In the Land Between Two Maps: Perceived Disabilities, Reasonable Accommodations, and Judicial Battles over the ADA

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I. Introduction

On May 19, 1998, after a heated argument with his superior, Edward Williams was suspended from the Philadelphia Housing Authority Police Department (PHA). Williams, a PHA police officer for 24 years, called a counselor later that night. During the conversation he remarked, "I understand why people go postal." According to later accounts by the counselor, Williams spoke of "smoking people, going postal, and having the means to do it." After an evaluation, a local counselor concluded that he suffered from major depression. PHA’s staff psychologist evaluated Williams and recommended that he be temporarily reassigned to a position that did not require him to carry a weapon but added that Williams could "work around other officers who will be wearing their weapon." PHA misconstrued the psychologist’s recommendations and believed that Williams was unable to work around armed officers. On October 14, Williams requested assignment to the PHA radio room. PHA, incorrectly believing that he was not qualified for any position as

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2. Id.
3. Id.
4. Id.
5. Id. at 757.
6. See id. (stating the defendant’s argument that Williams could not work around weapons or have access to weapons and thus was not qualified to work in the radio room).
7. Id.
a result of the psychologist's recommendations, did not assign him the job.⁸ On December 3, a human resources manager at PHA asked Williams to file for medical leave.⁹ Williams did not respond.¹⁰ On December 29, PHA sent Williams a termination letter.¹¹

Williams filed suit against his former employer in the United States District Court for the Eastern District of Pennsylvania. In Williams v. Philadelphia Housing Authority Police Department,¹² Williams argued that PHA violated the Americans with Disabilities Act of 1990 (ADA) by discriminating against him.¹³ Williams alleged, in part, that he had a "disability" under the ADA because PHA believed that he was disabled.¹⁴ Due to this disability, Williams argued, PHA was required to reasonably accommodate him so that he could continue working.¹⁵ When he requested accommodation by a transfer to a radio room position, PHA failed to respond and subsequently terminated him.¹⁶ Williams alleged that PHA discriminated against him by failing to provide the required accommodations.¹⁷ In essence, Williams argued that PHA's misperception had unlawfully barred him from working.

The ADA prohibits discrimination by employers against employees with disabilities.¹⁸ The definition of "disability" does not distinguish between having "a physical or mental impairment" and "being regarded as having such an impairment."¹⁹ This strong protection for nonexistent disabilities was

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⁸ See id. (stating the defendant's argument that Williams could not work around weapons or have access to weapons and thus was not qualified to work in the radio room).
⁹ Id. at 758.
¹⁰ Id.
¹¹ Id.
¹⁴ See id. at 766 (noting Williams's argument that PHA wrongly perceived him as having limitations he did not have, and thereby regarded him as being disabled).
¹⁵ See id. at 761–62 (stating that Williams alleges he was discriminated against by PHA's failure to provide the reasonable accommodations he requested).
¹⁶ Id. at 757–58.
¹⁷ See id. at 768 ("It is Williams's position that with the benefit of an accommodation transfer he would have been able to perform the essential functions of a member of the radio room.").
¹⁸ See 42 U.S.C. § 12102(2)(A)–(C) (2000) (defining "disability"); id. § 12112(a) (stating that no employer may discriminate against a qualified individual).
¹⁹ See id. § 12102(2) (defining "disability" as both "a physical or mental impairment" and "being regarded as having such an impairment").
intentional, as the Act’s legislative history shows: Congress adopted the view that "society’s accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."^{20}

Under the ADA, failing to reasonably accommodate a disabled employee is an act of discrimination.^{21} Reasonable accommodations, according to the EEOC, could include such changes as job restructuring or reassignment to a vacant position.^{22} Combining the "disability" and "discrimination" definitions suggests that employees are entitled to reasonable accommodations to the extent that they are perceived as disabled.^{23} In Williams’s case, he was barred from working because of PHA’s misperception of his impairment and its refusal to accommodate him.^{24} PHA’s actions thus appear to qualify as discrimination under the ADA.^{25} The Third Circuit, in reviewing Williams’s case, agreed.^{26}

This notion of accommodating a perceived disability, rather than an actual disability, has become a controversial concept, but it is one that only a few cases have tackled.^{27} The Fifth, Sixth, Eighth, and Ninth Circuits have held that the ADA does not afford these Williams-like requirements.^{28} The Eighth Circuit argued that such requirements would create a disparity in treatment among impaired but nondisabled employees.^{29} The ADA, concluded the court,


23. For a discussion of interpretation of the Act’s plain language, see infra Part IV.A.

24. See Williams, 380 F.3d at 775–76 (concluding that Williams was unable to work because of his employer’s misperception).

25. For a discussion of interpretation of the Act’s plain language, see infra Part IV.A. For a discussion of the Williams arguments, see generally Part IV.

26. See Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 775–76 (3d Cir. 2004) (concluding that Williams was unable to work because of his employer’s misperception).


28. For a discussion of the key circuit court cases that have held that the ADA does not afford Williams-like requirements, see infra Part III.

29. See Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 2003) (arguing that that disparity in treatment among similarly situated employees would be a bizarre result and that Congress could not have intended such an outcome).
could not reasonably have been intended to create such a result.\textsuperscript{30} The Ninth Circuit later expanded on this rationale, writing that such a result would "do nothing to encourage" the removal of stereotypic assumptions in the workplace.\textsuperscript{31}

Prior to Williams, only the First Circuit determined that Williams-like accommodations should be available to employees, but did so with no analysis.\textsuperscript{32} The Third Circuit itself had previously expressed doubts that Congress intended for the ADA to provide such accommodations.\textsuperscript{33} This suggests that the Third Circuit's decision in Williams could be an anomaly.

However, as this Note will argue, the Williams decision is not an anomaly but instead is the appropriate interpretation of the Act. It will also argue, however, that Williams-like requirements leave open the possibility that employees would abuse the requirements to gain unwarranted accommodations. A less severe, but equally troubling, result would be that employees are simply not encouraged to correct discriminatory "myths and fears."\textsuperscript{34}

This Note endorses two protections that would prevent the "gaming" problem, provide a clear rule for employers to depend on, and produce a broader enforcement of the purposes of the Act. These doctrines, the "interactive process" requirement and the limited Third Circuit defense introduced in Taylor v. Pathmark Stores, Inc.\textsuperscript{35} mesh with the Williams holding to provide a robust framework for both courts and employers.

\textsuperscript{30} See id. (arguing that Congress could not have intended such an outcome).
\textsuperscript{31} See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (arguing that requiring reasonable accommodations for regarded-as employees would do nothing to encourage employers to see their employees' talents clearly).
\textsuperscript{32} See Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 773 (3d Cir. 2004) (citing Katz v. City Metal Co. but pointing to district court decisions as "better reasoned"). For a discussion of Katz, see infra Part III.D.
\textsuperscript{33} See Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (stating, without deciding, that "it seems odd" to give an impaired but not disabled person a windfall because of an employer's misperception) (citing Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc)).
\textsuperscript{35} Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999). In Pathmark, the plaintiff was a grocery store manager who injured his ankle several times. Id. at 183. As a result, he was put on light duty work at the store. Id. After a doctor's evaluation, Pathmark concluded that the plaintiff was unable to stand for long periods, and terminated him. Id. at 184. Later, Pathmark admitted that it had received incorrect information, but declined to reinstate the plaintiff. Id. at 184–85. Taylor filed suit under the ADA, arguing that Pathmark could have provided him with a reasonable accommodation that would have allowed him to work. Id. at 185. Taylor also argued that he was regarded as disabled, based on a mistaken
In Part II, this Note will discuss the relevant terms and tests involved in an ADA reasonable accommodations claim. Part III will examine the major decisions that have shaped the current circuit split. Part IV will discuss the arguments given by both sides of the split. It will examine those arguments in the context of the origins of the reasonable accommodation and "regarded as" provisions of the ADA. It will argue that the Third Circuit's reading of the ADA is the better reading of the provision but that this reading leaves room for abuse and strange theoretical results. In Part V, this Note will suggest a possible resolution by arguing that courts should look primarily at the existence of an "interactive process" at the earliest and latest stages of a claim. It will also discuss the limited defense developed by the Third Circuit to combat ADA abuse. Finally, this Note will offer some concluding remarks in Part VI, by discussing the value of the proposed rules in the scheme of the ADA's larger purposes.

