, employers are in a reactive position. The burden is on the employee to initiate the reasonable accommodation process, advantaging the employer because the responsibility to provide an accommodation does not arise until

105. Susanna M. Bruyere, *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, CORNELL UNIVERSITY PROGRAM ON EMPLOYMENT AND DISABILITY (March 2000), *available at* http://www.dol.gov/odep/pubs/ek01/stats.htm.

106. 29 C.F.R. § 1630.2 (2004); 29 C.F.R. § 1630 app. §1630.9.

requested. By requiring an employee request to initiate the accommodation process, the ADA places covered entities in a situation where they will be on notice of a requested accommodation directly from the employee.

Some argue that providing reasonable accommodation to perceived-as-disabled individuals gives them an unfair advantage.[107] However, making reasonable accommodations does not involve providing modifications for the individual's personal benefit.[108] Rather, job-related modifications, which assist the employee in the performance of his job tasks, are also beneficial to the employer. Thus, an individual is not receiving additional benefit, but instead is receiving assistance in removing or alleviating obstacles to the performance of job tasks.

Additionally, perceived-as-disabled individuals will not be placed at an unfair advantage because of the process of determining the appropriate reasonable accommodation. In making this determination the employer should:

> (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[109]

This process involves both the employee and the employer, since the employer may not be fully informed as to the nature of the employee's disability.[110] In making this determination, an employer is only required

107. Michelle Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901 (2000). In analyzing to what extent "regarded as" disabled individuals are entitled to reasonable accommodations, Travis argues that applying the same qualification standards to perceived and actually disabled employees gives perceived disabled employees an unfair advantage over employees with actual disabilities. Travis does not argue that the perceived disability category should be abandoned, but rather that perceived disability claims should not be governed by traditional reasonable accommodation and essential functions rules. She instead recommends that a middle ground be established by a restructuring of the reasonable accommodations rights and the essential functions limit for "regarded as" disabled individuals. *Id.* at 999; *see also supra* note 98.

108. 29 C.F.R. § 1630 app. § 1630.9.

109. 29 C.F.R. § 1630 app. § 1630.9.

110. *Id.*

to make accommodations for limitations resulting from the disability.[111] Therefore, if the process determines that there are no reasonable accommodations appropriate for the individual's perceived disability, no accommodations will be required and the employee will not gain an unfair advantage by means of unnecessary accommodation. On the other hand, implementing this process will ensure that reasonable accommodations will be provided to "regarded as" disabled individuals who need them to perform the essential functions of their job.

Finally, an employee is entitled to reject an employer's reasonable accommodation. However, if the employee cannot perform the essential functions of the job without the rejected accommodation, the employee will not be considered an individual with a disability.[112] Therefore, an employer is protected from an employee's attempt to abuse the reasonable accommodation requirement since an employee who refuses an accommodation and still cannot perform the essential functions of the position will not be covered under the ADA.

3. Reasonable Accommodation: Undue Hardship Protection

The definition of discrimination under the ADA includes refusal to make reasonable accommodations to a disabled individual upon request.[113] However, the Equal Employment Opportunities Commission's (EEOC) regulations protect employers from overly burdensome expenditures on those accommodations by way of the undue hardship exception. The entitlement of reasonable accommodation requires "[m]odifications or adjustments to a job application process,"[114] or "to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed."[115] Additionally, reasonable accommodations involve any adjustments that will allow the employee to "enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[116] If an individual is able to perform his job tasks, with or without reasonable accommodation, he is a qualified individual under the ADA.

