COMMENT: PRECONCEIVED NOTIONS: "REGARDED AS" DISABLED EMPLOYEES AND THE RIGHT TO REASONABLE ACCOMMODATIONS UNDER TITLE I OF THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

Title I of the Americans with Disabilities Act of 1990 (hereinafter "ADA" or "Act")[1] enumerates three connotations of "disability" within its statutory context:[2] (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" (sometimes referred to as "actual disability"),[3] (2) "a *record* of such an impairment,"[4] or (3) "being *regarded as* having such an impairment."[5] There is little or no debate that an actually disabled individual is entitled to reasonable accommodations under the ADA,[6] but, of late, a schism has materialized in the United States Courts of Appeals with respect to "regarded as" disabled individuals and the right to reasonable accommodations within the purview of Title I of the ADA.[7] This comment will begin in Section II by illustrating the framework of Title I of the ADA through its purpose and protections. Thereafter, Section III will explore the origins of proscribing discrimination based on perceived disabilities. Section IV will analyze the divisive perspectives portrayed by the various circuits of

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1. 42 U.S.C. §§ 12101-12213 (2000). "Title I prohibits discrimination in employment against a qualified person with a disability." H.R. REP. NO. 101-485(III), at 31 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 454.

2. 42 U.S.C. § 12102(2).

3. *Id.* § 12102(2)(A); *see* Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999).

4. *Id.* § 12102(2)(B) (emphasis added).

5. *Id.* § 12102(2)(C) (emphasis added).

6. *Weber*, 186 F.3d at 916 ("Where an employee suffers from an actual disability (i.e., an impairment that substantially limits a major life activity), the employer cannot terminate the employee on account of the disability without first making reasonable accommodations that would enable the employee to continue performing the essential functions of his job."). It should be noted that reasonable accommodations are not required if they place an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A) (2004).

7. The following cases support the proposition that "regarded as" disabled employees are entitled to reasonable accommodations: Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004); Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151 (E.D.N.Y. 2002). The following cases support the proposition that "regarded as" disabled employees are not entitled to reasonable accommodations: Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003); Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999); *Weber*, 186 F.3d at 907; Newberry v. E. Tex. State Univ., 161 F.3d 276 (5th Cir. 1998).

the United States Courts of Appeals with respect to "regarded as" disabled employees and the right to reasonable accommodations. Finally, Section V will evaluate the legal nuances of said perspectives and envisage the probable vantage to be adopted by the Supreme Court of the United States.

II. PURPOSES AND PROTECTIONS OF THE ADA

The purpose of the ADA is "to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life."[8] Congress's initiative to achieve this objective began in 1973 with the Rehabilitation Act.[9] While the Rehabilitation Act only prohibits employers receiving federal dollars from discriminating against disabled persons in the employment process,[10] Title I of the ADA possesses a broader reach[11] and prohibits discrimination against disabled persons by private employers.[12]

Congress was moved to pass the ADA based upon several findings of fact.[13] Of significant importance, Congress found that some forty-three

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8. Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 446; s*ee also* 42 U.S.C. § 12101(b)(1) (2000).

9. Rehabilitation Act of 1973 § 701(b), 42 U.S.C. §§ 701-796l (2000). The purpose of the Rehabilitation Act of 1973 was, in large part, "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . ." § 701(b).

10. § 749(a). The statute states:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, 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* or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. (emphasis added) (footnote omitted).

11. 42 U.S.C. § 12112(a) (2000) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

12. *Id.* Employer is defined by the ADA as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." § 12111(5)(A). It should be noted that during the first two years, following the effective date of the ADA, a phase-in was implemented; thereby, an employer was defined as "a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year . . . ." *Id*. Furthermore, the following are exempt from the definition of employer: the United States, a corporation wholly owned by the United States, an Indian Tribe, or a bona fide private membership club receiving tax-exempt status under 26 I.R.C. § 501(c). § 12111(5)(B).

13. *See* § 12101(a) for a complete list of the Congressional findings, which led to the enactment of the ADA.

million (43,000,000) Americans have a physical or mental disability, which is ever more increasing as the population ages.[14] Congress also determined that the historical tendency of society has been to "isolate and segregate" individuals with disabilities,[15] since there has seldom been legal recourse for individuals discriminated against based on their disabilities, as compared to individuals discriminated against based on race, color, national origin, religion, sex, or age.[16] In addition, Congress found that persons with disabilities "occupy an inferior status in our society"[17] because of oppressive discrimination against traits and characteristics beyond their control that result in adverse socioeconomic effects.[18]

In light of its findings, Congress promulgated the ADA, intending to empower the Act with, at minimum, the same protections of the Rehabilitation Act,[19] as well as the powers, remedies, and procedures available to a plaintiff discriminated against based on race, color, religion, sex, or national origin under the Civil Rights Act of 1964.[20] Moreover, with the

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14. § 12101(a)(1).

15. § 12101(a)(2).

16. § 12101(a)(4). Title VII of the Civil Rights Act of 1964 renders it unlawful 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." § 2000e-2(a)(1), 42 U.S.C. §§ 2000A-2000h-6 (2000 & Supp. IV 2004). The Age Discrimination in Employment Act of 1967 ("ADEA") renders it unlawful 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 age . . . ." § 623(a)(1), 29 U.S.C. §§ 621-34 (2000). What is more, within the confines of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Supreme Court of the Unites States has construed discrimination based on race, color, national origin, and religion as suspect, thus warranting strict judicial scrutiny. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The Court has also construed discrimination based on sex to be quasi-suspect, while discrimination based on disability and age have been considered nonsuspect. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 445-46 (1985) (holding that persons with disabilities are not a suspect or quasi-suspect class; therefore, any discrimination against disabled persons is subject to rational basis review); *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (holding that gender based classifications are subject to heightened judicial scrutiny) (footnote & citation omitted); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam) (holding that discrimination based on age is not suspect; therefore, it is subject to rational basis review). It should be further noted that the Fourteenth Amendment only applies to state action, and private discrimination does not fall under its purview. Civil Rights Cases, 109 U.S. 3, 11 (1883).

17. 42 U.S.C. § 12101(a)(6) (2000).

18. *See id.* § 12101(a)(7).

19. 42 U.S.C. § 12201(a) (2000). This section provides in pertinent part that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." *Id.; see also* Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (holding that § 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

20. 42 U.S.C. § 12117(a) (2004). The statute states:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers,

enactment of the ADA, Congress has sought to protect disabled persons from stereotypical attitudes, by implementing a scheme to level the playing field in a manner consistent with Title VII of the Civil Rights Act of 1964.