II. An Overview of a Reasonable Accommodations Claim

This Part presents an overview of the relevant law involved in an ADA accommodations claim. Because ADA claims can be quite complex, this discussion cannot cover every permutation or detail, but it will provide the essential elements for a prima facie case based on reasonable accommodations for a regarded-as disability. This Part will provide the necessary background for understanding Williams and the other circuit decisions forming the split. In particular, it is important to understand the interplay between the "reasonable accommodation" provision and the "disability" definition.

A. "Disability" under the ADA

The statutory rule providing the basis for the Act's antidiscrimination provisions states that no employer covered under the Act may "discriminate against a qualified individual with a disability because of the disability . . . ." 37
A "disability" is defined as either "a physical or mental impairment that substantially limits one or more . . . major life activities," a "record of such an impairment," or "being regarded as having such an impairment." The EEOC has expanded on the third prong by stating that a person is regarded as having an impairment if he or she,

1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

3. Has none of the impairments defined [above] but is treated by a covered entity as having a substantially limiting impairment.

The ADA does not define "major life activities," but the Supreme Court has defined the phrase as referring to "those activities that are of central importance to most people's daily lives." The EEOC has defined "work" as a major life activity. This is critically important to employees such as Williams because many plaintiffs focusing on reasonable accommodations for regarded-as individuals have relied on this particular major life activity. The Supreme Court has summarized EEOC regulations by holding that an individual "must be precluded from more than one type of job, a specialized job, or a particular job of choice" to be substantially limited in the major life activity of working. Thus, plaintiffs such as Williams generally must establish that they were regarded as having an impairment that would have precluded the plaintiff from a range of jobs.

38. Id. § 12102(2).
40. ABIGAIL COOLEY MODIESKA, EMPLOYMENT DISCRIMINATION LAW § 4:5 & n.34 (3d ed. 2003).
41. Id. (quoting Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184, 198 (2002)).
42. Id. at § 4:5 & n.42 (citing 29 C.F.R. pt. 1630 app. § 1630.2(i) (2004)).
43. See, e.g., Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 762–63 (3d Cir. 2004) (discussing the plaintiff's allegation that he was substantially limited in the major life activity of "working"); Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998) (en banc) (discussing the plaintiff's allegation that he was substantially limited in the major life activity of "working").
B. Reasonable Accommodations

If a plaintiff can establish that he was regarded as disabled, he must then prove that he was a "qualified individual." The ADA defines this as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that [the] individual holds or desires." In essence, there must be a reasonable accommodation that would enable the employee to perform the job in question. The ADA defines "reasonable accommodation" with a nonexclusive list of possibilities. Among other things, a reasonable accommodation could include job restructuring, modified work schedules, reassignment to a vacant position, or acquisition of equipment or devices. The EEOC has stated that, in general, a reasonable accommodation is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."

C. Discrimination by the Employer

In making out a prima facie case, plaintiffs must also show that the employer discriminated against them in some way. Discrimination can include a failure to make reasonable accommodations to the "known physical or mental limitations of an otherwise qualified . . . employee [with a disability]." Discrimination can also include "denying employment opportunities to [an] employee . . . if such denial is based on the need of [the employer] to make reasonable accommodation." A plaintiff must show, then, that the employer regarded him as unable to perform many if not most of the class or range of jobs that utilized his skills and that the plaintiff was capable of performing these jobs with reasonable accommodations.

45. See Williams, 380 F.3d at 768 (discussing the plaintiff’s proof that he was a qualified individual); MODIESKA, supra note 40, at § 4:6 (discussing the prima facie element of qualified status).
47. See id. § 12111(9) (listing possible reasonable accommodations).
48. Id.
50. See Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 761 (3d Cir. 2004) (stating that the third element of a prima facie discrimination case under the ADA is that the plaintiff has suffered an otherwise adverse employment decision as a result of discrimination).
52. Id. § 12112(b)(5)(B).
Some defendants, such as PHA, have argued that an employer should only be required to reasonably accommodate the disability that the employer perceives, not the disability or impairment from which the plaintiff actually suffers. In refuting that argument, the Third Circuit noted that an employer would be "liable if it wrongly regarded [the employee] as so disabled that he could not work and therefore denied him a job." According to the court, if an employer only had to accommodate the perceived disability, the employer could always escape liability by regarding the employee as incapable of performing any work, thus disqualifying the employee from making a discrimination claim.

III. Setting the Stage For Williams: The Prior Decisions and Circuit Split

Opinions addressing accommodations for regarded-as employees consistently fall into one of two categories; there is a bright line separation with little variation between the holdings. To provide a clearer picture of the separation, this Part will examine the leading court decisions creating the circuit split. Because the Williams decision and others like it developed largely as a response to the antiaccommodation courts, this Part will discuss the latter holdings before presenting the Williams line of decisions.

A. Influential Commentary from the Third Circuit

An early accommodations case that became important for its influence, despite its failure to produce a holding, is Deane v. Pocono Medical Center. In that case, the plaintiff was a nurse employed by the defendant medical center. While lifting a resistant patient, she injured her right wrist, which forced her to miss one year of work. Her doctor eventually allowed her to

53. See Williams, 380 F.3d at 769 (discussing the defendant’s argument that it should only be liable for the failure to reasonably accommodate the disability in the eyes of the employer).
54. Id. at 769 (quoting Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 189–90 (3d Cir. 1999)).
55. See id. (arguing that the employee would never be able to demonstrate the existence of a reasonable accommodation if the employer could regard him as incapable of performing any work).
57. Id. at 141.
58. Id.
return to "light duty" work that would not require her to lift more than twenty pounds or perform repetitive manual tasks such as typing. The medical center, after one conversation with Deane, decided that it could not accommodate her at any position and terminated her. In her discrimination suit, the plaintiff alleged that she was perceived as disabled by the center and that the defendant discriminated against her because of its failure to reasonably accommodate her perceived disability. The trial court decided that Deane was neither actually nor regarded as disabled. Sitting en banc, the Third Circuit reversed. The court found that questions of fact existed as to whether the plaintiff was disabled and whether she was a qualified individual under the ADA. In making its findings, the circuit court specifically declined to decide whether Deane was entitled to a reasonable accommodation.

Although Deane did not produce a holding on the issue, Judge Becker made some important comments in a footnote. Becker acknowledged the "considerable force" of the defendant's argument that reasonable accommodations for regarded-as individuals would permit healthy employees to demand changes in their work environments and would "create a windfall for legitimate 'regarded as' disabled employees who, after disabusing their employers of their misperceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not."

B. Weber v. Strippit, Inc.: An Antiaccommodation Ruling from the Eighth Circuit

One of the leading cases on the antiaccommodation side of the split came from the Eighth Circuit in Weber v. Strippit, Inc. In Weber, the plaintiff suffered several hospital visits due to a heart condition and as a result was

59. Id.
60. Id.
61. Id. at 142.
62. Id. at 141–42.
63. See id. at 145–48 (holding that there is a general issue of material fact as to whether the plaintiff is qualified under the ADA, as well as to whether the plaintiff was regarded as disabled).
64. Id. at 140–41.
65. See id. at 148 n.12 (discussing whether "regarded as" individuals are entitled to reasonable accommodation).
66. Id.
unable to fully perform his duties for his employer, Strippit, Inc. 68 On the advice of his physician, who recommended that he recuperate for six months, Weber refused Strippit's request that he relocate. 69 Strippit declined to wait six months and subsequently either terminated Weber or allowed him to abandon his duties (the facts are not clear as to which occurred). 70 Weber alleged, in part, that Strippit believed he was disabled and refused to accommodate him. 71

The court concluded, after a reasoned analysis, that reading the ADA to mandate reasonable accommodations for individuals who are not actually disabled would lead to differential treatment among similarly-situated employees. 72 Although conceding that, on its face, the ADA requires an employer to provide reasonable accommodations for an employee who is regarded as disabled, the court found that such differential treatment would produce a bizarre result. 73 According to Judge Byrne, "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." 74 Accordingly, the court decided that a perceived disability does not warrant reasonable accommodations under the ADA. 75

C. Kaplan v. City of North Las Vegas: The Ninth Circuit Agrees

The Ninth Circuit largely tracked Weber's analysis in deciding Kaplan v. City of North Las Vegas. 76 In Kaplan, the plaintiff was a police officer

68 Id. at 910.
69 Id.
70 Id.
71 Id. at 915–16.
72 See id. at 917 (finding that "[t]he ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees"); see also infra Part IV.C (discussing the "bizarre results" arguments of the antiaccommodation courts).
73 See Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 2003) (arguing that a disparity in treatment among similarly situated employees would be a bizarre result and that Congress could not have intended such an outcome).
74 Id. at 917.
75 Id. at 917.
76 See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (following the Weber court's reasoning).
employed by the defendant city. After sustaining a hand injury, he became unable to hold objects, such as a gun, in his right hand. Relying on a misdiagnosis, the city concluded that Kaplan could not perform the essential functions of the job and terminated him. Kaplan alleged that the city improperly fired him and should have made reasonable accommodations for him, even though he was not actually disabled. The court decided that, notwithstanding the plain language of the ADA, Congress could not possibly have intended to require accommodations to individuals who had no actual disability.

