REASONABLE ACCOMMODATION FOR THOSE "REGARDED AS" DISABLED: WHY REQUIRING IT WILL CREATE POSITIVE INCENTIVES FOR EMPLOYERS

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I. Introduction 314
II. History of the ADA 316
  A. The Rehabilitation Act of 1973 316
  B. Americans with Disabilities Act of 1990 316
III. Circuit case decisions on reasonable accommodation for those "regarded as" disabled 317
  A. *D'Angelo v. ConAgra Foods, Inc.* 317
  B. *Weber v. Strippit, Inc.* 321
IV. Strict review of the circuit courts' analysis warrants mandating reasonable accommodation for those "regarded as" disabled 322
  A. The plain meaning of the statute allows for no differentiation in protection for those "regarded as" disabled 323
  B. Reasonable accommodation does not provide a windfall to those who are "regarded as" disabled 324
  C. Reasonable accommodation for those "regarded as" disabled would not reinforce stereotypes 326
  D. Reasonable accommodation for those "regarded as" disabled will not allow healthy employees to obtain reasonable accommodation through threat of litigation 327

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V. Legislative goals warrant a requirement of reasonable accommodation for those "regarded as" disabled 329
A. Rehab Act 329
B. ADA 331
C. Title VII of the Civil Rights Act of 1964 335
VI. Economic and social policy considerations warrant requiring reasonable accommodation 337
A. Employer incentives created by an accommodation mandate for those "regarded as" disabled are distinct from the incentives of an accommodation mandate in general 337
B. Any problem with occupational segregation of the non-disabled and disabled will not be affected by requiring reasonable accommodation 343
C. Requiring reasonable accommodation encourages the interactive process 345
VII. Conclusion 347

I. INTRODUCTION

At the birth of federal disability law in the United States, Congress, when enacting the Rehabilitation Act of 1973, asserted that "[i]t is against the basic tenets of the scientific process to make an assumption of no hope and no help" and reasoned that "[n]o less should be true of public policy."[1] Congress realized that this lack of hope and help was pervasive in America's relationship to its disabled population.[2] Most importantly, employers were resistant to hiring people with disabilities based on generalized and often

[1] S. REP. NO. 93-1297, at 6400 (1974).

[2] *See, e.g.*, 123 CONG. REC. 13515 (1977) ("I know that you would agree . . . that persons who have suffered a serious illness should not have their misfortune compounded by arbitrary denial of the right to employment upon recovery, or when they are able to work.").

irrational fears about disabled employees.[3] Due to the lack of "help and hope," Congress enacted the Americans with Disabilities Act ("ADA") to bring help and hope to those with disabilities. Nevertheless, the interpretation of the ADA in four circuit courts directly contravenes Congress's attempt to aid the integration of the disabled into society.[4] By holding that non-disabled employees "regarded as" disabled do not fall under the definition of "disability" under the ADA, these circuit courts have relieved employers of the reasonable accommodation requirement under the ADA for such employees.[5] This interpretation of the ADA is critically flawed both in its legal underpinnings as well as its social effects. As a result, the Supreme Court needs to directly confront this issue and hold that employees "regarded as" disabled are required to be reasonably accommodated by their employers and, in the absence of requisite accommodations, "regarded as" disabled individuals have a cause of action against their employers.

Part II of this commentary discusses the history of the establishment of the ADA and the ADA requirements that led to a circuit split. Next, Part III tracks two significant circuit court opinions that present the basis for the decisional split. Part IV then analyzes the reasoning of the circuit courts and focuses on critical arguments both for and against reasonable accommodation. Part V reviews the history of discrimination legislation that relates to the ADA and how such history clarifies the goals of the ADA. Lastly, Part VI analyzes the anticipated incentives for employers through a requirement of reasonable accommodation and discusses the positive effects created by such a requirement.

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[3] *See generally* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387 (1991).

[4] *See* Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003); Workman v. Frito-Lay, Inc., 165 F.3d 460 (6th Cir. 1999); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999); Newberry v. E. Texas State Univ., 161 F.3d 276 (5th Cir. 1998).

[5] *See Kaplan*, 323 F.3d at 1233; *Weber*, 186 F.3d at 917; *Newberry*, 161 F.3d at 279-80.

II. HISTORY OF THE ADA

A. The Rehabilitation Act of 1973

The foundation of the ADA was established seventeen years before its enactment through Congress's adoption of the Rehabilitation Act of 1973 ("Rehab Act").[6] The Rehab Act marked Congress's first explicit action to prevent discrimination against the disabled.[7] The Rehab Act states that "no otherwise qualified individual with a *disability* . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service."[8]

B. Americans with Disabilities Act of 1990

The ADA was created in order to expand the protection of the Rehab Act beyond federally funded programs and activities to all types of employment.[9] The ADA protects those with a disability from discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of the employment."[10] One means of protection against this discrimination is the requirement of reasonable accommodation for the disabled if such accommodation will allow the disabled person to perform the essential functions of the job without imposing undue burden on the employer.[11]

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[6] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of Title 29 of the U.S.C.).

[7] *See* Timothy J. McFarlin, Comment, *If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees "Regarded As" Disabled*, 49 ST. LOUIS U. L.J. 927, 930 (2005).

[8] 29 U.S.C. § 794(a) (2000) (emphasis added).

[9] McFarlin, *supra* note 7, at 932.

[10] 42 U.S.C. § 12112(a) (2000).

[11] *Id.* § 12112(b)(5)(A).

"Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[12] The issue considered in this Note is whether people who fall within subsection (C) of the ADA's "disability" definition should be provided reasonable accommodation.

III. CIRCUIT CASE DECISIONS ON REASONABLE ACCOMMODATION FOR THOSE "REGARDED AS" DISABLED

Based on the reasonable accommodation requirement above, eight circuits have been confronted with the issue of whether or not reasonable accommodation is required when the employee does not fall within subsection (A) of "disability," but when the employer *believes* that such employer is disabled.[13] Four circuits have expressly refused to require reasonable accommodation for those "regarded as" disabled while an opposing four circuits have held that such reasonable accommodation is mandated.[14]

A. *D'Angelo v. ConAgra Foods, Inc.*

Of the circuit court cases requiring reasonable accommodation, the most recent opinion from the Eleventh Circuit exemplifies a commonplace situation where this issue arises and the customary way in which a requirement of reasonable accommodation is upheld by the circuit courts.

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[12] 42 U.S.C. § 12102(2) (2000).

[13] *Id.*

[14] For cases not requiring reasonable accommodation see *supra* note 4; For cases requiring reasonable accommodation, see Kelly v. Metallics West, Inc., 410 F.3d 670 (10th Cir. 2005); D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005); 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) (impliedly affirming the requirement of reasonable accommodation).