Title I of the ADA provides in pertinent part that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[21]

This proscription begs two essential questions: (1) what qualifies as a disability; and (2) who is a qualified individual. Moreover, to state a *prima facie* case under Title I of the ADA a plaintiff must establish: (1) he or she is disabled within the meaning of the statute; (2) he or she is a qualified individual within the meaning of the statute; and (3) he or she has suffered an adverse employment action consequential to his or her disability.[22]

A. Disability Defined

Turning to the first query, Congress has provided three modes by which "disability" is defined:[23] (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," (commonly referred to as an "actual disability")[24] (2) "a record of such an impairment;"[25] and (3) "being *regarded as* having such an impairment."[26] Before further exploring these three modes of disability, however, it is necessary to define the following core terms: "physical or mental impairment," "major life activity," and "substantially limited."

> remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Id.; *see also* H.R. REP. NO. 101-485(III), at 48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 471. Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e-4 to –9 (2004).

21. 42 U.S.C. § 12112(a).

22. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 761 (3d Cir. 2004); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1229 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003); Buskirk v. Apollo Metals, 307 F.3d 160, 166 (3d Cir. 2002); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); Weber v. Strippit, Inc., 186 F.3d 907, 912 (8th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996).

23. 42 U.S.C. § 12102(2) (2000).

24. *Id.* § 12102(2)(A); *Weber*, 186 F.3d at 916.

25. § 12102(2)(B).

26. *Id.* § 12102(2)(C) (emphasis added).

Pursuant to its authority under the ADA[27] and the Administrative Procedures Act of 1946,[28] the Equal Employment Opportunity Commission (hereinafter "EEOC") has defined "physical impairment" as

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[29]

Likewise, the term "major life activity" has been defined as those "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[30] Finally, the EEOC has expounded two ways by which one may be "substantially limited:"[31] (1) if an individual is "unable to perform a major life activity that the average person in the general population can perform;"[32] or (2) if an individual is:

> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.[33]

Under the first mode of "disability," commonly referred to as an actual disability, it is essential that an individual actually have a physical or mental disability.[34] A plaintiff seeking to recover based on his or her actual disability must show he or she is substantially limited in a major life activity in the manner prescribed and outlined above by the EEOC.[35]

Under the second mode of "disability," a person is disabled if he or she "has a history of, or has been [previously] misclassified as having," an

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27. 42 U.S.C. § 12116 (2000).

28. 5 U.S.C. §§ 551-59 (2000 & Supp. IV 2004).

29. 29 C.F.R. § 1630.2(h) (2004).

30. *Id.* § 1630.2(i).

31. *Id.* § 1630.2(j).

32. *Id.* § 1630.2(j)(1)(i). The EEOC has also enumerated several factors to assist in determining if one is substantially limited in a major life activity, including: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from impairment." *Id.* § 1630.2(j)(2).

33. *Id.* § 1630.2(j)(1)(ii).

34. Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 28 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 450.

35. *Id.* at 28, 1990 U.S.C.C.A.N. at 451.

impairment that substantially limits a major life activity.[36] A plaintiff seeking to state a claim under Title I of the ADA based on a record of impairment, must show that he or she did in fact, have the impairment or was misclassified for a reasonable time period as having said impairment.[37] In addition, just as with an actual disability, the recorded impairment must be one that would substantially limit a major life activity as defined by the EEOC.[38]

Under the third mode of "disability," however, it is not necessary that a plaintiff have any impairment at all.[39] The EEOC regulations provide that one is "regarded as" disabled if any of the following are met:[40] (1) a prospective plaintiff has a physical or mental impairment that does not substantially limit a major life activity, but one's employer perceives the impairment to be one that does substantially limit a major life activity;[41] (2) a prospective plaintiff's impairment is elevated to substantially limiting a major life activity solely by reason of the perceptions of others toward his or her impairment[42]; or (3) a prospective plaintiff has no impairment whatsoever, but his or her employer treats him or her as having an impairment that substantially limits a major life activity.[43] Therefore, it is the employer's subjective state of mind, rather than the actual degree of impairment, that is integral to recovery under the third mode of "disability."[44]

B. Who Is a Qualified Individual?

Assuming that an individual is disabled within the statutory and regulatory contexts of the ADA, a plaintiff must then present evidence establishing that he or she is a qualified individual.[45] An individual is a "qualified individual with a disability" so long as he or she: is disabled within the aforementioned statutory context; possesses the minimum indicia of the position he or she "*holds or desires*" including the necessary skills, experience and education; and

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36. 29 C.F.R. § 1630.2(k) (2004); *see also* Weber v. Strippit, Inc., 186 F.3d 907, 915 (8th Cir. 1999).

37. Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 217 (D.Me. 2001) (citations omitted) holding that the fact that one was substantially limited for a "brief" period, marked by mitigation measures, does not bestow upon said individual status as having a record of being substantially impaired in a major life activity.

38. 29 C.F.R. § 1630.2(k).

39. H.R. REP. NO. 101-485(III), at 29, 1990 U.S.C.C.A.N. at 452.

40. 29 C.F.R. § 1630.2(l).

41. *See id.* § 1630.2(l)(1).

42. *See id.* § 1630.2(l)(2).

43. *See id.* § 1630.2(l)(3).

44. H.R. REP. NO. 101-485(III), at 30, 1990 U.S.C.C.A.N. at 452 ("The perception of the covered entity [employer] is a key element of this test.").

45. *See supra* notes 23-26 and accompanying text.

"*with or without* reasonable accommodations" can perform the "*essential*"[46] functions of the job.[47] If an individual is disabled within the meaning of the ADA, possesses the minimum qualifications of the position that he or she holds or desires, and can perform the essential functions of the position *without* reasonable accommodations, then the inquiry is complete, as the individual is qualified under all three modes ("actually," "record of," and "regarded as") of disability.[48] Although the individual is not entitled to reasonable accommodations,[49] he or she has stated a *prima facie* case for employment discrimination under the ADA provided that the individual suffered negative employment action that was, in whole or in part, proximate to his or her disability.[50] Conversely, if an individual cannot perform the essential functions of the position he or she holds or desires even with reasonable accommodations, then he or she has failed to state a claim upon which relief can be granted.[51] However, when an individual does require reasonable accommodations to perform the essential functions of the position he or she holds or desires, a split amongst the circuits of the United States Courts of Appeals has emerged pertaining to "regarded as" disabled persons.[52]

Reasonable accommodations are defined as any change in the work environment or the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities,[53] such as converting current facilities to yield readily accessible facilities for disabled employees, job restructuring, or reassignment to *vacant* positions.[54] The ADA provides, in pertinent part, that failing to provide reasonable accommodations "to the known physical or mental limitations of an otherwise qualified individual with a disability" is discrimination, unless the employer sets forth and substantiates that providing the reasonable accommodations will result in undue hardship.[55]

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46. A qualified individual need only be capable of performing the *essential*, as opposed to *all*, functions of the job which they hold or desire. Deane v. Pocono Med. Ctr., 142 F.3d 138, 146-47 (3d Cir. 1998) (en banc) (emphasis added).