The court in Kaplan argued first that it must "look beyond the literal language" of the ADA because a formalistic reading would lead to "bizarre results." Agreeing with the Eighth Circuit’s analysis and holding, the Kaplan court argued that if it were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, "impaired employees would be better off under the statute if their employers treated them as disabled even if they were not." That would be a "troubling result," remarked the court, under a statute aimed at decreasing "stereotypic assumptions." According to Kaplan, it would provide employees a windfall "if they perpetuated their employers' misperception of a disability." Finally, the court argued that such a result would "compel employers to waste resources unnecessarily."

Two other circuits have reached the same holding with little or no analysis. The Sixth Circuit has written that a finding that the plaintiff was only regarded as disabled would obviate the defendant's responsibility to reasonably accommodate her. The Fifth Circuit has stated simply that an "employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks

77. Id. at 1227.
78. Id.
79. Id. at 1229.
80. Id. at 1231.
81. See id. at 1232 ("If we were to conclude that ‘regarded as’ plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not.").
82. Id. at 1232 (citing Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001)).
83. Id.
84. Id. (quoting 42 U.S.C. § 12101(a)(7) (2000)).
85. Id.
86. Id.
the employee has such an impairment. Two circuits, the Second and the Seventh, have considered but passed on the issue.

D. Katz v. City Metal Co.: The Controversy Begins

Remarkably, for the first six years after the 1990 enactment of the ADA, few judicial opinions addressed reasonable accommodations and perceived disabilities. As one court observed, judicial interpretations of the perceived disability prong of the ADA were "hen’s-teeth rare." Most courts and commentators credit the First Circuit’s opinion in Katz v. City Metal Co. with being the original proaccommodation precedent, and before Williams, it was the sole circuit-level decision of its kind.

The plaintiff in Katz was a scrap metal salesman employed by the defendant company. After suffering a heart attack and an extended hospital stay, the plaintiff was fired. The district court entered judgment for the defendant, deciding as a matter of law that the plaintiff did not have an actual disability under the ADA. The First Circuit noted that the plaintiff could recover if he was regarded as disabled and if he could have performed his duties with reasonable accommodations. Finding that the trial court did not consider these factors, the court reversed and remanded.

89. See Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 64 (2d Cir. 2003) (raising the issue but declining to consider it unnecessarily).
90. See Mack v. Great Dane Trailers, 308 F.3d 776, 783 (7th Cir. 2002) (stating that the issue was not one that required decision at present).
91. See Moberly, supra note 27, at 610–11 (discussing the lack of judicial history of perceived-as claims prior to Katz).
92. See id. (discussing the judicial history of perceived-as claims prior to Katz) (quoting Cook v. R.I. Dep’t of Mental Health, Retardation & Hosps., 10 F.3d 17, 22 (1st Cir. 1993)).
94. See, e.g., Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 773 (3d Cir. 2004) (citing Katz as the sole circuit court case to previously hold that "regarded as" plaintiffs have a right to reasonable accommodation); Moberly, supra note 27, at 612 (stating that Katz was the first opinion from a circuit court to address the issue).
95. Katz, 87 F.3d at 28.
96. Id. at 29.
97. Id. at 30.
98. Id. at 33.
99. Id. at 33–34.
Katz, however, did not delve into any substantive analysis on the regarded-as issue. Instead, it merely decided that the plaintiff’s ability to perform with reasonable accommodation, whether the plaintiff was actually or regarded-as disabled, was a question for the jury. Despite its subtleties, this decision generated controversy, resulted in unsettled expectations, and invited considerable refinement and expansion.

E. Jacques v. DiMarzio, Inc.: A District Court Expands on Katz

Subsequently, several district court judges followed Katz and fleshed out the arguments, setting the stage for the Williams decision. Most notably, Judge Block’s sua sponte reconsideration of the issue in Jacques v. DiMarzio, Inc. offered a detailed analysis. In Jacques, the plaintiff had suffered from a long history of psychiatric impairments. She took several leaves of absence due to emotional difficulties. Citing difficulties with workers, the company terminated her, and she subsequently sued under the ADA antidiscrimination provisions. The plaintiff alleged in part that she was regarded as disabled and that she was not offered reasonable accommodations. The court, in a sua

100. See Moberly, supra note 27, at 614 (commenting that Katz reached its conclusion "with virtually no substantive analysis of an employer’s duty to accommodate").
101. See Katz, 87 F.3d at 34 (remanding the case for a new trial to be retried under any or all theories of disability asserted by the plaintiff).
105. See Williams, 380 F.3d at 773 (finding the Jacques decision to be the most persuasive in its analysis).
107. Id. at 154.
108. Id. at 155.
109. Id. at 159–60.
110. Id. at 161.
supplemental decision, decided that the plaintiff was entitled to reasonable accommodations to the extent that she was regarded as disabled.111

Judge Block wrote perhaps the most detailed analysis prior to Williams, devoting some nine pages in the reporter to the issue of reasonable accommodations for regarded-as employees.112 First, the court argued, the plain language of the statute does not differentiate between actual and regarded-as individuals when requiring reasonable accommodations.113 Second, the legislative history of the statute as well as Supreme Court decisions emphasize that the ADA was designed to "redress insidious misperceptions of employee disabilities stemming from prejudices and biases of employers and co-workers."114 Third, the court argued, courts have required employers to participate in an "interactive process" when looking for reasonable accommodations for employees.115 This practical requirement, the court said, is consistent with a view that the ADA requires accommodations for all disabilities, real or perceived.116 Finally, the court took on the Weber critique directly.117 It stated that, contrary to Weber’s suggestions of "bizarre results," an employer’s state of mind is often a factor in discrimination cases.118 The court also refuted Weber’s prediction of employee abuse of the ADA by stating that a "good faith requirement" is "implicit in the ADA’s regulatory scheme."119

F. Williams v. Philadelphia Housing Authority Police Department: The Third Circuit Joins Katz

As discussed in Part I of this Note, Williams sued his employer under the ADA alleging in part that, to the extent that he was perceived as disabled, he was not given reasonable accommodations.120 The district court granted

111. Id. at 171.
112. See id. at 163–71 (discussing reasonable accommodations for regarded-as employees).
113. Id. at 166.
114. Id. at 167.
115. See id. at 168–70 (discussing the interactive process). For a discussion of the interactive process, see infra Part V.A.
116. Id. at 170.
117. See id. at 170–71 (discussing the Weber arguments).
118. See id. at 170 (stating that plaintiff’s claims under other discrimination statutes often hinge on defendant’s perceptions).
119. Id. at 171.
120. See Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 766–68 (3d Cir. 2004) (stating that the plaintiff argued that he was regarded as disabled and that he was qualified to work with reasonable accommodations).
summary judgment for PHA, deciding that Williams was not disabled because he was not significantly restricted in a major life activity. The court did not reach the accommodation question. The Third Circuit reversed, deciding that there was a material dispute of fact as to whether Williams was disabled. The circuit court then proceeded to the question of whether Williams was entitled to reasonable accommodations to the extent that he was regarded as disabled.

The Third Circuit borrowed extensively from the Jacques decision in its own analysis of the reasonable accommodation issue. The court discussed the issue in four parts. In the first part, the court examined the plain language of the ADA. Judge Stapleton easily determined that the text of the ADA does not distinguish between actually disabled and regarded-as disabled individuals in requiring accommodation.

In the second part of its analysis, the court discussed the legislative history of the ADA. Reinforcing its conclusion on the plain language, the court quoted from a House of Representatives Report that articulated the reasons behind the regarded-as prong. Adopting the rationales provided by the Supreme Court in School Board v. Arline, the report stated 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." The Third Circuit stated that the Williams case "demonstrates the wisdom of that conclusion" because, but for the employer's misperception, the plaintiff would have been eligible for a position at PHA.