In *D'Angelo v. ConAgra Foods, Inc.*,[15] the plaintiff was diagnosed with vertigo shortly before she began her employment with the defendant in an entry-level position at a seafood processing plant.[16] She did not inform the defendant of her diagnosis.[17] During her first eighteen months on the job, D'Angelo was promoted twice and was placed in charge of transportation duties.[18] As a "transporter," D'Angelo was occasionally required to oversee the inspection of moving conveyor belts.[19] This element of the job often aggravated her vertigo condition and, as a result, the plaintiff asked her supervisor if she could be assigned to different duties.[20]

Upon reviewing a report from her physician, D'Angelo's plant manager and the vice president of human resources decided to terminate D'Angelo.[21] In a letter to the plaintiff, the defendant noted that she was terminated because "[her] position as a product transporter require[d] [her] to work around moving conveyors and mechanized equipment," and "based upon the restrictions that have been placed upon [her] by [her] physician . . . [she posed] a safety hazard to [herself] and [her] co-workers."[22] As a result of this termination, the plaintiff filed suit for discrimination under the ADA based on the fact that she was both disabled and "regarded as" disabled.[23]

The district court cited two reasons for granting summary judgment for the defendant. First, the plaintiff's vertigo did not substantially limit a major life activity and, therefore, as a matter of law, the plaintiff could not recover under

[15] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

[16] *Id.* at 1222.

[17] *Id.* at 1223.

[18] *Id.* at 1222.

[19] *Id.* at 1223.

[20] *Id.*

[21] *Id.* at 1223–24.

[22] *Id.* at 1224.

[23] *Id.*

subsection (A) of the ADA's "disability" definition.[24] Secondly, even if D'Angelo were "regarded as" disabled under subsection (C) of the "disability" definition, the defendant employer would *not* be required to reasonably accommodate her.[25] The Court stated, "even if regarded-as plaintiffs were entitled to such accommodation, D'Angelo was not a 'qualified individual' anyway."[26]

On appeal, the plaintiff put forth three arguments. First, she claimed that summary judgment was not permissible on the characterization of her vertigo as non-disabling because there were issues of material fact that needed to be addressed—namely, whether vertigo is a condition "that substantially limits her ability to perform the major life function of working."[27] Second, she asserted that the lower court incorrectly found as a matter of law that she was not a "qualified individual" under the ADA.[28] Finally, and most importantly for this paper, she argued that those who are "regarded as" disabled by their employer are entitled to reasonable accommodation by their employers.[29] The Eleventh Circuit affirmed the lower court's decision regarding D'Angelo's actual disability status; however, it remanded on the second issue of whether or not she was a "qualified individual."[30]

On the remaining issue of reasonable accommodation, the court held that those "regarded as" disabled are protected by

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[24] *Id.* This relates to a claim under subsection (A) of the disability definition and is not directly related to the issue of this paper. *See* Sutton v. United Airlines, 527 U.S. 471, 481-83 (1999), for analysis on what "substantially limits a major life activity" of working and therefore makes an employee disabled under subsection (A); see American with Disabilities Act of 1990 § 103(2)(A), 42, U.S.C. § 12102(2)(A) (1994) for the definition of "disability."

[25] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1224 (11th Cir. 2005).

[26] *Id.*

[27] *Id.* at 1225.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1239-40.

the reasonable accommodation requirement of the ADA.[31] In arriving at this holding, the Eleventh Circuit focused on three key considerations.

First, the court based its holding on the plain meaning of the statute. It noted that "the plain language of the ADA yields no statutory basis for distinguishing among individuals who are disabled in the actual-impairment sense and those who are disabled only in the regarded-as sense."[32] Secondly, the court compared the legislative purpose of the ADA with that of similar anti-discrimination statutes. It observed that requiring reasonable accommodation is "altogether consistent with the Supreme Court's interpretation of a nearly identical provision of the Rehabilitation Act of 1973,"[33] and that Congress's use of a similar structure in the ADA implies that a similar interpretation of the ADA is appropriate.[34] Thirdly, the court challenged the "bizarre results" that other circuits believed may follow from extending the reasonable accommodation requirement to employees "regarded as" disabled.[35] The Eleventh Circuit stated that "an employee who is simply impaired and an employee who is impaired and 'regarded as' disabled are not similarly situated since the 'regarded as' disabled employee

[31] *Id.* at 1240.

[32] *Id.* at 1235.

[33] *Id.* at 1236 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)).

[34] *Id.* at 1237.

[35] *Id.* at 1239 (quoting Williams v. Phila. Hous. Auth. Police Dep't., 380 F.3d 751, 774 (3d. Cir. 2004). *See* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (calling the result "perverse and troubling"); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999) (writing that the "ADA cannot reasonably have intended" the result); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) (observing that a finding under the "regarded as" prong would obviate defendant's obligation to accommodate it); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) (observing that employers need not provide reasonable accommodation to "regarded as" employees).

is subject to the stigma of the disabling and discriminatory attitudes of others."[36]

B. *Weber v. Strippit, Inc.*[37]

In contrast to the circuit opinions requiring reasonable accommodations for those "regarded as" disabled, the Eighth Circuit in *Weber* provides a common backdrop for examining the reasoning of the four circuits that find no such requirement. In *Weber*, the defendant hired the plaintiff, Weber, as an international sales manager.[38] Three years after being hired, Weber had a serious heart attack and had recurrent heart problems that occasionally required his hospitalization for the following two years.[39] Approximately one year after Weber's heart attack, the defendant informed him that he would have to relocate or accept a reduced position at the company.[40] Weber told the defendant that his doctor said he should not move for six months.[41] When the defendant refused to wait six months, Weber either quit or was terminated.[42]

Weber brought suit based on ADA claims of both actual and perceived disability along with various state law claims.[43] At trial, the jury found for the defendant on all ADA claims, and Weber appealed. For the purposes of this paper, the main focus of the appeal was the jury instructions given on the plaintiff's "regarded as" disabled claim.[44] Weber asserted that the lack of a "reasonable accommodation" jury instruction was erroneous.[45]

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[36] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005) (quoting Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (emphasis omitted)).

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

[38] *Id.* at 910.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 911.

[45] *Id.* at 915.