47. 29 C.F.R. § 1630.2(m) (2004) (emphasis added).

48. *Deane*, 142 F.3d at 146-47 (footnotes and citations omitted).

49. *Id.* at 146.

50. *See* Americans with Disabilities Act of 1990 §12102(2), 42 U.S.C. §§ 12101-12213 (2000).

51. *Deane*, 142 F.3d at 146.

52. *See* cases cited *supra* note 7.

53. 29 C.F.R. § 1630.2(o) (2004).

54. 42 U.S.C. § 12111(9) (2000) (emphasis added). Employers are not required to create new positions for disabled individuals. Bushkirk v. Apollo Metals, 307 f.3d 160, 169 (3d Cir. 2002) (citing Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996)).

55. § 12112(b)(5)(A). Furthermore, "if (the) individual poses a 'direct threat' to the health or safety of [the disabled individual] or others," the employer is not required to provide accommodations, "unless such accommodation would either eliminate such risk or reduce it to an acceptable level." *Deane*, 142 F.3d at 146 n.9 (citing 29 C.F.R. § 1630.2(r) (2004)); *see also* § 12111(10). The statute states:

> The term 'undue hardship' means an action requiring significant difficulty or expense . . . . [i]n determining whether an accommodation

Furthermore, it is discriminatory for an employer to deny "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability," because the employer would be required to provided reasonable accommodations if said employment opportunities were tendered.[56]

If an individual suffers from an "actual" disability, the circuits appear to be in accord that an individual is entitled to reasonable accommodations, so long as such accommodations are necessary to perform the essential functions of the position he or she holds or desires.[57] Conversely, where an individual is merely "regarded as" disabled, a rift subsists between several circuits of the Untied States Courts of Appeals. The Fifth, Sixth, Eighth, and Ninth Circuits have held that "regarded as" disabled employees are not entitled to reasonable accommodations under the purview of the ADA.[58] Juxtaposed, the First and Third Circuits, as well as the Eastern District of New York have held, to the contrary, that individuals who are "regarded as" disabled by their respective employers are entitled to reasonable accommodations.[59] Facially, it appears that Congress has made no distinction between "qualified individuals" who are "actually," "of record," or "regarded as disabled,"[60] but those circuits, holding otherwise, are skeptical of any Congressional intent to provide accommodations to "regarded as" disabled employees, exclaiming that the

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> 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.

§ 12111(10).

56. § 12112(b)(5)(B).

57. *See* Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) ("The reasonable accommodation requirement is easily applied in a case of an actual disability.").

58. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); *Weber*, 186 F.3d at 907, 917; Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

59. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 776 n.19 (3d Cir. 2004); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 166 (E.D.N.Y. 2002) (Supplemental Decision).

60. *Kaplan*, 323 F.3d at 1232 (citations omitted).

results would be "bizarre," and non-disabled individuals would receive a windfall.[61]

III. ORIGINS OF PROSCRIBING DISCRIMINATION OF PERCEIVED DISABILITIES

In its original form, the Rehabilitation Act only prohibited the discrimination of actually disabled persons.[62] In 1974, Congress expanded the definition of disabled person, temporally referred to as "handicapped individual," to include not only those persons who were actually disabled, but also those persons who had a record of or were regarded as having a "physical or mental impairment which substantially limits one or more of such person's major life activities."[63] The 1974 Amendment to the definition of "handicapped individual" was passed in furtherance of Congress's goal to combat not merely prejudice, but also to circumvent the "archaic attitudes and laws" and "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps," as "[t]he public lacks adequate knowledge about the potential of these individuals [handicapped persons] to contribute significantly to society."[64]

More specifically, Congress amended the Rehabilitation Act to include "regarded as" disabled persons, with the intention

> to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964[65] prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority.[66]

Notably, "persons who do not in fact have the condition" that they are perceived to have, as well as persons who have a physical or mental impairment that does not substantially limit a major life activity, were intended to fall within the purview of the "regarded as" handicapped category.[67] By

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61. *Kaplan*, 323 F.3d at 1232 (citation omitted); *Weber*, 186 F.3d at 916-17.

62. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 278-79 (1987) (citations omitted).

63. *Id.*; *see also* Rehabilitation Act of 1973 § 705(20)(B), 29 U.S.C. §§ 701-796l (2000). (same); Rehabilitation Act Amendments of 1974, S. REP. NO. 93-1297, at 38 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6389.

64. S. REP. NO. 93-1297, at 50, 1974 U.S.C.C.A.N. at 6400; *see also Arline*, 480 U.S. at 279.

65. Civil Rights act of 1964 § 2000d, 42 U.S.C. §§ 2000a-2000h-6 (2000 & Supp. IV 2004) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

66. S. REP. NO. 93-1297, at 39, 1974 U.S.C.C.A.N. at 6389.

67. *Id.* at 39, 1974 U.S.C.C.A.N. at 6389-90.

including this amendment, Congress's intent was to "combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped."[68]

The legislative history surrounding the 1974 Amendments to the Rehabilitation Act quite readily shows that Congress was concerned with not just the effect of an impairment on the individual (handicapped person), but also with the effect of a person's impairment on others.[69] The Senate Report relating to the 1974 Amendments[70] provides the following example of an individual who would be protected by the "regarded as" prong of the handicap definition: " 'a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning.' "[71]

Interpreting the congressional intent behind the incorporation of "regarded as" prong within the Rehabilitation Act, the United States Supreme Court, in *School Board of Nassau County v. Arline*,[72] stated that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[73] The Court further reasoned that Congress's decision to adopt the "regarded as" prong to the definition of "handicapped individual" was an acknowledgement that society's "myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[74] It should be noted that the Court showed increased enthusiasm for the inclusion of the "regarded as" prong in light of the safeguard implemented by Congress—"only those individuals who are both handicapped *and* otherwise qualified are eligible for relief."[75]

In promulgating the ADA, Congress adopted, verbatim, the definition of "handicapped individual" in the Rehabilitation Act, as amended in 1974, for use as the definition of "disability."[76] Moreover, Congress explicitly adopted

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68. *Arline*, 480 U.S. at 279.