121. Id. at 755.
122. Id. at 768–69.
123. Id. at 772–76.
124. See id. at 773 ("We . . . find Judge Block's analysis in Jacques particularly persuasive, and will largely track his approach . . . .").
125. Id. at 774.
126. Id. at 774 (quoting Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999)).
127. Id. at 774.
131. See id. at 774 (arguing that Williams would have been eligible for a radio room assignment if not for PHA's erroneous perception).
In the third part, the court relied on the precedent set by *Arline*. In *Arline*, the Supreme Court held that the employer had "an affirmative obligation [under the Rehabilitation Act] to make a reasonable accommodation" for a regarded-as employee. Judge Stapleton went on to assert that the "regarded as" sections of the Rehabilitation Act play a "virtually identical role" in the statutory scheme as the "regarded as" sections of the ADA. In addition, said the court, it is well established that the ADA must be read to "grant at least as much protection" as the Rehabilitation Act. Therefore, regarded-as employees under the ADA "are entitled to reasonable accommodation in the same way as are those who are actually disabled."

In the final part of its analysis, the *Williams* court discussed the "windfall" proposition. The court found little difficulty with the defendant's argument that the plaintiff would receive a windfall accommodation by being perceived as disabled. It reiterated the fact that Williams was denied the opportunity to work because of PHA's misperception. Arguing that a similarly situated employee who was not wrongly perceived would have been given the opportunity to work, the court concluded that "[t]his is precisely the type of discrimination the 'regarded as' prong literally protects from." Accordingly, the Third Circuit held that the ADA requires reasonable accommodations for those regarded as disabled.

**IV. Analysis of the Williams Decision**

Claims arising under the ADA can be difficult to analyze. The Third Circuit acknowledged as much in its introduction to *Taylor v. Pathmark Stores, Inc.* when it said that, because of its structure and content, the ADA "is often a difficult statute for courts and employers to interpret and, sometimes, to

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132. See id. at 775 (discussing, in Part V.C of the opinion, the Supreme Court’s decision in *Arline*).
133. Id. at 775 (quoting *Arline*, 480 U.S. at 289 n.19).
134. Id. at 775.
135. Id. at 775 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998)).
136. Id. at 775.
137. Id. at 775–76.
138. See id. (concluding, in one paragraph, that the facts of the case would present no windfall).
139. See id. at 775 ("Williams was specifically denied such an assignment because of the erroneous perception of his disability.").
140. Id. at 775–76.
141. Id. at 776.
follow. 142 This Part will discuss the Williams court's interpretations of this difficult statute and will argue that those interpretations are correct. It will contend that the plain language of the statute requires reasonable accommodations for those regarded-as disabled. It will further contend that the legislative history of the ADA supports the plain language reading. The Supreme Court decision in School Board v. Arline strongly suggests such a result. Finally, this Part will conclude that absurd results do not necessarily flow from the Williams interpretation.

A. The Plain Language of the Statute

Amid the disagreements and differences brought forth by the circuits, there is at least one point on which courts have agreed. All courts that have addressed the question have found that, on its face, the ADA requires reasonable accommodation to individuals regarded as disabled. 143 Under the ADA, an employer cannot discriminate against a qualified individual with a disability. 144 Discrimination can include a failure to make a reasonable accommodation for a qualified individual with a disability, 145 and the ADA does not differentiate between actual disabilities and perceived disabilities. 146 The term "disability," as defined in the ADA, covers both an actual disability and "being regarded as having such an impairment." 147 In addition, the reasonable accommodation requirement is written to apply to a "disability," and does not include separate provisions for both actual and regarded-as


143. See e.g., Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004) (noting that all courts would agree that the ADA does not distinguish between actually disabled and "regarded as" disabled individuals); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (concluding that the ADA requires reasonable accommodation to qualified individuals with a disability and that there is no differentiation, for purposes of "qualified individual with a disability," between actually disabled and "regarded as" disabled individuals).


145. Id. § 12112(b)(5)(A). Although not relevant here, this provision in the code does create one affirmative defense. An employer does not have to make a reasonable accommodation that would impose an "undue hardship on the operation of the business." Id.

146. See id. § 12102(2)(A)-(C) (defining "disability" as both a physical or mental impairment that substantially limits a major life activity, as well as being regarded as having such an impairment); see also Williams, 380 F.3d at 774 (discussing the plain language of the ADA and determining that it mandates reasonable accommodations for persons regarded as disabled).

disabilities. The disability determination is a threshold issue, and once an employee is determined to be disabled under the ADA, he is protected from discrimination. To read the Act otherwise would be to conflate separate and distinct provisions. The inescapable conclusion, say the courts, is that the statute provides for reasonable accommodations for those regarded as disabled.

Understandably, some courts have not found this conclusion to be sufficiently persuasive. As one appellate court reflected, "The ADA presents subtle issues of statutory interpretation, far more subtle and difficult... than those prescribed under the other anti-discrimination statutes." The *Kaplan* court refused to equate the "absence of a stated distinction" with an "explicit instruction by Congress." Much has been written on the weight that should be accorded plain (or seemingly plain) statutory language. It is generally agreed that if the words of a statute are unambiguous, there is nothing for the courts to do but to follow the language. What the *Kaplan* line of decisions seem to be doing, then, is ignoring the plain language to achieve a preferred outcome.

There is some support for this in the traditional canons of statutory construction, but the support falls short of providing a clear interpretation. One
such canon is the rule that a remedial statute should be liberally construed.\textsuperscript{156} In particular, courts have stated that federal antidiscrimination laws, including the ADA, should be liberally construed to effectuate their remedial purposes.\textsuperscript{157} Assuming for the sake of argument that the Kaplan court is correct and Congress did not intend to require accommodations for those regarded as disabled,\textsuperscript{158} a liberal reading of the statute may be appropriate. However, this rule of construction raises major questions. As the Seventh Circuit has stated, a liberal construction of a remedial statute is not one that "flies in the face of the structure of the statute."\textsuperscript{159} Here, the structure is straightforward; the ADA simply does not differentiate between impairment by actual disability and impairment by being "regarded as" disabled in its definition of "disability."\textsuperscript{160} Justice Antonin Scalia has argued that the liberal construction rule is vague at best, for there is no real definition of a "liberal construction."\textsuperscript{161} At worst, wrote Scalia, it is simply a tool to achieve a desired result.\textsuperscript{162}

Another doctrine that may have influenced the Kaplan decision is the court's supposed duty to correct Congressional slips when called upon to do so.\textsuperscript{163} Assuming again for the sake of argument that Congress did not intend the plain language of the statute to read the way it does, one could argue that it

\begin{itemize}
\item \textsuperscript{156} See Corrigan & Thomas, supra note 155, at 232 (discussing Justice Scalia's distrust of the rule that remedial legislation should be strictly construed); see also Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 CASE W. RES. L. REV. 581, 581–86 (1990) (attacking the usefulness of such a rule).
\item \textsuperscript{157} See Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 983 (10th Cir. 2002) (stating that the ADA should be liberally construed to effectuate its antidiscriminatory purpose); Holt v. JTM Indus., 89 F.3d 1224, 1231–32 (5th Cir. 1996) (Dennis, J., dissenting) (discussing the interpretation of the Age Discrimination in Employment Act of 1967) (citing, e.g., Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (discussing interpretation of the Civil Rights Act of 1964)).
\item \textsuperscript{158} Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (asserting that Congress cannot have reasonably intended for those regarded as disabled to be entitled to reasonable accommodations).
\item \textsuperscript{159} EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995).
\item \textsuperscript{160} See 42 U.S.C. § 12102(2) (2000) (defining "disability" for purposes of the ADA to mean, inter alia, "a physical or mental impairment" or "being regarded as having such an impairment").
\item \textsuperscript{161} See Scalia, supra note 156, at 582 ("How 'liberal' is liberal, and how 'strict' is strict?").
\item \textsuperscript{162} See id. at 586 (arguing that the liberal interpretation rule is popular because it can be used to reach the result the court wishes to achieve).
\item \textsuperscript{163} See Kent Greenawalt, Legislation: Statutory Interpretation: 20 Questions 47 (1999) (discussing the courts' practices of correcting errors when the legislative history strongly suggests that one was made).
\end{itemize}
was an oversight that should be corrected. The Supreme Court held as such in *Church of the Holy Trinity v. United States*, a famous and exhaustive statutory interpretation case decided in 1892. In *Holy Trinity*, the Court found that a contract which was void by the plain language of a statute was nonetheless valid under the statute’s spirit. In language akin to Kaplan’s, the Court stated that it is "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

Kent Greenawalt, in his text on statutory interpretation, discussed several arguments against a court taking such liberties in the name of upholding the supposed purposes of a statute. First, legislators are typically more careful with specific language than they are with general purposes. This could be particularly true with legislation such as the ADA, which has a long history of revisions and adjustments traceable from the Civil Rights Act through the Rehabilitation Act. A court, then, should follow clear specific provisions before following overriding purposes, even unambiguously stated purposes.