The court held that no "reasonable accommodation" instruction was necessary because there was no obligation for an employer to reasonably accommodate those they "regard as" disabled.[46]

In finding no requirement for accommodation, the court first noted that "[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to *bizarre results*."[47] Reasonable accommodation would allow two similarly-situated, non-disabled individuals to be treated differently. The court found that this result was not equitable and, therefore, weighed against reasonable accommodation.[48]

In addition, the Third Circuit cited its own previous arguments, stating that granting reasonable accommodation would "(1) permit healthy employees to, through litigation, demand changes in their work environments under the guise of 'reasonable accommodation' for disabilities based on misperceptions; and (2) create a windfall for legitimate 'regarded as' disabled employees."[49]

IV. STRICT REVIEW OF THE CIRCUIT COURTS' ANALYSIS WARRANTS MANDATING REASONABLE ACCOMMODATION FOR THOSE "REGARDED AS" DISABLED

With the given backdrop of the relevant case law, the question arises as to which circuit opinion is correct. Upon analysis of the main points of each circuit, it is clear that reasonable accommodation should be required for those "regarded as" disabled.

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[46] *Id.* at 916.

[47] *Id.* (emphasis added).

[48] *Id.* at 917.

[49] *Id.* (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 (3d Cir. 1998)).

A. The plain meaning of the statute allows for no differentiation in protection for those "regarded as" disabled

To start the analysis of the circuit split, the courts begin by analyzing the plain meaning of the "disability" definition under the ADA along with its interaction with the requirement of reasonable accommodation.[50] In various circuits, the plain meaning of the statutory language is a key factor in favor of requiring reasonable accommodation for those who are "regarded as" disabled.[51]

Under the ADA, an employer is prohibited from discriminating "against a qualified individual with a disability because of the disability of such individual."[52] Thus, to state a claim under the ADA, the plaintiff must demonstrate that he has a "disability."[53] The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being *regarded as* having such an impairment."[54] The definition provides no distinction in protection between the three sections.[55] Therefore, it is illogical to allow a certain level of protection under the first or second possibility while limiting such protection for the third "disabled" class, those "regarded as" disabled.[56] If a disparity in protection is required, it cannot be inferred from the text of the statute. "The text of the statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not."[57]

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[50] 42 U.S.C. § 12102(2) (2000); 42 U.S.C. § 12111(9) (2000).

[51] *See* Kelly v. Metallics West, 410 F.3d 670 (10th Cir. 2005); D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005).

[52] 42 U.S.C. § 12112(a) (2005).

[53] 42 U.S.C. § 12101(b)(1) (2000).

[54] 42 U.S.C. § 12102(2) (2000) (emphasis added).

[55] *See Kelly*, 410 F.3d 670; *D'Angelo*, 422 F.3d 1220.

[56] *See id.*

[57] *D'Angelo*, 422 F.3d at 1236; *see supra* Part III.A.

The only way that the statute itself could support the proposition that reasonable accommodation was not required for those "regarded as" disabled would be through legislative action. The "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."[58]

B. Reasonable accommodation does not provide a windfall to those who are "regarded as" disabled

Based on the plain meaning of the statute, one might assume no substantive issue with respect to its interpretation. However, the main argument of every circuit that has rejected reasonable accommodation for those "regarded as" disabled is that such people receive reasonable accommodation when, in actuality, they do not deserve it. In effect, these "regarded as" disabled people receive a windfall.[59] Moreover, opponents proclaim that there "should be no right to reasonable accommodation for those who can be lawfully terminated—for the same reason—once the lawsuit is over."[60] What these critics fail to realize, however, is that the "dessert" of such accommodations does not arise from the employee's innate impairment itself but rather the third party's views of the "disability" of such employee.[61] The courts rely "on the assumption that the employer's desire to fire, or otherwise adversely act against, the employee is unrelated to its perception of the employee's impairment."[62] The Third Circuit rejected the windfall analysis and stated

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[58] *D'Angelo*, 422 F.3d at 1238 (citing Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1552 (11th Cir. 1996)).

[59] Most courts rejecting reasonable accommodation call this reasoning a "bizarre result." *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907 (8th Cir. 1999).

[60] Allen Dudley, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for "Regarded As" Disabled Individuals*, 7 GEO. MASON. L. REV. 389, 415 (1999).

[61] *See id.*, for an example of how an opponent of reasonable accommodation ignores the fact that employer perceptions negatively affect job performance.

[62] McFarlin, *supra* note 7, at 975.

that there is no advantage given to the "regarded as" disabled plaintiff because the plaintiff was "specifically denied . . . an assignment *because of* the erroneous perception of his disability."[63]

In *Williams v. Philadelphia Housing Authority Police Dep't.*, the Third Circuit correctly realized that the windfall problem would in fact not occur because the discriminatory attitudes of the employer create a disparity in the economic opportunity of the person "regarded as" disabled.[64] Williams was employed as a police officer and began to suffer from depression.[65] As a result, the police department was informed that Williams should not work with guns for at least three months.[66] When Williams asked for reassignment to a position that did not require him to wear a gun, he was denied reassignment.[67] The police department subsequently terminated Williams.[68]

In the *Williams*' situation, it is clear that the termination was not based on factors completely unrelated to the perceived disability. Had Williams not been disabled, there is little likelihood that his termination would have been effectuated.[69] The defendant in *Williams* "refused to provide that assignment solely based upon its erroneous perception that Williams' mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns—perceptions specifically contradicted by [defendant's] own psychologist."[70] Based on this evidence, the court noted that "[t]he employee whose limitations [were]

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[63] Williams v. Phila. Hous. Auth. Police Dep't., 380 F.3d 751, 775 (3d Cir. 2004) (emphasis added).

[64] *Id.*

[65] *Id.* at 756.

[66] *Id.* at 757.

[67] *Id.*

[68] *Id.* at 758.

[69] Assuming that the employment was at-will, Williams could be terminated at any time. However, the argument in this case turns on whether he *would have been* terminated absent the perception of disability.

[70] *Williams*, 380 F.3d at 775.

perceived accurately [got] to work, while Williams [was] sent home unpaid."[71]

Thus, there is no windfall to those "regarded as" disabled. While their actual impairments may not have warranted reasonable accommodation, third party perceptions of a disability are sufficient to put the "regarded as" disabled person in a disadvantaged position as compared to the non-disabled person who is not "regarded as" disabled. Therefore, the argument for denying reasonable accommodation based on unjust windfalls is not sound. Given the inequitable position between the "regarded as" disabled person and the normal, non-disabled person, the requirement of reasonable accommodation is perfectly sensible.[72]

C. Reasonable accommodation for those "regarded as" disabled would not reinforce stereotypes

Another argument against reasonable accommodation relied on by some circuits is that providing such accommodation can lead to a reinforcement of the disability stereotypes.[73] Cited with such argument is the statute's explicit aim "at decreasing 'stereotypic assumptions not truly indicative of the individual ability of [people with disabilities].'"[74] Since the Congressional intent of eliminating such stereotypes unambiguously arises from the statute, the argument in *Kaplan v. City of N. Las Vegas* rejecting reasonable accommodation is defective. It underestimates the sufficient base level of anti-discrimination

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[71] *Id.*

[72] *But see* Kristopher J. Ring, *Disabling the Split: Should Reasonable Accommodations Be Provided to "Regarded as" Disabled Individuals Under the Americans with Disabilities Act (ADA)?*, 20 WASH. U. J.L. & POL'Y 311 (arguing that reasonable accommodation in the form of "education" of the employer is the only accommodation that will not prevent a windfall to the employee and moreover, that it should only be required when the employee has some form of actual impairment).