69. *Id.* at 282.

70. S. REP. NO. 93-1297 (1974) at 1974 U.S.C.C.A.N. 6373.

71. *Arline*, 480 U.S. at 282 (quoting S. Rep. No. 93-1297, at 64, 1974 U.S.C.C.A.N. at 6414) (footnote omitted).

72. *Id.* at 273. The Court decided that the plaintiff, a woman with past infections of tuberculosis, who was terminated from her position as an educator at a public education facility, had been discriminated against under the Rehabilitation Act (provided that she was an otherwise "qualified individual"); she was regarded as disabled because of the defendant school board's perceptions surrounding the contagiousness of her past infections. *Id.* at 275-77.

73. *Id.* at 283 (footnote omitted).

74. *Id.* at 284 (footnote omitted).

75. *Id.* at 285. The issue regarding the plaintiff's qualified status was remanded to the District Court for determination. *Id*. at 289.

76. The Rehabilitation Act, as amended in 1974, defines an "individual with a disability" as: "[A]ny person who—(i) has a physical or mental impairment which substantially limits one or more of such person's major life activates; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." § 705(20)(B), 29 U.S.C. §§ 701-796l (2000); *cf.* Americans with Disabilities Act of 1990 § 12102(2)(A), 42 U.S.C. §§ 12101-12213 (2000) (" '[D]isability' means, with respect to an individual—(A) a physical or mental impairment that

the Supreme Court's decision in *Arline* with respect to their interpretation of the "regarded as" prong in the Rehabilitation Act's definition of "handicapped individual." Congress then incorporated this interpretation into its underlying rationale for the definition of "disability" in the ADA.[77] Thus, for a second time, Congress has included the "regarded as" prong to protect persons who are merely regarded as disabled, noting that while "an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling."[78]

In doing so, Congress again explained that the myths and fears of society surrounding a disability may be as disabling as the disability itself.[79] Congress explicitly stated that any person who is rejected or otherwise turned away from employment as a result of the:

> myths, fears, and stereotypes associated with disabilities would be covered [by the regarded as prong], 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 ["actually disabled"] or second ["record of disabled"] part of the definition.[80]

Accordingly, it is quite evident that the "regarded as" prong of a "handicapped individual," as encapsulated and interpreted within the meaning of the Rehabilitation Act, was to be extended with full faith and credit to the meaning of the "regarded as" prong of the definition of "disability" under the ADA.[81]

IV. A SCHISM BETWEEN THE CIRCUITS

The controversy surrounding the "regarded as" prong of disability under the ADA and the right to reasonable accommodations first ensued in the First Circuit Court of Appeals in *Katz v. City Metal Co.*[82] The plaintiff in *Katz* suffered a temporarily debilitating heart attack, resulting in difficulty breathing and limited mobility.[83] Shortly after his release from hospitalization, the

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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.").

77. Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

78. *Id.* (citing *Arline*, 480 U.S. at 283).

79. *Id.* (quoting *Arline*, 480 U.S. at 284).

80. *Id.*

81. Bragdon v. Abbott, 524 U.S. 624, 631-32 (1998) (holding that § 1220(a) of the ADA "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."). Section 12201(a) states in relevant part: "[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." Americans with Disabilities Act § 12201(a), 42 U.S.C. §§ 12101-12213 (citation omitted).

82. 87 F.3d 26, 32 (1st Cir. 1996).

83. *Id.* at 28-29.

plaintiff sought out his employer to discuss his return to work.[84] As a result of the heart attack, the plaintiff was unable to climb the staircase at his place of employment; thus, his employer had to come down the staircase to meet him, at which time they spoke of the plaintiff's prospects of returning to work.[85] The plaintiff made his employer aware that he wished to return to work as soon as possible.[86] The plaintiff's employer, however, conveyed to the plaintiff that he should not worry about work and "that the main thing was for [him] to get well."[87] A few weeks later, while recuperating, the plaintiff was informed of his discharge from his position.[88] In response, the plaintiff contacted his employer and offered to return to work immediately on a part-time basis with a reduction in salary, and he stated that he would "accept whatever accommodations the company would make."[89] The plaintiff's employer refused to accept his offer,[90] and in response, the plaintiff filed suit under the ADA, asserting, amongst other things, that he was regarded as disabled by his employer.[91]

While the district court dismissed the claim, the First Circuit was receptive to the notion that the plaintiff would fall within the "regarded as" disabled prong of the definition of disability.[92] The court noted the following as sufficient evidence for a jury to conclude that the plaintiff was regarded as disabled: the encounter at the office where the plaintiff could not climb the stairs; the employer's knowledge of the heart attack, subsequent medical procedures, and hospitalization; and the plaintiff's communications to his employer regarding his willingness to return to work in a limited capacity.[93] What is more, the First Circuit interpreted the inclusion of the "regarded as" prong of disability to "offer protection . . . to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so," based on the language and underlying policy of the ADA.[94]

As abovementioned, meeting the definition of disability is only one element of a plaintiff's prima facie case under Title I of the ADA.[95] Therefore, to

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84. *Katz*, 87 F.3d at 29.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Katz*, 87 F.3d at 29.
90. *Id.*
91. *Id.* at 32 ("Katz alleged in his complaint that he was not only actually disabled but also perceived by his employer to be disabled, and was fired because of it.").
92. *Id.* (citations omitted).
93. *Id.* at 32-33.
94. *Id.* at 33.
95. *Katz*, 87 F.3d at 30. The Court in *Katz* stated:

> To obtain relief under the Act [ADA], a plaintiff must prove three things. First, that he was disabled within the meaning of the Act. Second, that with or without reasonable accommodation he was able to perform the

determine if the plaintiff was a qualified individual, the First Circuit addressed the issue of reasonable accommodations.[96] The Court highlighted that the plaintiff had asked his employer to accommodate him by allowing the plaintiff to return to work on a part-time basis,[97] but such facially reasonable accommodation was "rejected out of hand."[98] The Court held that it could be reasonably inferred from the evidence that the plaintiff was fired from his position as a result of the preconceived notions of his employer.[99] Moreover, the disability was likely the proximate cause of the plaintiff's termination.[100] In *Katz*, the First Circuit made it abundantly clear that if an individual is perceived to be disabled by his employer, is denied reasonable accommodations, and is terminated because of his or her disability, that individual has made out a prima facie case of discrimination under the ADA.[101] Thus, according to the First Circuit, "regarded as" disabled persons are entitled to reasonable accommodations.