Greenawalt also discussed the proposition that "much legislation in the United States results from self-interested pressure and compromise." Legislation passes through Congress for a variety of reasons, argued

164. See infra Part IV.B (discussing the legislative history of the ADA in which Congress apparently failed to discuss the possibility of reasonable accommodations for those regarded as disabled).

165. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Holy Trinity*, an Act of February 26, 1885 prohibited "the importation or migration of any foreigners and aliens ... under contract or agreement ... to perform labor or service of any kind in the United States, its Territories, and the District of Columbia." Id. at 458 (quoting *Alien Contract Labor Laws*, ch. 164, § 2, 23 Stat. 332 (1885) (repealed 1952)). The appellant was a New York church that entered into a contract with a pastor residing in England, under which the pastor would serve the church. Id. The United States claimed that the contract was void. Id. The New York Circuit Court agreed that it was void under the plain language of the statute. Id. The Supreme Court reversed, stating among other things that the legislative history and the evil intended to be remedied by the statute cannot include the contract in question. See id. at 465 (stating that the intent of Congress was simply to "stay the influx of this cheap unskilled labor").

166. See id. at 472 (holding the contract valid despite the plain language of the statute).

167. Id. at 459; see Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (stating that the court must look beyond the language of the statute if it would lead to absurd results).

168. See GREENAWALT, supra note 163, at 50, 107 (discussing the arguments for and against ignoring a statute’s plain language).

169. Id. at 50.

170. See infra Part IV.B (discussing the legislative history of the ADA).

171. GREENAWALT, supra note 163, at 50.

172. Id.
Greenawalt, some of which may be obvious and some of which may not be so obvious. Moreover, different legislators may approve legislation for different reasons. Bearing this in mind, wrote Greenawalt, it would be dangerous to depend on general purposes to the detriment of the plain language.

B. The Legislative History of the ADA and the Arline Decision

Even if a court decided that it was within its duty and power to remedy inadvertent drafting errors, it is not at all clear that the result here is inadvertent. As the Williams court argues, the legislative history suggests that Congress intended regarded-as employees to be afforded reasonable accommodations. This is especially true when read in light of School Board v. Arline, as this Part will discuss. However, this Part will begin with a discussion of the Act’s background, in the process arguing that this background supports the result in Williams.

1. The Legislative History of the "Regarded As" Prong

Unlike the newer "reasonable accommodations" provision, the "regarded as" language in the ADA has an established lineage. The ADA’s predecessor, the Rehabilitation Act of 1973, concerned itself with protecting the "handicapped" against discrimination stemming not only from overt prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps." Congress reflected this concern with language in the Rehabilitation

173. See id. at 107 (stating that different legislators may or may not have intentions, but the body as a whole has only outcomes (quoting Frank Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983))).

174. See id. at 50 (stating that between stated purposes and specific language, arguably the specific language should carry the day).

175. See Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 774 (3d Cir. 2004) (arguing that the legislative history of the ADA supports reasonable accommodations for regarded-as employees).

176. See infra Part IV.B.3 (discussing School Board v. Arline).

177. See Williams, 380 F.3d at 775 (stating that it is a well-established rule that the ADA must be read "to grant at least as much protection as provided by . . . the Rehabilitation Act") (citing Bragdon v. Abbott, 524 U.S. 624, 632 (1998)). But see Lamie v. United States Trustee, 540 U.S. 526, 527 (2004) ("The starting point in discerning congressional intent is the existing statutory text and not the predecessor statutes," (citation omitted)).


Act that is virtually identical to the "regarded as" language in the ADA. The legislative history of the Rehabilitation Act makes clear that Congress believed individuals who "do not in fact have the condition which they are perceived as having . . . may be subjected to discrimination on the basis of their being regarded as handicapped."

The Rehabilitation Act, however, was limited in its application to programs or activities receiving federal financial assistance, the executive agencies, and the U.S. Postal Service. As a possible reaffirmation and expansion of its concerns, Congress echoed the purposes of the "regarded as" prong when the broader ADA was enacted. The legislative history expressly indicates that the ADA uses the same "regarded as" test set forth in the Rehabilitation Act. Congress described the rationale for this test by adopting the Supreme Court's interpretation in the landmark Rehabilitation Act case of School Board v. Arline, which found that "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."

2. The Legislative History of the "Reasonable Accommodations" Provisions

The ADA requires an employer to provide reasonable accommodation to disabled employees unless it would cause an undue hardship. An
accommodation, according to the EEOC, is generally a "change in the work environment or in the way things are customarily done that [ensures] equal employment opportunities." The agency’s definition of "reasonable accommodations" includes modifications or adjustments that "enable [a disabled employee] to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities," or that "enable a [disabled employee] to perform the essential functions of [his or her] position." Such an accommodation may include "permitting the use of accrued paid leave" for treatment, job restructuring by reallocating marginal job functions, or reassignment to a vacant position, as Mr. Williams requested.

Unlike the "regarded as" provisions of the ADA, the "reasonable accommodation" provision is arguably what sets it apart from, rather than connects it to, other antidiscrimination legislation. Neither the Rehabilitation Act nor the Civil Rights Act include any explicit reasonable accommodation requirement. The ADA provisions break from the past by advocating differential treatment, not equal treatment, as a form of equality.
treatment burdens some individuals more than others, then the employer has not treated the burdened individuals equally. 198

As Professor Mary Crossley has argued, this diversion has been used incorrectly by commentators and judges to describe reasonable accommodations as "special benefits" designed only for the "truly disabled." 199 Such a belief is somewhat inconsistent with the EEOC's statement that "the duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities," and that accommodation "removes workplace barriers for individuals with disabilities." 200 Here, the agency is suggesting perhaps that reasonable accommodations are designed to benefit all disabled individuals, not just those that request accommodation. Professor Crossley argued that reasonable accommodations remove structural barriers in place that discriminate against disabilities, and that the failure to reasonably accommodate is thus equivalent to "real" discrimination. 201 Society constantly accommodates the needs of the nondisabled majority, she argues, because the existing workplace is built around those needs. 202 Thus, conventional workplace practices and environments discriminate by advantaging the nondisabled over the disabled. 203

3. School Board v. Arline: Influential Commentary

In making its findings, the Williams court relied extensively on the Supreme Court's decision in School Board v. Arline. 204 Arline involved a schoolteacher

& THE CASE AGAINST DISABILITY RIGHTS 205–22 (2003) (discussing the factors within the ADA that contribute to its susceptibility to criticism).

198. See Crossley, supra note 195, at 886–87 (discussing the "minority group" model of disability that asserts that justice demands unequal treatment as a form of equal treatment).

199. See id. at 864 (suggesting that an analysis of the purpose of reasonable accommodations may help to counteract the commentators that have sought to limit its use).

200. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, supra note 187, at 5467-4.

201. See Crossley, supra note 195, at 890 (endorsing the findings of disability theorists that the maintenance of existing barriers is real discrimination and that therefore the obligation to provide accommodations for disabilities is nothing more than an order to stop discriminating).

202. See id. at 892–983 (discussing the reasons why nondisabled individuals perceive accommodations as special and how conventional structures advantage the nondisabled).

203. See id. at 894 (stating that the standard social environment is discriminatory by allowing access to nondisabled people, while excluding disabled people, and that employers who maintain these environments discriminate by continuing to use these mechanisms of discrimination).

who was dismissed because she had tuberculosis, a contagious disease. The schoolteacher filed suit under the Rehabilitation Act, alleging discrimination. The employer argued that it did not discriminate because the plaintiff was fired due to her contagiousness, not because of the disability itself. The trial court found no disability, but the court of appeals reversed, stating that the plaintiff's disability fell within the statute. The appeals court remanded for further findings on whether the plaintiff was otherwise qualified for a position with reasonable accommodation. The Supreme Court affirmed.