[73] *See, e.g.*, Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003).

[74] *Id.* at 1232 (citing 42 U.S.C. § 12101(a)(7) (2005)).

protection needed to effectuate the elimination of unfair stereotypic assumptions. In order for any disabled individual to break the generalized, undeserved stereotypes of others, the disabled person must have an environment to dispel such myths.[75] The ADA was meant to create this environment, with the workplace specifically mentioned as a key focal point.[76] "[T]he real danger is not that an employee will fail to educate an employer concerning her abilities, but that 'the employee whose limitations are perceived accurately gets to work, while [the employee regarded as disabled] is sent home unpaid.'"[77] Thus, the concern of the Ninth Circuit in *Kaplan* is valid. In order to address this concern, the individual must retain his job, and reasonable accommodation for those "regarded as" disabled reaches this end.

D. Reasonable accommodation for those "regarded as" disabled will not allow healthy employees to obtain reasonable accommodation through threat of litigation

In *Weber*, the court refused to require reasonable accommodation in part due to a fear that healthy employees could, after dispelling their employers' incorrect beliefs, still obtain preferential treatment through threats of litigation. This fear, however, is based on an incomplete analysis of the ADA. For an employee to be "regarded as" disabled, the employer must believe that the employee has a "disability."[78] To establish this, a plaintiff must show that his employer thinks the employee has "a physical or mental impairment that *substantially limits* one or more of the major life

[75] *See* Williams v. Phila. Hous. Auth. Police Dep't., 380 F.3d 751, 775-76 (3d Cir. 2004).

[76] 42 U.S.C. § 12101(a)(3) (2005) (citing "employment" as one area in which it is "critical" to end discrimination); 42 U.S.C. § 12101(a)(5) (stating that one problem with the discrimination is "outright intentional exclusion").

[77] Kelly v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005) (alteration in original) (quoting *Williams*, 380 F.3d at 775).

[78] 42 U.S.C. § 12102(2) (2000).

activities."[79] Proof that the employer holds such a belief is no small mountain to climb. Under the EEOC guidelines,[80] whether or not an impairment "substantially limits" a major life activity must be determined on a case-by-case basis.[81] In each determination, the EEOC takes into account factors such as "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."[82] Even more specific to the workplace situation, the EEOC states that an employee will not be "substantially limited" from working unless he is excluded from the class of jobs or broad range of jobs in various classes within a reasonable geographic area.[83] An inability for an employee to do one specific job is insufficient.[84]

Based on the EEOC guidelines, the fears of *Weber* are tenuous at best. To successfully pressure an employer to provide accommodation, an employee will need to prove more than simply the fact that the employer terminated him based on its perception. The employee must also show that such perception included the belief that the employee could not work at a similar job in the same area or work in a broad range of other jobs in the area. This is a tall order to prove[85]

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[79] *Id.* at § 12102(2)(A) (emphasis added).

[80] See Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 523-24 (1999), for the use of the EEOC guidelines as informative on the issue of "substantial limitation."

[81] 29 C.F.R. § 1630.2(j), App. (2006).

[82] *Id.* at § 1630.2(j)(2).

[83] *Id.*

[84] *Id.*

[85] *See* Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded As Having Disabilities Under the Americans with Disabilities Act? Why "No" Should Not Be the Answer*, 36 SETON HALL L. REV. 895, 957-58 n.495 (2006) (noting that recent Supreme Court decisions have been employer-friendly when it comes to proving disability of a claimant).

and, therefore, it is unlikely that an employee will simply be able to coerce accommodations from his employer.[86]

V. LEGISLATIVE GOALS WARRANT A REQUIREMENT OF REASONABLE ACCOMMODATION FOR THOSE "REGARDED AS" DISABLED

Even if we assume that the "bizarre result," "reinforcement of stereotypes," and "threat of litigation" arguments are sufficient to question the plain meaning of the ADA's statutory language, a thorough examination of the legislative intent provides further support for an obligation to reasonably accommodate. Within the legislative intent, two key goals are described at great length: improvement in welfare of the disabled and prevention of discriminatory treatment.

A. Rehab Act

The first goal of the ADA was articulated seventeen years before its inception through the Rehab Act. This goal was improvement in the welfare of those who were disabled. Much of the legislative history of the Rehab Act focuses on the promotion of this goal.[87] In *School Board of Nassau v. Arline*,[88] the Supreme Court held that the legislative intent of the Rehab Act was to "foster the integration of the disabled into federally funded programs and fight the 'irrational fears and prejudice on the part of employers or fellow workers.'"[89] The Court in *Arline* further noted that the basic purpose of the Rehab Act is "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of

[86] *See, e.g.*, Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Airlines, 527 U.S. 471 (1999) (rejecting claims for failure by the employee to sufficiently show "substantial limitation").

[87] *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 277 (1987).

[88] *Id.* at 277.

[89] *Id.* at 284 n.13 (citing 123 Cong. Rec. 13515 (1977)).

others"[90]: "the primary goal of the Act is to increase the employment of the handicapped."[91] Therefore, the main purpose of the Rehab Act was to improve the *welfare* of people with a "physical or mental impairment (whether actual, past, or *perceived*)."[92] The Court noted that the Act was heavily focused on making sure that the employment arena was open to those who are disabled.[93]

At first glance, this welfare objective may appear to run counter to enforcement of the requirement of reasonable accommodation for those who are "regarded as" disabled. After all, there is no need to increase the welfare of those who are not, in actuality, disabled because in theory such individuals should be able to compete for jobs without such accommodation.[94] It would be a windfall to allow them to have such accommodations.[95] However, this argument is erroneous because the focus should not be on the effect of the accommodation on the individual employee, but rather on the welfare of the *aggregate* disabled population. Congress was explicitly worried about the denial of jobs and the burden imposed by the handicapped on the general public if the disabled were not integrated into the workforce free from prejudice. Accommodation of those "regarded as" disabled meets this end.[96]

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[90] *Id.* at 284.

[91] *Id.* at 283, n.10 (citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 633, at n.13).