In 1998, the issue of "regarded as" disabled persons and the right to reasonable accommodations re-emerged in *Newberry v. East Texas State University*[102] and *Workman v. Frito-Lay, Inc.*, [103] in the Fifth and Sixth Circuits, respectively. Both circuits held contrary to the First Circuit's opinion in *Katz*.[104] In *Newberry*, the Court exclaimed, "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."[105] Likewise, the Sixth Circuit held that a

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> essential functions of his job. And third, that the employer discharged him in whole or in part because of his disability.

Id. (footnote omitted).

96. *Katz*, 87 F.3d at 30 (citation omitted).

97. *Id.*

98. *Id.*; *see also* Americans with Disabilities Act of 1990 § 12111(9), §§ 12101-12213 (2000). The statute states:

> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, *part-time or modified work schedules*, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. (emphasis added).

99. *Katz*, 87 F.3d at 33.

100. *Id.*

101. Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 218 (D. Me. 2001) (interpreting *Katz*, 87 F.3d at 32-34). It should be noted that if an employer can prove undue hardship it will suffice as an affirmative defense. *See* § 12112(b)(5).

102. 161 F.3d 276 (5th Cir. 1998).

103. 165 F.3d 460 (6th Cir. 1999).

104. *Workman*, 165 F.3d at 467; *Newberry*, 161 F.3d at 280.

105. *Newberry*, 161 F.3d at 280.

finding requiring reasonable accommodations under the "regarded as" disabled prong "would obviate the . . . obligation to reasonably accommodate . . . ."[106] Neither the Fifth nor the Sixth Circuit provided any persuasive reasoning for their conclusion that no right to reasonable accommodations exists under the "regarded as" disabled prong of the definition of disability.[107] Thus, at face value, the decisions in *Newberry* and *Workman* appear to be unfounded and contradict Congress's intent in promulgating the ADA.

Again in 1998 and also in 1999, the issue surrounding the right to reasonable accommodations and "regarded as" disabled employees surfaced, this time in the Third Circuit, in *Deane v. Pocono Medical Center*[108] and *Taylor v. Pathmark Stores, Inc.*[109] In *Deane*, the Third Circuit noted that there may be merit to, but declined to opine, on the argument set forth by the Pocono Medical Center—that adopting the view that "regarded as" disabled employees are entitled to reasonable accommodations would: "(1) permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of 'reasonable accommodations' for disabilities based upon misperceptions; and (2) create a windfall for legitimate 'regarded as' disabled employees . . . ."[110]

Similarly, in *Taylor*, the Third Circuit explicated its quandary with the right to reasonable accommodations and perceived disabilities.[111] The Court stated:

> On the one hand, the [ADA] does not appear to distinguish between disabled and "regarded as" [disabled] individuals in requiring accommodation. On the other, it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation.[112]

Again the Court declined to adjudicate the issue.[113]

Subsequently, in *Weber v. Strippit, Inc.*,[114] the Eighth Circuit expounded upon the dilemma pronounced by the Third Circuit and held that there is no entitlement to reasonable accommodations for employees who are "regarded as" disabled.[115] More specifically, the Eighth Circuit stated: "The reasonable accommodation requirement makes considerably less sense in the perceived

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106. *Workman*, 165 F.3d at 467 (citations omitted).

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

108. 142 F.3d 138 (3d Cir. 1998) (en banc). It should be noted that the plaintiff asked for reasonable accommodations in this instance. *Id.* at 141.

109. 177 F.3d 180 (3d Cir. 1999).

110. *Deane*, 142 F.3d at 149 n.12.

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

112. *Id.* (citing *Deane*, 142 F.3d at 149 n.12).

113. *Id.*

114. 186 F.3d 907 (8th Cir. 1999).

115. *Id.* at 916-17 ("[W]e hold that 'regarded as' disabled plaintiffs are not entitled to reasonable accommodations . . . .").

disability context."[116] Furthermore, "[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results."[117]

The plaintiff in *Weber*, like that of *Katz*, suffered from heart disease[118] and complained, in part, that he was "regarded as" disabled by his employer as a result.[119] Moreover, the plaintiff complained that when he refused his employer's demand that he relocate to a different state for six months following his heart attack, at the behest of his physician, he suffered adverse employment action—termination.[120] The district court held that the plaintiff's claim, predicated on his alleged actual disability, was denied as a matter of law,[121] and, as a result, refused to instruct the jury as to any requirement of reasonable accommodations stating that "an employer need only accommodate actual disabilities . . . ."[122]

On appeal, the Eighth Circuit concurred with the judgment of the district court relating to the right to reasonable accommodations.[123] The Eighth Circuit reasoned that to bestow a right to reasonable accommodations upon those persons who are merely "regarded as" disabled would create a windfall, stating:

> The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.[124]

It should be noted, for reasons more apparent below, that the foundation for the Eighth Circuits "windfall" rationale is derived from dicta originating in the Third Circuit's opinions in *Deane* and *Taylor*.[125]

In *Jewell v. Reid's Confectionary Company*,[126] the District of Maine further expounded upon the First Circuit's opinion in *Katz*, holding that "regarded as" disabled employees are entitled to reasonable accommodations.[127] While the primary rationale for the holding in *Jewell* hinged upon the fact that the District of Maine was bound by the First Circuit's precedent,[128] the Court also expressed its disdain for the Eighth Circuit's opinion in *Weber*.[129] The District

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116. *Weber*, 186 F.3d at 916.
117. *Id.*
118. *Weber*, 186 F.3d at 910.
119. *Id.* at 914.
120. *Id.* at 910.
121. Weber v. Strippit, Inc., 186 F.3d 907, 915-16 (8th Cir. 1999).
122. *Id.*
123. *Id.* at 916.
124. *Id.* at 917.
125. *Id.*
126. 172 F. Supp. 2d 212 (D. Me. 2001).
127. *Id.* at 218 (citation omitted).
128. *Id.*
129. *Id.* at 218-19.