In affirming the appellate court's decision, the Supreme Court discussed the legislative history of the "regarded as" prong at length, stating that "the . . . definition reflected Congress's concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws.'" The Court went on to say that it would be unfair to allow an employer to distinguish between the effects of a disease on others and the effects of a disease on a patient. According to the Court:

Congress was as concerned about the effect of an impairment on others as it was about its affect on the individual. . . Congress extended coverage . . . to those individuals who are simply 'regarded as having' a physical or mental impairment. . . Such 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.

The Court also discussed the overall scheme of the Rehabilitation Act, stating that allowing the discrimination of the type practiced by the defendant "would be inconsistent with the basic purpose of [the Act], which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The Court treated the disability question distinctly from the reasonable accommodation question, stating in a footnote that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for

205. Id. at 276.
206. Id. at 276–77.
207. Id. at 281.
208. Id. at 277.
209. Id.
210. Id.
211. Id. at 279.
212. Id. at 282.
213. Id.
214. Id. at 284.
his or her job if reasonable accommodation will not eliminate that risk. The Court remanded the case to determine if the plaintiff was in fact otherwise qualified for a position with or without reasonable accommodation.

As Williams stated, Arline controls similar cases under the ADA because the regarded-as prongs in both statutes "play a virtually identical role." Courts have uniformly looked to cases decided under one statute when deciding cases under another. The ADA also explicitly states that the ADA should apply the same level of standards as the Rehabilitation Act.

Professor Michelle Travis, the author of several articles on the issue, disagrees with the use of Arline for precedential value in cases such as Williams. According to Travis, the Arline case was decided under the "record of" (a disability) prong, not the "regarded as" prong. However, the opinion’s importance derives not from its narrow holding but from its treatment of a plaintiff without an actual disability. The defendant in Arline conceded that the plaintiff had a record of a disability and argued instead that the plaintiff was terminated because of "the employer’s reluctance to expose its other employees and its clientele to the threat of infection." The Court spent much of the opinion responding to that reason by reinforcing the importance of the "regarded as" prong (not the "record of" prong) of the Rehabilitation Act.

C. The Absurd Results Doctrine

The Kaplan opinion states that the court must look beyond a literal interpretation if it leads to an absurd result. Judge Gould argued that affording

215 Id. at 287 n.16.
216 Id. at 289.
220 See 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, 933 n.125 (2000) (citing cases that have used Arline to argue that the Supreme Court has reached the conclusion that reasonable accommodations are required for regarded-as employees).
221 Id. Note that Travis may have since retreated from this position, if only slightly. See Michelle A. Travis, Perceived Disabilities, Social Cognition, and "Innocent Mistakes", 55 VAND. L. REV. 481, 550 (2002) (stating that Arline was the first interpretation of the "regarded as" prong of the Rehabilitation Act).
223 See id. at 282–86 (discussing the perceived disability provision of the Rehabilitation Act and its legislative history).
224 Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (citing Royal
reasonable accommodations to those merely regarded as disabled would create a disparity among those employees who are misperceived and similarly situated employees who are correctly perceived. It would be absurd, he argued, for a statute aimed at decreasing stereotypes to require disparate treatment based on stereotypic assumptions. Finding such a result sufficiently absurd, the court refused to follow the literal interpretation of the Act.

The "absurd results" doctrine—sometimes referred to as "bizarre results"—is a mildly controversial doctrine and is not without its detractors. It has a long history with the federal courts, though, and has been used in one form or another by the Supreme Court since at least 1876. Its longevity alone is enough to give the doctrine credibility; as Justice Scalia has noted, there is a certain amount of validity that comes with age. However, there are several reasons why the absurd results doctrine does not easily apply here.

225. See Kaplan, 323 F.3d at 1232 (citing Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999)) (agreeing with the Eighth Circuit that the ADA cannot reasonably have been intended to create disparities in treatment among similarly situated employees).

226. See id. (stating that such a ruling would be a "troubling result" under a statute aimed at decreasing stereotypic assumptions).

227. Id. at 1232–33. The court did concede that "it is not an easy question because of the language of the statute." Id.


229. See Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 640–41 (1876) (deciding that the literal interpretation of a federal act granting land to the state of Nevada, with the qualification that it did not apply to lands previously sold or granted, did not grant a better title than a newer one held by a miner because Congress could not reasonably have intended to exclude only past grants when no land had been granted in the past).

230. See Scalia, supra note 156, at 583 (conceding that rules of construction acquire "a sort of prescriptive validity" over time because the legislature presumably comes to depend on them when writing statutes).
The Supreme Court has indicated that the doctrine should only be used when it would be consistent with legislative purpose. In fact, the doctrine's origins can be traced to a search for legislative purpose, when the Supreme Court decided that Congress could not possibly have intended a federal land grant statute to apply to lands previously granted. As discussed in Part IV.B above, the legislative purpose of the ADA contemplates a strong enforcement of the "regarded as" prong and the "reasonable accommodations" provision, and any interpretation which would weaken that enforcement would be out of line with the Act's purposes.

The absurd results argument sometimes takes a slightly different form. Courts that argue against accommodating perceived disabilities, and the employers that defend against such actions, have made the argument that such an accommodation would result in a "windfall" for nondisabled employees. The argument has been extended by scholarly commentary as well. In Kaplan, Judge Gould explained that the windfall would be a "troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly indicative of the individual ability of [people with disabilities]." Kaplan argued that entitling "regarded as" plaintiffs to reasonable accommodations would not

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231. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available." (emphasis added)).

232. See Heydenfeldt, 93 U.S. at 638 (analyzing the legislative intent behind a land grant and refusing to follow the literal reading of some of the grant's provisions because they did not comport with that intent).

233. See supra Part IV.B (discussing the legislative intent behind the ADA, the "regarded as" prong, and the "reasonable accommodations" language).

234. See infra Part VI (concluding that reasonable accommodations should be afforded to those individuals who are regarded as disabled).

235. See Williams v. Phila. Hous. Auth. Police Dept., 380 F.3d 751, 775 (3d Cir. 2004) (discussing the defendant's "windfall theory"); Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999)) (arguing that requiring reasonable accommodations for those "regarded as" disabled would "improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability"); Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) (arguing that if the plaintiff received a reasonable accommodation for a perceived disability, he would be entitled to accommodations that no similarly situated employees would enjoy); Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (acknowledging the persuasiveness of the defendant's "windfall" argument but declining to reach the issue).

236. See Travis, supra note 220, at 990–91 (theorizing that the "windfall" would likely be small but may adversely affect morale among coworkers).

encourage employees or employers to have a clear understanding of employees' talents.\textsuperscript{238}

It is difficult to see how one could reconcile the mechanisms of the ADA with the idea that employers should be able to discriminate against employees they perceive as disabled. This would lead to a rise in the number of improperly motivated employment decisions that the ADA could not protect against.\textsuperscript{239} The effect of this, as the Williams case shows, would be that misperceived individuals would be barred from working whereas similarly situated individuals who are not misperceived would be allowed to work.\textsuperscript{240}

Given that antidiscrimination laws exist to correct inequality by discrimination,\textsuperscript{241} an employee who is discriminated against should have legal recourse whether or not he actually needs an accommodation.\textsuperscript{242}

In addition, eliminating the reasonable accommodations requirement would do nothing to encourage employers to correctly perceive employees. As the Williams court argues, an employer could easily perceive an employee as incapable of doing the required work and subsequently terminate the employee.\textsuperscript{243} Such an employer would face no adverse action against it and no discouragement to refrain from such clear discrimination. In contrast, an employer who was required to accommodate a perceived disability could not use such intentional misperception as a defense.

Finally, in requiring reasonable accommodations for those regarded as disabled, the ADA broadens the base of potential plaintiffs who are able to correct the societal barriers faced by disabled individuals. As Judge Becker has argued, "The elimination of prejudice and ignorance is integral to ensuring that otherwise qualified individuals are not excluded from the workplace."\textsuperscript{244} The

\textsuperscript{238} Id.

\textsuperscript{239} See Travis, supra note 220, at 994 (arguing that regarded-as employees should be protected by the ADA to the extent that it requires reasonable accommodation).


\textsuperscript{241} See Crossley, supra note 195, at 897 (asserting that it is a major concern of antidiscrimination laws to remedy the inequality of opportunity that comes from segregating practices).