However, the EEOC has placed a ceiling on the entitlement of reasonable accommodation to protect employers from unmanageable

111. 29 C.F.R. § 1630.9(a) (2004).
112. 29 C.F.R. § 1630.9(d) (2004).
113. 42 U.S.C.A. § 12112(b)(5)(A) (2000).
114. 29 C.F.R. § 1630.2(o)(1)(i) (2003).
115. 29 C.F.R. § 1630.2(o)(1)(ii) (2003).
116. 29 C.F.R. § 1630.2(o)(l)(iii) (2003).

expense and difficulty. If an accommodation presents "significant difficulty or expense" to the employer, the employer is not required to comply.[117] Factors to consider in an undue hardship analysis include: the nature and cost of the accommodation, the overall financial resources, the number of employees employed by the covered entity, the effect of the accommodation on other expenses and resources at that facility as well as of the entire business, the type of business in which the covered entity is involved, and the impact of that accommodation on other employees' ability to perform their work.[118]

A covered entity will not be required to make reasonable accommodations that pose an undue hardship. Thus, any argument suggesting the requirement of reasonable accommodation unfairly forces employers to make expensive accommodations that are not necessary is weakened by the undue hardship safeguard. Additionally, the ADA provides for an individualized analysis of the accommodation required for each employee taking into account the employer's financial limitations. To protect against any absurd results, an analysis of the accommodation necessary for a "regarded as" disabled employee should also take into account the extent of the disability or misconception of the disability.

If the analysis reveals that no accommodation is necessary because it would not correct any of the difficulties faced by the employee, no accommodation is required. Likewise, if the analysis reveals that the accommodation requested is overly burdensome for the covered entity, no accommodation is required. However, if the analysis reveals accommodation is necessary after considering the extent of the employer's misconceptions of the employee's abilities, the accommodation should not be denied solely because the employee has no actual disability. The disability status is due in whole to the employer's mistaken beliefs as to the employee's abilities. Thus, such situations appropriately require an employer to accommodate such individuals, not only as a matter of policy, but also as a means of carrying out Congress's intent to prevent such misconceptions and discrimination. Therefore, the arguments stressing the absurd results of requiring reasonable accommodation to "regarded as" disabled individuals ignore the fact that any accommodation required by the statute will not be overly burdensome and will be the product of an individualized analysis of the employee's needs.

In conclusion, the ADA provides safeguards within its text in three

117. 29 C.F.R. § 1630.2(p)(1) (2003).

118. 29 C.F.R. § 1630.2(p)(2)(i)-(v) (2003).

ways. First, "regarded as" disabled status is dependent on an employer's attitudes or misconceptions about an employee's abilities or disabilities. Second, requiring "regarded as" disabled individuals to request the accommodation directly from the employer ensures that employers are notified of their responsibility to provide accommodation. Finally, an employer is shielded from excessive costs by the undue hardship exception.

4. The "Limited Remedies" Approach

In her article *Perceived Disabilities, Social Cognition and "Innocent Mistakes,*" Michelle Travis explores the three views courts have taken when addressing the "regarded as" prong of the ADA.[119] First, the "no liability" approach views the ADA as aimed only at preventing purposeful discrimination.[120] Courts in employing this approach will not apply the "regarded as" disabled prong to unintentional or nonmotivational misperceptions. This approach is flawed in that it does not further the ADA's purpose of eliminating stereotypes and it allows underlying misconceptions to persist.

The second approach, the "full liability" approach, treats the "regarded as" disabled prong "identically to both nonmotivational and motivational mistakes."[121] Thus, an employer will be liable for its misconceptions regardless of intent. This approach is preferable to the "no liability" approach, but it does not take into account any amount of good faith or reasonable effort the employer has made to eradicate misconceptions about disabled individuals.

Finally, the "limited remedies" approach promotes the purpose of the ADA and serves to protect employers from undeserved liability. "The ADA incorporates by reference the remedies provided under Title VII."[122] Yet, unlike Title VII, the ADA contains one remedial provision recognizing individual, unintentional discrimination.

> In cases where a discriminatory practice involves a provision of a reasonable accommodation . . . , [compensatory and punitive] damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation.[123]

119. 55 VAND. L. REV. 481, 549-77 (2002).