of Maine made particular note of the fact that "the emphasis is on encouraging the employer [who knows about or perceives a disability] to engage in an interactive process with the [employee] to determine effective reasonable accommodation."[130] The District of Maine further reasoned that if an employer fails to engage in said interactive process when the employer wrongly regards an employee as disabled, but instead takes adverse action against the employee, "it is hardly a 'bizarre' result to hold the employer accountable."[131] Moreover, the District of Maine highlighted that Congress passed the ADA in part "to punish employers for making just this sort of 'stereotypic [assumption] not truly indicative of the individual ability' of their employees."[132]

Turning to perhaps the most well reasoned opinion regarding employees perceived to be disabled and the right to reasonable accommodations,[133] the Eastern District of New York, in *Jacques v. DiMarzio, Inc.*,[134] concurred with the decisions in *Katz* and *Jewell* derived from the First Circuit.[135] The decision of the Eastern District of New York was premised upon the plain language and the legislative history of the ADA, as well as "the mandatory interactive process, as referenced in *Jewell*," and that court's critiques of the *Weber* decision.[136] Beginning its analysis with the plain language of the ADA, the Eastern District of New York points out that Congress had made no effort to distinguish between "regarded as" disabled and actually disabled persons in legislating the definition of a qualified individual.[137] Thus, this first step in

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130. *Jewell*, 172 F. Supp. 2d at 219 (citing Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (second alteration in original); *see also* Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 (3d Cir. 1998) (en banc).

131. *Jewell*, 172 F. Supp. 2d at 219.

132. *Id.* (citing Americans with Disabilities Act § 12101(a)(7), 42 U.S.C. §§ 12101-12213 (2000)). The statute states:

> The Congress finds that . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

§ 12101(a)(7).

133. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004), (finding the "analysis in *Jacques* particularly persuasive").

134. 200 F. Supp. 2d 151 (E.D.N.Y. 2002).

135. *Id.* at 166 (Supplemental Decision) ("The Court disagrees with *Weber* and all the other courts that have held that reasonable accommodations should not be available where a plaintiff is 'regarded as' disabled.").

136. *Id.*

137. *Id.* (citation omitted); *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d. Cir. 1999) ("[T]he statute does not appear to distinguish between disabled and 'regarded as' individuals in requiring accommodation."); Deane v. Pocono Med. Ctr., 142 F.3d 138, 147 (3d

interpreting a statute[138] lends itself to a finding that Congress intended reasonable accommodations to extend not just to actually disabled persons but to "regarded as" disabled persons as well.[139]

In addition to the statutory language, the Eastern District of New York explored the legislative history of the ADA.[140] The Court focused upon Congress's explicit approval of the Supreme Court's decision and rationale in *Arline*, with respect to the "regarded as" prong of disability.[141] Particularly, the *Jacques* Court noted that *Arline* held "regarded as" disabled employees to be entitled to reasonable accommodations under the Rehabilitation Act,[142] and Congress, by way of statute, has conferred at least the same benefits and protection of the Rehabilitation Act upon the ADA.[143] What is more, the Eastern District of New York was persuaded by the argument set forth by the plaintiff in *Deane*:[144] based upon Congress's motive to end the stereotypical attitudes deeply founded in American society,[145] reasonable accommodations for "regarded as" disabled employees are necessary, as "merely informing the employer of its misperception will not be enough" to uproot such deeply founded stereotypes.[146] The *Jacques* Court further reasoned "[c]ategorically denying reasonable accommodations to 'regarded as' plaintiffs would allow the

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Cir. 1998) (en banc) ("[N]owhere in the Act does it distinguish between actual or perceived disabilities in terms of the threshold showing of qualifications.").

138. *Jacques*, 200 F. Supp. 2d at 166 (Supplemental Decision) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

139. *Id*.

140. *Id.* at 166-67.

141. *Id*.; *see also* Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N 445, 453.

142. *Jacques*, 200 F. Supp. 2d at 167 (Supplemental Decision) (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987)).

143. *Id.* (citing Bragdon v. Abbott, 524 U.S. 624, 632 (1998)); *see also* Americans with Disabilities Act of 1990 § 12201(a), §§ 12101-12213 (2000) ("[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.").

144. *Jacques*, 200 F. Supp. 2d at 167 (Supplemental Decision) (quoting Deane v. Pocono Med. Ctr., 142 f.3d 138, 148 n.12 (3d Cir. 1998) (en banc)).

145. *Id.* (citation omitted); *see also* 42 U.S.C. § 12101(a)(7) This statute states:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .

Id.; *see also* US Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002) (citation omitted) (holding that "[t]he [ADA] seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace.").

146. *Jacques*, 200 F. Supp. 2d at 167 (Supplemental Decision) (citation omitted).

prejudices and biases of others to impermissibly deny an impaired employee his or her job" because of an employer's mistaken perception.[147]

Looking beyond the plain language and the legislative history of the ADA, the Eastern District of New York explored the mandatory interactive process imposed upon employers in some jurisdictions.[148] In such jurisdictions, a mandatory obligation is imposed upon employers to communicate and interact with employees that may need reasonable accommodations.[149] The purpose of the interaction is to provide the employer with information necessary to accommodate the employee, as well as provide a "prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled."[150] The need for said interaction arises from a request by the employee for accommodations or by the "employer's recognition of the need for such an accommodation."[151] The legislative history of the ADA and the EEOC's regulations promulgated in response to the ADA also encourage employers to engage in an interactive process with their employees for the purpose of determining the scope of reasonable accommodations that may be required.[152] Moreover, once an employee requests an accommodation, it is the

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147. *Jacques*, 200 F. Supp. 2d at 168.

148. *Id.* at 168-170.

149. *Id*. at 168 (citing Barnett v. U.S. Air, 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002)); *Barnett*, 535 U.S. at 407 (Stevens, J., concurring) (noting that the Ninth Circuit's holding with respect to interactive process was "correct[ ]" and "is untouched by the Court's opinion today."); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc) (holding that while the obligation to engage in the interactive process is not explicitly provided for in the ADA, it "is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee.").

150. *Jacques*, 200 F. Supp. 2d at 170 (Supplemental Decision).

151. *Id.* at 169 (quoting *Barnett*, 228 F.3d at 1112); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (CCH), § 902, No. 915.002 (October 17, 2002) *available at* http://www.eeoc.gov/policy/docs/accommodation.html. The EEOC Compliance Manual states:

> [a]n employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

Id.; *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999) (*en banc*) (holding that all that is needed for notice is for the employer to have "enough information to put it on notice that [the employee] might have a disability.").