[92] *Id.* (emphasis added).

[93] *Id.*

[94] *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 958-59 (2003) (noting that the welfare reform purpose may be effectuated by denying recovery to those who may be rejected from one job, but who still can compete for other jobs).

[95] *See, e.g.*, Weber v. Strippit, 186 F.3d 907 (8th Cir. 1999) (exemplifying a circuit court taking this view).

[96] For further analysis of this conclusion, see later arguments.

B. ADA

Rooted in the groundwork laid by the Rehab Act, the ADA attempted to further the welfare objectives of the Rehab Act.[97] In 1983, the Commission on Civil Rights directed Congress to take action based on cost considerations of supporting the disabled.[98] Through its research, the Commission found that efforts to integrate the disabled into the community would "more than pay for themselves through 'large savings in reduced expenditures of public benefits programs.'"[99] Based on the Commission's research and proposal, the ADA was formed with a clear welfare objective.[100] However, the Commission's jumpstart to the legislation was far from the end of the welfare argument for implementing the ADA. When brought before Congress, the lead sponsors of the bill "argued that significant funds spent on disability benefits programs 'would be available for other national priorities if the disabled, who are barred from working because of the barriers of discrimination, were able to lead productive lives.'"[101] At the congressional hearings on the ADA, disability rights advocates also reinforced the welfare basis of the ADA. General civil rights activists like Reverend Jesse Jackson argued that the ADA would save people money by "moving people with disabilities from welfare to the workforce."[102] Finally, the non-government community sold the ADA as welfare reform.[103] Newspapers throughout the nation published articles and editorials touting the reform's beneficial, cost-reducing effects on

[97] As a whole, the purpose of the ADA was grounded on welfare considerations, but the "regarded as" disabled section of the Code focused more directly on anti-discrimination features. This is noted in the legislative history of the ADA and Title VII later.

[98] Bagenstos, *supra* note 94, at 958-59.

[99] *Id.* at 959.

[100] Weicker, *supra* note 3, at 390.

[101] Bagenstos, *supra* note 94, at 962.

[102] *Id.* at 968.

[103] *Id.* at 971.

government spending.[104] Therefore, the ADA is strongly based on the positive effects on the welfare of those who are disabled.

Assuming the welfare-based intent of both the Rehab Act and the ADA, some advocates of the welfare purpose claim that denial of recovery for those "regarded as" disabled is warranted because people who are "regarded as" disabled are not meant to be protected under the ADA's welfare goals since such employees will not be perceived as disabled by all employers.[105] Proponents of this view argue that "[a] welfare reform approach would treat the ADA as a way of getting people out of benefits programs and into the workforce, not as a way of getting job accommodations for people who would be in the workplace regardless."[106] In support of this contention, proponents call upon the Supreme Court's decision in *Sutton v. United Airlines* as evidence.[107]

In *Sutton*, the Court held that applicants for a job were not "disabled" under the ADA's definition because they were not prevented from getting work in general, only from obtaining one particular job with the defendant.[108] Based on the welfare purpose of the ADA, proponents of this theory claim that the Court did not protect such individuals because doing so would not lower the cost to society by forcing reasonable accommodation.[109] For that reason, those "regarded as" disabled will be able to find work elsewhere even if they are not reasonably accommodated by their current employer and, therefore, should not be afforded protections.[110]

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[104] *Id.* at 971-975.

[105] See Bagenstos, *supra* note 94, for the argument that the welfare purpose is not effectuated by finding protection for someone who is not "disabled" because it does not reduce the cost of such people to the general public.

[106] *Id.* at 979.

[107] Bagenstos, *supra* note 94, at 978-79; Sutton v. United Airlines, 527 U.S. 471 (1999).

[108] *Sutton*, 527 U.S. at 492.

[109] Bagenstos, *supra* note 94, at 979.

[110] *See id.*

While this argument correctly interprets the welfare considerations of the ADA, it fails to consider two key elements of the Act. First, while the welfare objective is important, it is best dealt within another element of the ADA as recognized in *Sutton*. The focus of the Court in *Sutton* was on the interpretation of the "substantially limited" language of the statute.[111] By analyzing the case in such a manner, the Court implicitly acknowledged that the welfare rationale for the ADA should be fully addressed before the reasonable accommodation determination is even reached. If the employee is "regarded as" having an impairment that will not "substantially limit" major life activities, then he cannot state a claim for accommodation at all.[112] Thus, commentators incorrectly make reference to the welfare rationale in relation to the reasonable accommodation requirement when, in actuality, such rationale is addressed before reasonable accommodation is at issue.

Second, the argument fails to sufficiently acknowledge the ADA's strong anti-discrimination intent.[113] In February 1986, when disability discrimination was first being analyzed, the National Council on the Handicapped ("the Council") issued a report titled "Toward Independence."[114] In the report, the Council called for expansive protection against discrimination toward the disabled.[115] Through customer forums and the 1986 Harris Poll, a survey of public opinion, the Council determined that discrimination was widespread and that there was a "sizable consensus on the need for expanded civil rights protection."[116]

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[111] *Sutton*, 527 U.S. at 491-94.

[112] *Id.* (holding that the appellants were not substantially limited in major life activities and therefore did not present a claim for reasonable accommodation due to be "regarded as" disabled).

[113] In Bagenstos, *supra* note 94, the author notes that even though there is a strong welfare purpose, it is by no means the only purpose behind the ADA.

[114] Weicker, *supra* note 3, at 390.

[115] *Id.*

[116] *Id.* (citing Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986)).

In addition, the statutory language of the ADA voiced two key goals: (1) welfare for the disabled *and* (2) anti-discrimination principles.[117] The statute asserts that its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[118] Further, the chief sponsor of the ADA maintains that the law clearly reached its key objective, "a broad-scoped prohibition of *discrimination* against people with disabilities and . . . specific methods by which such discrimination is to be eliminated."[119] Moreover, in promotion of the anti-discrimination goals of the ADA, the EEOC Compliance Manual explicitly opposes the reasoning in *Sutton*.[120] The Manual clearly states that "it is not necessary that the employer's perceptions of the individual be shared by other employers."[121] Thus, along with welfare considerations, the courts cannot deny the clear anti-discrimination goals of the ADA. Based on these anti-discrimination goals, it is impossible to follow the *Sutton* analysis to subsection (C) of the "disability" definition while still upholding the unambiguous purposes of subsection (C).

Seen in this light, the ADA promotes the requirement of reasonable accommodation for those "regarded as" disabled. The only way to alleviate the "serious and pervasive social problem" of discrimination against those actually disabled is through deterrence.[122] The employer's incorrect characterization of an employee as "disabled" should not shield the employer from liability if reducing discrimination is the goal of the statute. The simple fact that the employer has discriminated based on a perceived disability should be sufficient.