\textsuperscript{242} See Travis, supra note 220, at 995 ("Because the employer's intent is just as bad regardless of whether the perceived disability plaintiff needs an accommodation or not, both employees should have some form of legal recourse.").

\textsuperscript{243} See Williams, 380 F.3d at 769 (stating that an employer could regard an employee as incapable of performing any work, and the employee's ADA claim would always fail because he would never be able to prove the existence of any vacant, funded position he was capable of performing in the eyes of the employer).

\textsuperscript{244} Deane v. Pocono Med. Ctr., 7 A.D. Cases (BNA) 198, 216 n. 11 (3d Cir. 1997), rev'd on reh'g, 7 A.D. Cases (BNA) 555 (3d Cir. 1997), aff'd on reh'g en banc, 142 F.3d 138 (3d Cir. 1998).
ADA was designed to counteract discrimination in various forms.245 Congress’s decision to include the failure to reasonably accommodate in the definition of "discriminate" is consistent with equating the maintenance of existing barriers with "real" discrimination.246 The enforcement of reasonable accommodations requirements for regarded-as employees would enable employees to challenge those barriers created by prejudice and ignorance, the same barriers that the ADA was created to combat.247 Those with actual disabilities are benefited by the systematic removal of structural barriers in the workplace.248 When reasonable alterations are available to procedures and facilities that would assist disabled individuals, it is unimportant whether or not those alterations arise from a disabled person's difficulties with the existing systems. What is important is that the systems change.

It is useful to note that, in Williams and almost every other case discussed in this Note, the employees were not simply looking for additional benefits over and above what is afforded nondisabled employees. Rather, they sought to work.249 As Judge Stapleton wrote in Williams, "The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid."250 If the PHA had accurately perceived Williams’s impairment, it likely would have been able to accommodate him and he would not have lost his job.251 On a practical level then, an abstract
argument about whether Congress intended nondisabled individuals to be afforded accommodations does not comport with reality. Without Williams-like protections, if an employer mistakenly believes that an employee is so disabled that he or she cannot be reasonably accommodated and still perform the essential duties of the position, that employer would be within his rights to dismiss the employee.\textsuperscript{252} Reading the ADA to allow this effect would work counter to one of the central aims of the Act—providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."\textsuperscript{253}

\textbf{V. Improving on the Williams Decision}

The most powerful critique of the Williams approach can be stated simply: If accommodations are provided to employees who are incorrectly perceived but not to employees who are correctly perceived, employees would have some incentive to see that their employers incorrectly perceive them; alternatively, they would have no incentive to correct possibly discriminatory views.\textsuperscript{254} A more active use of existing judicially developed mechanisms, however, would prevent this problem. This Part focuses on two related mechanisms, the "interactive process" requirement and a limited defense developed by the Third Circuit, and the solutions those mechanisms provide. As the following discussion illustrates, these mechanisms also serve two related and equally important functions—they work to facilitate the purposes of the ADA by encouraging efficient restructuring of discriminatory practices, and they also provide clear, consistent rules for employers and courts to follow.

\textsuperscript{252} See supra note 243 and accompanying text (discussing the possible "perceiving away" tactic by employers).

\textsuperscript{253} 42 U.S.C. § 12101 (2000). A complete discussion on how the Kaplan reading conflicts with the disparate impact theory of the ADA is beyond the scope of this Note and could likely fill a Note of its own. For more information on disparate impact theory and reasonable accommodation, see generally Crossley, supra note 195.

\textsuperscript{254} See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) ("[I]t would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability."); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (noting the bizarre result when one impaired employee receives a "windfall" but other impaired employees do not).
Many circuit courts, including the Ninth Circuit in an opinion with which Judge Gould concurred, have decided that both the employer and the employee must work together to find an appropriate accommodation when required.\textsuperscript{255} The "interactive process" described by courts is not a part of the ADA. In fact, the Act gives no substantive guidance on finding a reasonable accommodation.\textsuperscript{256} This interactive process requirement is supported, however, by the EEOC's regulations regarding application of the ADA.\textsuperscript{257}

The EEOC regulations state that "to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the [disabled] individual."\textsuperscript{258} The regulatory language could be construed as a recommendation rather than a requirement, but courts confronted with the issue have uniformly held that it is a requirement once the employee has requested an accommodation or the employer has recognized a need for an accommodation.\textsuperscript{259} One court explained the weak

\textsuperscript{255} See Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 771 (3d Cir. 2004) (stating that the Third Circuit has repeatedly held that an employer has a duty to engage in an interactive process with an employee who requests accommodation); Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1111-12 (9th Cir. 2000) (examining the legislative history of the ADA and the EEOC guidelines and finding that employers are required to engage in an interactive process when determining reasonable accommodations), rev'd on other grounds sub nom. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12 (1st Cir. 2000) (stating that the duty to provide an interactive process is a continuing one); Walter v. United Airlines, Inc., No. 99-2622, 2000 U.S. App. LEXIS 26875, at *11-12 (4th Cir. Oct. 25, 2000) (unpub.) (stating that an employer cannot be found in violation of the ADA simply by a showing that it failed to engage in the interactive process, but it can be found in violation if it is shown that it failed to identify the appropriate accommodation for a disabled individual by failing to engage in the interactive process); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 951-52 (8th Cir. 1999) (stating that the employer is required to engage in an interactive process with the employee to determine a reasonable accommodation). But see John R. Autry, Note, \textit{Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"}, 79 \textit{Crim. L. Rev.} 665, 697 (2004) (concluding that, contrary to what courts have stated about the importance of the interactive process, all of the appeals courts that have commented on the issue have refused to impose ADA liability independent of the availability of a reasonable accommodation).

\textsuperscript{256} See Autry, \textit{supra} note 255, at 666 (stating that Congress failed to provide any information regarding the proper method by which reasonable accommodations are fashioned).

\textsuperscript{257} See 29 C.F.R. § 1630.2(o) (2004) (describing the guidelines for employers in complying with ADA requirements).

\textsuperscript{258} \textit{Id.} § 1630.2(o)(3).

\textsuperscript{259} See, \textit{e.g.}, Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 771 (3d Cir. 2004) (stating that the interactive process is required, in part, to "ascertain whether there is in fact a disability"); Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000) (arguing that
language of the regulations by stating that it is "merely a recognition that in some circumstances the employer and employee can easily identify an appropriate reasonable accommodation." The EEOC’s interpretive guidance, which states that the employer must make a reasonable effort to determine the proper accommodation, also supports the assertion that it is a mandatory process. In addition, the agency’s enforcement guidelines indicate:

[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.

Although courts have held that the interactive process is a requirement, no court has found independent liability for failing to engage in the process. A plaintiff that is not qualified under the ADA cannot impose liability on the employer for its failure to comply with the interactive process requirement. In real terms, then, the interactive process requirement has relevance only in certain situations. Some courts have refused to grant summary judgment for employers when they have not engaged in the interactive process. Another way in which the interactive process requirement is enforced comes from the good-faith standard used in assessing compensatory and punitive damages. Under the ADA, a plaintiff could be entitled to compensatory and punitive damages if the employer engaged in intentional discrimination. However, such damages may not be awarded when the

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260. Barnett, 228 F.3d at 1112.
262. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 187, at 5467-26 to 5467-27 (emphasis added).
263. See Autry, supra note 255, at 690 (arguing that the key to liability is the defendant’s failure to implement an available accommodation, not a failure to engage in the interactive process).
264. See id. at 687 (stating that courts have rejected the argument that liability can be found for failure to engage in the interactive process when the employee is not qualified).
265. See id. at 691 (stating that the interactive process still has relevance in the context of a motion for summary judgment and a request for punitive and compensatory damages).
266. See id. at 692–93 (stating that some courts have held that a failure to interact in good faith operates as a per se bar to an employer’s obtaining summary judgment).
267. See id. at 694–96 (arguing that the interactive process limits compensatory and punitive damages for employers).
employer "demonstrates good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation."\(^\text{268}\) The interactive process, then, provides a sort of insurance against such damages by showing a good faith effort to accommodate an employee who requests such accommodation.\(^\text{269}\)

In applying this to regarded-as disability cases, courts can discourage the intentional or unintentional maintenance of incorrect perceptions by placing a greater emphasis on the interactive process. Regardless of whether an employee is attempting to actively game the reasonable accommodations requirement or is simply not encouraged to correct an employer’s misperceptions, the interactive process would filter out these situations. Court enforcement of the process would facilitate its institutionalization in places of employment. Although courts may not wish to find liability solely on a failure to engage in the interactive process, there is ample precedent for enforcement at the summary judgment stage as well as the damages stage.\(^\text{270}\)

From a policy perspective, the interactive process requirement facilitates the purposes of the ADA by encouraging nonlegal remedies to inequality.\(^\text{271}\) The value of extrajudicial resolution has been recognized in other legal doctrines such as the common-law and statutory rules of evidence.\(^\text{272}\) Similarly, the interactive process encourages a kind of mediation between the employer and employee.\(^\text{273}\) As the Third Circuit has noted, standard mediation practices are less costly, more confidential, and less invasive than litigation, and the interactive process achieves these goals even more effectively.\(^\text{274}\) Congress acknowledged this when it wrote that "[a] person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job,"\(^\text{275}\) and that "frequently . . . the


\(^{269}\) See Autry, supra note 255, at 696 (arguing that the interactive process immunizes an employer from § 1981 damages).