120. *Id.* at 550.

121. *Id.* at 549.

122. *Id.* at 563 (referring to 42 U.S.C.A. § 2000e-5 (1994)).

123. *Id.* at 565 (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, 102, codified at 42

Thus, an employer who has attempted to provide reasonable accommodation to a "regarded as" disabled employee, or has taken other reasonable steps towards doing so, will not suffer punitive or compensatory damages. This Comment favors the limited remedies approach because, by providing remedial mitigation, it encourages employers to take reasonable steps towards accommodating individuals who request accommodation. Additionally, this approach strikes the appropriate balance between employer liability and fulfillment of the ADA's purpose.

B. Policy Behind Holding Covered Entities Accountable for Their Actions and Misconceptions

An overarching concern surrounding this issue is that a "regarded as" disabled individual is classified as such because of the employer's misconceptions and attitudinal barriers and thus has no actual impairment needing accommodation.[124] Some argue that requiring reasonable accommodation to such individuals places them at an unfair advantage as opposed to providing them an equal opportunity.[125] However, a "regarded as" disabled employee, not in need of any accommodation, will not likely be placed at an unfair advantage because of the statutory safeguards mentioned in Part III. Regardless, it is far more important to fulfill the ADA's purpose of eliminating fears, myths, stereotypes, and misconceptions. By requiring reasonable accommodation for such employees, employers will be held accountable for their actions, inactions, and misperceptions.

This Comment does not suggest that reasonable accommodation be used to penalize employers. Rather, requiring accommodations should be a consequence of discriminatory decisions and actions. Without extending the reasonable accommodation antidiscrimination provision to individuals with perceived disabilities, employers have no incentive to be mindful of their preconceptions about the abilities of employees. Additionally, holding employers to a higher standard with respect to their attitudes about employees will serve to prevent discrimination in other areas, such as gender, race, color, national origin, and religion. This is also consistent with congressional intent, for many of the provisions of the ADA were formed in the likeness of Title VII.

From a more practical standpoint, holding covered entities to a higher standard concerning their attitudes toward employees also benefits those

U.S.C.A. 1981a(a)(3) (1994)).

124. Travis, *supra* note 107.

125. *Id.* at 955-72.

entities. Employers will need to be more cautious of the attitudes of supervisory and managerial employees, as well as lower-level workers. Training may be a necessary step in this process. Although this adds another cost to an already expensive process, the long-term and residual benefits from employee awareness and ADA training will outweigh short-term costs. Just as holding employers to a higher standard with regard to disabled workers will help to prevent discrimination of other classes of individuals, it will also protect the employer from litigation stemming from such litigation.

VI. CONCLUSION

The issue of whether "regarded as" disabled individuals are entitled to reasonable accommodation is extremely ripe. The First and Third Circuits provided lengthy analyses supporting the contention that reasonable accommodation is required in cases of "regarded as" disabled individuals. On the other hand, the Fifth, Sixth and Eighth Circuits rejected the entitlement of reasonable accommodation for regarded as disabled individuals, relying solely on the "absurd results" that would follow if reasonable accommodation were required. The goal of this Comment is to promote the reasoning of the First and Third Circuits. The courts must uphold congressional intent. Those circuits that disagree with the entitlement of reasonable accommodation for "regarded as" disabled individuals appear to ignore the congressional intent behind including "regarded as" disabled status. Thus, this Comment urges the United States Supreme Court to visit this issue when the opportunity arises and resolve this circuit split. The entitlement of reasonable accommodation is a remedy not only for those individuals who are actually disabled, but also for those who are disabled as a result of others' misconceptions. Individuals who are disabled in this country have extreme difficulty in obtaining and keeping employment—a fact motiviating the passage of the ADA. The United States Supreme Court has a duty to interpret the ADA as intended and provide full protection to all disabled individuals, whether their impairment arises out of physical, mental, or attitudinal barriers.