> The inclusion of persons regarded as having a substantially limiting impairment reflects

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[117] *See* 42 U.S.C. §§ 12101(a)(7-9), (b)(1) (2005).

[118] *Id.* at § 12101(b)(1).

[119] Weicker, *supra* note 3, at 392 (emphasis added).

[120] EEOC-CM 902.8 (1995).

[121] *Id.*

[122] Weicker, *supra* note 3.

> Congressional intent to protect all persons who are subject to discrimination based on disability, even if they do not in fact have a disability. It also reflects a recognition by Congress that the reactions of others to an impairment or a perceived impairment can be just as disabling as the limitations caused by the actual impairment.[123]

C. Title VII of the Civil Rights Act of 1964

In addition to examining the Rehab Act and the ADA itself, one must also relate the goals of Title VII of the Civil Rights Act of 1964 to the ADA. This comparison of Congressional intent focuses directly on the definition of "disability" in the ADA. In the ADA, Congress added clause (C) to the definition of disability because it "clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as Title VII of the Civil Rights Act of 1964 prohibits discrimination . . . whether or not the person discriminated against is in fact a member of a racial minority."[124] Congress believed that there was a need to protect the "handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar and insensitive to the difficulties confront[ing] individuals with handicaps.'"[125] Thus, when considering whether reasonable accommodation is required for those "regarded as" disabled, it is instructive to look at the intent of Title VII of the Civil Rights Act of 1964.

The Civil Rights Act of 1964 was enacted primarily based on the concern over the "plight of [African Americans] in our

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[123] EEOC-CM 902.8 (1995).

[124] S. REP. NO. 93-1297, at 6389 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400.

[125] School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (citing S. REP. NO. 93-1297, at 50 (1974)).

economy."[126] Congress recognized the disparity between the future prosperity of African American and Caucasian people and found that "[t]he crux of the problem [was] . . . employment opportunities for [African Americans] in occupations which have been traditionally closed to them."[127] From this legislative history, similar to that of the ADA, there emerges a clear focus on a mix of both welfare and anti-discrimination goals.

In *Perkins v. Lake County Department of Utilities*,[128] the court used this intent to infer protection for those who may not even fall under the "minority" classification of Title VII. The *Perkins* court addressed the issue of whether a plaintiff had met the prima facie requirements under Title VII. Specifically, the defendant claimed that the plaintiff had not sufficiently proven that he was actually a "minority" and, thus, could not recover under Title VII.[129] In dismissing the claim, the court held that "it is the employer's reasonable belief that a given employee is a member of a protected class that controls this issue . . . [w]hen racial discrimination is involved, perception and appearance are everything. As with the joy of beauty, the ugliness of bias can be in the eye of the beholder."[130]

Therefore, grounded in the interpretation of the purpose of Title VII, the Court's interpretation of the ADA should support a reasonable accommodation for those "regarded as" disabled.[131] The Court has interpreted the welfare and anti-discrimination goals of Title VII to mandate protection from discrimination even if the victim is not of the protected class. Therefore, it would contravene longstanding discrimination

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[126] United Steelworkers of Am. v. Weber, 443 U.S. 193, 194 (1979).

[127] *Id.* at 203 (citing 10 CONG. REC. 6548 (1964)).

[128] Perkins v. Lake County Dep't of Utils., 860 F. Supp. 1262 (N.D. Ohio 1994).

[129] *Id.*

[130] *Id.* at 1277-78.

[131] *See* Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001) (noting that the ADA and Title VII have the same purpose and courts have "routinely used Title VII precedent in ADA cases").

law to refuse protection of those "regarded as" disabled through reasonable accommodation.

VI. ECONOMIC AND SOCIAL POLICY CONSIDERATIONS WARRANT REQUIRING REASONABLE ACCOMMODATION

Apart from the legal arguments set forth above, social policy also supports a requirement of reasonable accommodation for those "regarded as" disabled.[132]

A. Employer incentives created by an accommodation mandate for those "regarded as" disabled are distinct from the incentives of an accommodation mandate in general

One of the main policy arguments against the ADA is that it may actually lower the number of career opportunities afforded to those who are disabled.[133] According to one of the most comprehensive studies to date, "wages of disabled workers exhibited no change relative to those of non-disabled workers, while employment levels fell significantly for disabled workers aged 21-39 relative to non-

[132] This economic analysis does not take on the issue of whether reasonable accommodation should be completely removed or amended to better fit the economic goals of the statute, but rather whether in this context, reasonable accommodation is economically reasonable. For an in depth analysis on this issue and descriptions of economic research in this area, see, e.g., Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1258-63 (2003); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

[133] Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 528 (2004); *see also* Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693 (2000); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223 (2000).

disabled workers in this same age cohort."[134] The cost factor seems to form the basis of this argument. The ADA creates an increased cost for discriminatory practices against the disabled.[135] This increased cost is based on the potential liability of an employer acting in a discriminatory fashion with respect to hiring and termination actions.[136] The goal of the statute is to deter discriminatory practices through the increased cost of such discrimination. However, the increased cost for hiring or terminating someone with a disability counteracts the desired deterrent effect. This may encourage employers to shy away from employing disabled individuals in the first place.[137]

Considering this "cost" factor under the ADA, one of the main reasons for criticism of the ADA is that the disincentives from the added costs of hiring are greater than the incentives to reduce discrimination based on increased potential liability. As a result, commentators contend that the ADA actually lowers the availability of jobs for the disabled.[138] Critics contend that the decreased employment levels of the disabled are based on one key factor, the ineffectiveness of ADA enforcement.[139]

The ADA was founded on the idea of increasing the protection of the disabled by prohibiting discriminatory practices and requiring reasonable accommodations for the disabled. These protective measures increase the cost of employing the disabled in two ways. First, discriminatory practices against people with disabilities fall under greater scrutiny than actions against the non-disabled and, therefore, succumb to a higher probability of liability if discrimination is present. Second, the accommodations given to the disabled under the ADA impose an extra cost on

[134] Jolls, *supra* note 133, at 276 (citing Acemoglu & Angrist, *supra* note 133).

[135] Jolls, *supra* note 133.

[136] *Id.*

[137] Bagenstos, *supra* note 133.

[138] *Id.* at 536 (citing DeLeire, *supra* note 133).