\(^{270}\) See id. at 691 (stating that the interactive process still has continued relevance in the context of a motion for summary judgment and a request for punitive and compensatory damages).

\(^{271}\) See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 316 n.6 (3d Cir. 1999) (discussing the value of the interactive process as a form of mediation).

\(^{272}\) See, e.g., Fed. R. Evid. 408 (barring the admission of settlement offers into evidence at trial); Winchester Packaging v. Mobil Chem. Co., 14 F.3d 316, 320 (7th Cir. 1994) (stating that out-of-court resolution of legal disputes would be discouraged if settlement offers were admissible as evidence).

\(^{273}\) See Taylor, 184 F.3d at 315 n.6 (discussing the value of the interactive process as a form of mediation).

\(^{274}\) Id.

employee['s] . . . suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefitting from the consultation.\(^\text{276}\)

The interactive process is particularly important as an extrajudicial tool when no reasonable accommodation is actually required. As Congress stated in the ADA's legislative history, "[m]any individuals with disabilities do not require any reasonable accommodation whatsoever. The only change that needs to be made . . . is a change in [the employer's] attitude."\(^\text{277}\)

In addition, emphasizing the interactive process requirement would create consistent, predictable rules for courts and employers. For courts, the benefit would be a simple, efficient means to test cases dealing with reasonable accommodations for regarded as disabled employees at the early stages of litigation. For employers, engaging in the interactive process would have three benefits. First, it is likely that a misperception would be eradicated by such a process, thus reducing the occurrences of discrimination by misperception as well as the problems associated with being liable for not reasonably accommodating a perceived disability. Second, even if the misperception persists, they would be shielded from compensatory and punitive damages and would have a better chance of succeeding early in litigation. Third, the interactive process would likely ferret out intentional misrepresentation by the employee. The court in *Deane v. Pocono Medical Center* summarized these benefits best in noting,

> [T]his protracted (and very much ongoing) litigation would likely have been unnecessary had the parties taken seriously the . . . importance of communication and cooperation between employers and employees in seeking reasonable accommodations. Specifically, we [have] noted that, in the context of the Rehabilitation Act, "both parties have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith." . . . While it may turn out that reasonable accommodation for Deane is impossible . . ., nevertheless, an employer who fails to engage in the interactive process runs a serious risk that it will erroneously overlook an opportunity to accommodate a statutorily disabled employee, and thereby violate the ADA.\(^\text{278}\)

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\(^{276}\) *Id.*


\(^{278}\) *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 149 (3d Cir. 1998) (en banc) (citations omitted).
B. The Third Circuit’s Limited Defense

As Judge Stapleton discusses in a footnote in Williams, there is generally no good-faith defense for employers who mistakenly misperceive a plaintiff’s condition and subsequently fail to accommodate the plaintiff’s actual impairments.\(^{279}\) However, if an employer engages in an "individualized determination of the employee’s actual condition" and develops a misperception "based on the employee’s unreasonable actions or omissions," the employer is entitled to a limited defense in the Third Circuit.\(^{280}\) The Circuit has thus created a boundary for an employer’s liability for accommodations.\(^{281}\) This defense does not come from explicit language in the ADA or the EEOC regulations but rather derives from the "general logic of the ADA."\(^{282}\) In formulating the defense, the court in Taylor v. Pathmark Stores, Inc. cited a line of Supreme Court cases that created an affirmative defense for Title VII liability based on concerns for logic and equity.\(^{283}\)

According to Pathmark, the ADA has as a major purpose the protection of individuals who are subject to stereotypes about their abilities.\(^{284}\) In a situation in which an employee (or his agent) is responsible for a factual mistake about the extent of the employee’s impairment, prejudice is not involved.\(^{285}\) In this situation, said the Pathmark court, a limited defense best serves the aims of the ADA.\(^{286}\) The court was careful, however, to distinguish this situation from an innocent mistake where the employer failed to engage in an "individualized determination," or an interactive process.\(^{287}\) Put simply, "There is no defense of

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\(^{280}\) Williams, 380 F.3d at 770 n.14 (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3d Cir. 1999)).

\(^{281}\) Pathmark, 177 F.3d at 192.

\(^{282}\) Id.

\(^{283}\) Id. at 192 n.6 (citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)).

\(^{284}\) Id. at 192; see also 42 U.S.C. § 12111(b)(1) (2000) (stating that a purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

\(^{285}\) See Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 192–93 (3d Cir. 1999) (asserting that a factual mistake by an employer that is attributable to the employee or his agent should not create liability under the ADA).

\(^{286}\) Id.

\(^{287}\) See id. at 193 ("We emphasize that it is not reasonable for an employer to extrapolate from information provided by an employee based on stereotypes or fears about the disabled.").
reasonable mistake.\textsuperscript{288} The court presented the defense as an extension of the interactive process requirement. It stated that the rule "is consistent with [the] decision in Deane, in which [the court] emphasized the employer's failure to take reasonable steps to learn the true extent of the plaintiff's impairment."\textsuperscript{289}

Currently, only courts in the Third Circuit utilize the defense articulated in Pathmark.\textsuperscript{290} As that court suggested, however, the defense is fully compatible with the logic of the ADA as well as the interactive process requirement that courts have imposed. Adopting such a limited defense would serve to balance the Williams-like requirements for regarded-as individuals and the interactive process. Employers who engaged in the interactive process with an employee in apparent need of a reasonable accommodation would have the security of an available defense should an employee fail to similarly engage in the process in good faith. Additionally, the defense could quell judicial concerns about the possibility of such employee practices.

\textit{VI. Conclusion}

When confronted with two conflicting statutory provisions, the Oregon Supreme Court once conjured the military adage that "all battles are fought at the corner of two maps."\textsuperscript{291} Like the proverbial military battles that the Oregon court alluded to, Williams and other cases like it fall obstinately within the intersection of two ADA provisions—the "reasonable accommodation" provision and the "regarded as" provision. Although several indicators have been given as to how these two sections fit together, the intersection has never been explicitly charted. Until Congress or the Supreme Court addresses the issue directly, courts will be left with only theoretical results and actual effects to guide their interpretation of the Act.

In the larger sense, it is the tension between theory and reality that may have the most effect on past, and future, court decisions on the issue. Some courts have looked to the abstract theoretical results of the plain language of the ADA and, seeing possible absurdity, have refused to abide it. Other courts have given more weight to the facts before it, and finding that the plain

\textsuperscript{288} Id.
\textsuperscript{289} Id. at 194.
\textsuperscript{291} Schultz v. Bank of the West, 934 P.2d 421, 423 (Ore. 1997) (referring to two sections of Article 9 of the Uniform Commercial Code that required interpretation and reconciliation).
language would provide a proper actual result, have ruled as such. Ultimately, the question may be not which approach is right or wrong but which approach is relevant given the goals of the Act. This Note proposes that both approaches are relevant to some extent and can be reconciled through a greater emphasis on the interactive process and Third Circuit defense.

This Note concludes that employers should be liable for failing to provide reasonable accommodations for those regarded as disabled. It also concludes that employers should be required to engage in the interactive process when faced with an employee who may need accommodation. However, if the employer engages in the interactive process and the employee acts unreasonably by failing to correct any misperceptions, the employer should be relieved of any duty to accommodate the misconception. True to the expressed vision of the Americans with Disabilities Act, this approach creates "clear, strong, consistent, enforceable standards addressing discrimination"\textsuperscript{292} against individuals with real or perceived disabilities.