152. "A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations . . . ." S. REP. NO. 101-116, at 34 (1989). "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal,

employer's responsibility to engage in the interactive process if the employer "regards" the employee as disabled, despite any actual disability.[153] Thus, logic follows that the interactive process is "consistent with the Court's conclusion that Congress intended reasonable accommodations to be part of the 'regarded as' prong of the ADA."[154]

Finally, the Eastern District of New York attacked the flawed logic of the Eighth Circuit's opinion in *Weber*. As set forth above, the Eighth Circuit held that to entitle "regarded as" disabled employees to reasonable accommodations would create "bizarre results," as such persons would receive a windfall over their brethren, who, although not regarded as disabled, may be impaired, but not actually disabled.[155] However, as the Eastern District of New York aptly points out, a disparity does exist between those who are not substantially impaired, yet are "regarded as" disabled, and those who are merely not substantially impaired.[156] Succinctly stated, those who are "regarded as" disabled are "subject to the stigma of the disabling and discriminatory attitudes of others," unlike their merely nonsubstantially disabled counterparts.[157] To the extent that the fear of the Eighth Circuit comes to light and undeserving employees seek accommodations, the Eastern District of New York quelled said fear as the ADA's good faith requirement would protect the employer.[158] In light of the foregoing rationale, the Eastern District of New York held that "regarded as" disabled employees do indeed have a right to reasonable accommodations.[159]

Despite the detailed reasoning set forth in *Jacques*, the schism between the circuits continued to expand. In 2002 and 2003, five opinions addressing the issue of "regarded as" disabled persons and the right to reasonable accommodations were handed down by various U.S. Courts of Appeals: two by the Second Circuit, *Cameron v. Community Aid for Retarded Children, Inc.*[160]and *Shannon v. New York City Transit Authority*;[161] one, again, by the Third Circuit, *Buskirk v. Apollo Metals*;[162] one by the Seventh Circuit, *Mack v. Great Dane Trailers*;[163] and one by the Ninth Circuit, *Kaplan v. City of North Las Vegas*.[164] While the Second and Third Circuit addressed, but declined to decide the

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interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3) (2004).

153. *Jacques*, 200 F. Supp. 2d at 169 (Supplemental Decision); *see also supra* note 150 and accompanying text.

154. *Jacques*, 200 F. Supp. 2d at 170 (Supplemental Decision) (citation omitted).

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

156. *Id.*

157. *Id.*

158. *Id.* at 170-71. The good faith requirement refers to the duty of both parties to engage in the interactive process to explore possible accommodations. *Id.*; *see also supra* note 151 and accompanying text.

159. *Jacques*, 200 F. Supp. 2d. at 166 (Supplemental Decision).

160. 335 F.3d 60 (2d Cir. 2003).

161. 332 F.3d 95 (2d Cir. 2003).

162. 307 F.3d 160 (3d Cir. 2002).

163. 308 F.3d 776 (7th Cir. 2002).

164. 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

issue,[165] the Ninth Circuit sided with the neighboring Eighth Circuit holding that there is no requirement to provide reasonable accommodations to "regarded as" disabled employees.[166] Despite the Ninth Circuit's conclusion that the plain language of the ADA does not distinguish between the right to reasonable accommodation amongst actually disabled and "regarded as" disabled employees,[167] the court, like the Eighth Circuit, held that to afford reasonable accommodations to "regarded as" disabled persons would cause "bizarre" results and create a windfall for "regarded as" disabled employees.[168] The Ninth Circuit pronounced that to provide reasonable accommodations to persons, who are not actually disabled, would "waste resources."[169] Furthermore, the court suggested that employer's resources "would be better spent assisting those persons who are actually disabled . . . ."[170]

In 2004, the Third Circuit was, yet again, presented with the issue surrounding employees with perceived disabilities and the right to reasonable accommodations in *Williams v. Philadelphia Housing Authority Police Department*.[171] On this occasion, the Third Circuit decided the issue, thereby requiring that reasonable accommodations be afforded to persons "regarded as" disabled,[172] despite the Court's dicta in *Deane* and *Taylor*. The Court was persuaded, largely in part, by the Eastern District of New York's opinion in *Jacques*.[173] The Third Circuit admitted that the possibility may exist where it would be "bizarre" to grant reasonable accommodations to persons merely "regarded as" disabled; however, such results would not stem from the "vast majority of cases."[174] In evaluating the issue, the Third Circuit focused, similar to *Jacques*, on the plain language and the legislative history of the ADA, concluding that both favored the Court's holding that persons with perceived disabilities are entitled to reasonable accommodations.[175] The Court particularly focused on the Supreme Court's decision in *Arline*,[176] and it noted that *Weber* and *Kaplan* failed to address that decision.[177] The Third Circuit further held that the Supreme Court's decisions in *Arline* and *Bragdon*, when read in conjunction, provide the following conclusion: it "seems inescapable that 'regarded as' employees under

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165. *Cameron*, 335 F.3d at 64; *Shannon*, 332 F.3d at 103-04; *Buskirk*, 307 F.3d at 168-69; *Mack*, 308 F.3d at 783 n.2.

166. *Kaplan*, 323 F.3d at 1233.

167. *Id.* at 1232 (citation omitted).

168. *Id.* (citation omitted).

169. *Id.*

170. *Id.*

171. 380 F.3d 751 (3d Cir. 2004).

172. *Id.* at 775.

173. *Id.* at 773.

174. *Id.* at 774.

175. *Id.*

176. 380 F.3d 751, 775 (3d Cir. 2004).

177. *Id.*

the ADA are entitled to reasonable accommodation in the same way as are those who are actually disabled."[178]

Recently, the Northern District of Illinois, in *Ammons-Lewis v. Metropolitan Water Reclamation District of Greater Chicago*,[179] distinguished, but did not reject, the holdings in *Williams*, *Jacques*, and *Katz*.[180] The Court held that where no adverse employment action ensues, an employer is not required to reasonably accommodate "regarded as" disabled employees.[181] The Northern District of Illinois noted the schism on the issue of "regarded as" disabled employees and the right to reasonable accommodations, and declined to hold, one way or another, beyond the scenario where no adverse employment action exists.[182] Perhaps this is the situation envisioned by the Third Circuit in *Williams*, where bizarre results may subsist.