[139] Jolls, *supra* note 133, at 275.

the employer.[140] Based on these increased costs, an employer, if making an economically sound decision, will have lower demand for disabled workers than non-disabled workers due to the disabled worker's lower marginal product.[141] In order to meet this lower demand for disabled workers, the rational employer can respond in two ways. First, the employer could lower the wage for the disabled worker. However, adjustment of the wage rate so that a disabled worker is paid less for the same job as a non-disabled worker is overt discrimination based on disability.[142] Therefore, this practice is likely unsustainable by the employer. As a result, the employer must choose the second option, a reduction in the employment levels of the disabled.[143] If, however, the ADA was strictly enforced and efficient in weeding out employment level discrimination, such discrimination would not be sustainable.[144] But the enforcement mechanisms of the ADA are not sufficiently protective to make the employer react to the added liability created by the ADA, and so the employer can use discriminatory employment levels and effectively maintain a lower level of employment for the disabled.[145] Thus, imperfect enforcement most likely leads to decreases in the aggregate employment levels of the disabled.[146]

Based on the foregoing analysis, many commentators have found that requiring reasonable accommodation for those who are "regarded as" disabled will only exacerbate the

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[140] Bagenstos, *supra* note 133, at 536.

[141] Jolls, *supra* note 133, at 241 (noting that increased cost reduces the marginal productivity of the disabled worker); *see also* Schwab, *supra* note 132, at 1208-12 (discussing the effect of "soft" and "hard" preferences mandated by the ADA on the employer).

[142] Jolls, *supra* note 133, at 264.

[143] *Id.*

[144] This recognizes a situation that is not possible since it is unreasonable to believe that any law can be "strictly" enforced; see *id.* at 266, for a discussion of why "there is in fact a broadly held view that such restrictions are significantly limited in their enforceability . . .".

[145] *Id.* at 276-77 (discussing the empirical research that shows decreased employment levels).

[146] *Id.*

disincentive for employers without creating an adequate benefit for the employee; thus, based on policy considerations, such a requirement should not be mandated.[147] Yet what these commentators fail to realize is that the context of the cost considerations of an employer with respect to someone "regarded as" disabled is clearly distinct from the corresponding context with respect to a person who is actually disabled.

Much of the previous analysis focuses on the employer-employee relationship prior to the hiring of a disabled individual. At the hiring stage of the relationship, it is true that the rational employer would recognize that the added cost of hiring a disabled individual may make such a hiring inefficient and would therefore discriminate against the disabled person, in violation of the ADA, by refusing to hire her. The disabled person, having invested little in the relationship, may believe that she was discriminated against, but will often take no action against the prospective employer. Even if the disabled individual were to take ADA-based legal action, due to the multi-faceted nature of the hiring process, it is unlikely that she would be able to make out a sufficiently clear legal basis for recovery. Moreover, if stating a claim under the discriminatory impact theory, statistical proof of discrimination will often be impossible to utilize to show differential employment except among relatively large employers.[148] Therefore, the preceding effect of cost on disabled employment levels is clearly relevant to the hiring situation.

However, the cost considerations that affect the hiring process are not nearly as relevant with respect to the reasonable accommodation of someone who is "regarded as" disabled. When analyzing the "regarded as" disabled question, the focus must be placed on the third party's perceptions of the "regarded as" disabled person. At the hiring stage, the potential employer treats a person who is

[147] *See* Allen Dudley, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for "Regarded As" Disabled Individuals*, 7 GEO. MASON L. REV. 389, 416 (1999).

[148] Jolls, *supra* note 133, at 266.

disabled no differently than a person whom it "regards as" disabled. In both cases, the potential employer subjectively believes that the prospective employee is disabled and, therefore, will need reasonable accommodation. In fact, based on the ADA's plain language, the employer will not be allowed to ask the potential employee "disability-related" questions or subject the applicant to a medical examination until after giving such an employee a conditional offer for employment.[149] The ADA clearly states that during the "preemployment" period, "a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[150] Thus, the hiring decision will not be affected by whether the potential employer would have had to accommodate the "regarded as" disabled employee. Whether the would-be employee is actually disabled or not, the employer will still act in the same manner as if such would-be employee was disabled and would require reasonable accommodation. Therefore, the criticisms of reasonable accommodation for those "regarded as" disabled are not relevant in the hiring setting because both the "regarded as" disabled and the actually disabled are treated identically.

While the effects of reasonable accommodation do not influence employer decisions at the hiring level, such a requirement greatly affects employers' *post-hiring* decisions, the most prevalent situation in which reasonable accommodation cases arise.[151] This result is a logical

[149] 42 U.S.C. § 12112(d)(2)(A) (2000).

[150] *Id.*; this assumes that the job applicant's disability is not clearly obvious through physical appearance. However, in that case, there is still no difference in the eyes of the employer between an applicant who is disabled and one who is "regarded as" disabled.

[151] It is not surprising that most "reasonable accommodations" cases arise post-hiring, given that most pre-hiring decisions are made with the expectation that reasonable accommodation must be given to the disabled person, or without any knowledge of the applicant's disability. For an analysis of the inefficiency of withholding such information from employers during the pre-hiring season, see J.H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903 (2003).

conclusion from the construction of the ADA. While employers are restricted during the pre-employment period, the ADA explicitly allows an employer to inquire about the nature and severity of an employee's disability during employment if it is "shown to be job-related and consistent with business necessity."[152] Therefore, employers' termination decisions often turn on their interpretation of such medical examinations or inquiries. The relevant case law also supports this distinction as the factual situations of the circuit cases follow a very similar pattern. In this common pattern, an employee, after working for some time, shows signs of a condition not apparent at hiring and then is later terminated based on such condition.[153] Given this backdrop, the employer will have already hired the "regarded as" disabled person, and the main consideration will be whether firing the person is more economically beneficial than reasonably accommodating such an individual. Unlike the hiring situation described above, this termination decision will likely trigger significantly more ADA scrutiny than would a hiring decision.[154] First, the terminated employee has invested far more during her time with the employer. Unlike an interviewee candidate, a current employee has spent significant time and energy doing her job. As a result, the terminated employee loses far more than the candidate and is more likely to bring an ADA discrimination claim. Moreover, the employer will likely have more extensive documentation of the employee's performance, including any recorded problems or negative feedback that the employee has received.[155] The termination decision is thus more

[152] 42 U.S.C. § 12112(d)(4)(A) (2000).

[153] *See, e.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751 (3d Cir. 2004); Weber v. Strippit, 186 F.3d 907 (8th Cir. 1999); Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996).

[154] Verkerke, *supra* note 151, at 939 (noting that "it is well known that the majority of discrimination claims involve discharge rather than promotion or hiring") (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991)).

[155] *Id.*

transparent than the hiring decision. Finally, more detailed information about the employer-employee relationship makes statistical data less important since the case is more likely to be brought as a disparate treatment claim than a disparate impact claim. Due to these considerations, the employer will often be more reluctant to discriminate in termination decisions than in hiring decisions for fear of increased potential liability.

Given this increased reluctance, we should analyze the effect of a requirement of reasonable accommodation for those "regarded as" disabled solely with respect to the termination decision. Through a requirement of reasonable accommodation, the ADA will provide increased potential liability for the termination decision. Employers will not be able to arbitrarily receive relief from liability for discriminatory terminations simply because of their mistaken beliefs about an employee. Contrary to arguments rejecting reasonable accommodation, if reasonable accommodation is not required, then *employers* would receive a windfall.[156] Taken to the extreme, an employer could admit that it did not accommodate someone it openly "regarded as" disabled and subsequently fired her based on the mistaken belief of her disability without facing liability. It is clearly inequitable for an employer to receive a windfall through exemption from liability, simply based on poor judgment of what qualifies as a disability.

B. Any problem with occupational segregation of the non-disabled and disabled will not be affected by requiring reasonable accommodation

Commentators have also argued that even if wage and employment levels are binding, ADA requirements will

[156] *See Weber*, 186 F.3d at 917 (noting that extending accommodations to "regarded as" disabled plaintiffs could "create a windfall for legitimate 'regarded as' disabled employees who, after disabusing their employers of their misperceptions, could nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions" (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 148-49 (3d. Cir. 1998))).

promote occupational segregation, negating any of the benefits that the ADA provides to disabled employees.[157] The argument hypothesizes that if a company is required to hire and pay non-disabled and disabled employees equally, then it will have no choice but to reduce the wage paid across the board.[158] In response to this wage reduction, non-disabled workers will leave their jobs over the long term in search of jobs where they are not forced to subsidize the reasonable accommodation of their disabled co-workers.[159] As a result, there will be occupational segregation between the disabled and non-disabled, and wage disparities will persist even with strict ADA enforcement.

Given this contention, the requirement of reasonable accommodation for those "regarded as" disabled is even further supported from a public policy standpoint. As stated previously, disputes involving "regarded as" disabled persons who seek accommodation arise most frequently when the employee was hired and was only later believed to have a disability.[160] In this scenario, and assuming the occupational segregation above, the employee will likely be within the class of employees who left lower-paying jobs in search of higher-paying jobs that avoided subsidization of the disabled workers.[161] Therefore, the "regarded as" disabled employee would be getting the benefits received by the non-disabled worker. This is in clear accord with the intended goals of the ADA; requiring reasonable accommodation in this context allows for equal treatment of those "regarded as" disabled and the non-disabled.

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[157] *See, e.g.*, Jolls, *supra* note 133, at 268-72.

[158] *Id.*

[159] *Id.* at 271.

[160] *See* Verkerke, *supra* note 154, at 939-940.

[161] *Id.* at 940 (stating that the restrictions on employment differentials are binding on the employer when the disabled worker has hidden disabilities).

C. Requiring reasonable accommodation encourages the interactive process

While the policy analysis alone supports an accommodation mandate for those "regarded as" disabled, it is further supported by the Equal Employment Opportunity Commission's (EEOC) call for an interactive process between disabled employees and their employers.[162] The EEOC guidelines for the ADA state that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability. . . . This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[163] In accordance with this EEOC policy, many courts have "held that both employer and employee 'have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.'"[164] The vast majority of courts have recognized the duty to engage in the interactive process as a mandatory obligation.[165]

Moreover, legal scholarship has often lauded the use of the interactive process as the "procedural" component of reasonable accommodation.[166] Commentators have noted that the interactive process encourages employers to "act on the basis of substance . . . rather than on thoughtless or subconscious aversion."[167] Further, the interactive process forces employers to "investigate the productivity of individuals with disabilities . . . who are more productive than others and yet would not be hired absent the ADA's

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[162] 29 C.F.R. § 1630.2(o)(3) (2005).

[163] *Id.*

[164] *See, e.g.*, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 771 (3d Cir. 2004) (citing Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997)).

[165] McFarlin, *supra* note 7, at 960.

[166] *See, e.g.*, Schwab, *supra* note 132, at 1258-63.

[167] *See, e.g., id.* at 1258-59.

procedural requirement."[168] Finally, the interactive process may even produce the right incentives for disabled individuals themselves. By compelling employers to base their decisions more on productivity and worker ability, and less on discriminatory prejudice, the law creates incentive for the disabled "to invest in their own productivity."[169] The disabled will no longer believe that their efforts at increased productivity such as successful completion of a college education or other training will go unnoticed in the labor market.

Insistence on reasonable accommodation for those "regarded as" disabled clearly enhances the benefits of the interactive process.[170] Creating increased potential liability for the employer encourages the employer to engage in the interactive process. The employer will no longer be able to regard an individual as disabled, terminate such individual, and then be relieved of liability based on the incorrect nature of past assumptions. Instead, "the interactive process provides an opportunity for employers to initially assess an employee's possible impairments and to consider if reasonable accommodation is required. If the employer in good faith determines that the employee is not disabled, the employer has absolved itself from ADA liability."[171] This increased use of the interactive process will strike directly at the goals of the ADA. First, employers will be less likely to discriminate based on stereotyped assumptions about those they believe are disabled.[172] This effect reinforces the anti-discrimination goals of the ADA. Second, the employee would be able to maintain her job if, absent the perception of her disability, she can effectively do her work.[173] This effect reinforces the welfare goals of the ADA. Finally, absent the intended goals of the ADA, promoting the interactive process also allows for matching of needs between the employer and

[168] *Id.* at 1259.

[169] *Id.* at 1259-60.

[170] McFarlin, *supra* note 7, at 962-963.

[171] *Id.* at 962.

[172] *Id.* at 963.

[173] *Id.*

the employee and will thereby reduce litigation over adverse actions.[174]

VII. CONCLUSION

The statutory language of the ADA clearly provides for protection of those "regarded as" disabled and makes no explicit restriction on the type of protection afforded to such individuals. However, four circuits have directly contravened this language based on the "bizarre result" created by reasonable accommodation and other equity considerations. These circuits' reasoning is critically flawed and, therefore, the Supreme Court should take an affirmative step toward requiring reasonable accommodation for those "regarded as" disabled. By mandating reasonable accommodation, the Supreme Court will promote the two distinct and equally important goals of the ADA: increasing the welfare of the disabled and preventing discrimination against the disabled. In addition, requiring such accommodations will improve incentives imposed on employers through ADA legislation. It is clear, through legal, policy, and economic analyses, that the Supreme Court must grant certiorari on this issue and affirm the view that reasonable accommodation is required for those "regarded as" disabled.

[174] *Id.*