V. EVALUATION AND OUTLOOK

To recapitulate, the schism pertaining to "regarded as" disabled employees and the right to reasonable accommodation subsists as follows: the First and Third Circuits require reasonable accommodations, while the Fifth, Sixth, Eighth, and Ninth Circuits do not.[183] It is the position of the First and Third Circuits that Congress has clearly entitled all persons meeting any one of the three definitions of disability to reasonable accommodations. In contrast, the Fifth, Sixth, and particularly the Eighth and Ninth Circuits, cannot conceive that Congress could have intended to bestow the right to reasonable accommodations upon persons merely "regarded as" disabled, reasoning such persons would receive a windfall.[184] While Courts on both sides of the issue make valid arguments, the stance taken by the First and Third Circuits logically supersedes that of the Fifth, Sixth, Eighth, and Ninth Circuits.

First and foremost, as aptly pointed out by the Third Circuit in *Williams*, the decisions in *Weber* and *Kaplan* fail to address the Supreme Court's opinion in *Arline*.[185] While the decision in *Arline* did not directly pertain to the ADA, it held that "regarded as" disabled persons are entitled to reasonable accommodations under the Rehabilitation Act.[186] What is more, the Supreme Court's decision in *Bragdon* explicitly states that the rights and remedies under

178. *Arline*, 380 F.3d at 775.

179. 2004 U.S. Dist. LEXIS 21917 (N.D. Ill. Nov. 01, 2004).

180. *Id.* at *15-16.

181. *Id.* at *16 (citation omitted).

182. *Id*. at *15-16.

183. *See* cases cited *supra* note 7.

184. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999); *see also* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004) (noting that the Fifth and Sixth Circuits offered no persuasive reasoning for their decisions).

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

186. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987) ("Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee."); *see also Williams*, 380 F.3d at 775.

the Rehabilitation Act extend to the ADA.[187] Therefore, the Court's decision in *Arline* seems inescapably binding with respect to the ADA.

As if the foregoing was insufficient, the legislative history and plain language of the ADA lead to the conclusion that "regarded as" disabled employees are entitled to reasonable accommodations. Congress emphatically adopted the decision in *Arline* with respect to the "regarded as" prong of disability, particularly noting the Supreme Court's rationale that "although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling."[188] It should be further noted that when Congress amended the Rehabilitation Act in 1974 to include the "regarded as" prong to the definition of "handicap individual," it made no other substantive changes; thus, "[t]he authors apparently assumed that once an employee with a perceived disability was deemed to be 'handicapped,' the rest of the Rehabilitation Act and its regulations would apply just as appropriately as for actual disabilities."[189] Additionally, the plain language of the Rehabilitation Act makes no distinction between the three definitions of "handicapped individual" and the right to reasonable accommodations.[190] Furthermore, Congress incorporated the definitions of "handicap," now termed "disability," and "qualified individual" from the Rehabilitation Act into the ADA. Moreover, there is no distinction between "actually" disabled and "regarded as" disabled persons set forth by Congress in the plain language of the ADA with respect to reasonable accommodations.

Disregarding the implicit mandate from Congress and the Supreme Court, the Eighth Circuit in *Weber* and the Ninth Circuit in *Kaplan* concluded that to grant reasonable accommodations to "regarded as" disabled employees would generate "bizarre results" and create a windfall to said persons.[191] At first glance, the argument set forth in *Weber* and *Kaplan* appears to be credible: persons who are impaired but not actually disabled are entitled to reasonable accommodations solely by reasons of their employers' misperceptions, while others, who are similarly impaired but not "regarded as" disabled, are entitled to nothing.[192] However, those who are "regarded as" disabled are not in a like position to those who are not perceived as such.[193] As the Supreme Court and Congress have stated, an employer's misperceptions may prove to be just as

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187. *See* discussion *supra* note 81.

188. Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

189. 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, 939 (2000).

190. *Id.* at 939-40.

191. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999).

192. *Kaplan*, 323 F.3d at 1232; *Weber*, 186 F.3d at 916-17.

193. Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775-76 (3d Cir. 2004); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (Supplemental Decision).

disabling as an actual disability itself.[194] Hence, the logic of *Weber* and *Kaplan* is flawed.

Absent the requirement for reasonable accommodations, employers could maintain their stereotypic mentality with respect to their misperceived conceptions of an employee's impairment, which is clearly in contravention to the Congressional motives and intentions to disabuse Americans of said attitudes.[195] Thus, while a windfall may exist on a superficial plain, in reality, a "regarded as" disabled employee is entitled to reasonable accommodations in order to level the playing field between those who are merely impaired and those who are impaired *and* "regarded as" disabled. What is more, an employer has an implicit, if not compulsory, obligation to engage in an interactive process to determine appropriate accommodations where said employer perceives an employee to be disabled. Thus, to hold an employer liable for said employer's malfeasance in failing to engage in the interactive process hardly amounts to a bizarre result.[196]

Accordingly, the Supreme Court should adopt the holdings advanced by the First and Third Circuits in the spirit of stare decisis with respect to *Arline*, as well as in light of the compelling rationales set forth in *Jacques* and *Williams*, particularly where adverse employment action is taken. The plain language, the purpose, and the legislative history of the ADA, coupled with the faulty logic and clear disregard for binding precedent in *Weber* and *Kaplan*, clearly point to a holding that "regarded as" disabled employees are entitled to reasonable accommodations. Moreover, *Weber* and *Kaplan* moot the "regarded as" prong of disability within the confines of the ADA, as well as allow stereotypical attitudes toward persons with disabilities to subsist in the workplace, which places many qualified individuals one step closer to a pink slip.

VI. CONCLUSION

Congress intended that "regarded as" disabled employees be entitled to reasonable accommodations congruent with their actually disabled counterparts. Sadly, stereotypical attitudes toward disabled persons exist in American society, and they often lead to adverse employment action taken upon persons with disabilities. Despite the fact that certain individuals with less substantial physical and mental impairments are not actually disabled within the meaning of the ADA, stereotypical attitudes may extend to such individuals as well. In some instances, the perceptions of others may, in and of themselves, cause such persons to be disabled. In an effort to combat discrimination based on preconceived notions and prejudices, Congress has statutorily mandated "regarded as" disabled employees be entitled to

194. Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987); Americans with Disabilities Act of 1990, H.R. REP. NO. 101-485(III), at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

195. *See supra* notes 9, 145 and accompanying text.

196. *See supra* notes 131, 151 and accompanying text.

reasonable accommodations. Similarly, the Supreme Court has interpreted like language in the ADA's predecessor, the Rehabilitation Act, to bestow the right to reasonable accommodations upon "regarded as" disabled employees. Thus, when the Supreme Court grants certiorari on this issue, all indications lend themselves to a holding in favor of requiring employers to provide reasonable accommodations to employees who are regard as disabled.