

Fact Sheet
Are Individuals with “Regarded As” and “Record Of” Disabilities
Entitled to Accommodations Under the ADA?

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The ADA’s reasonable accommodation requirement does not distinguish between individuals with an impairment that substantially limits them in a major life activity (an “actual” disability), individuals with a record of such an impairment (a “record of” disability), and individuals who are regarded as having such an impairment (a “regarded as” disability). Yet courts have wrestled with the issue of whether the accommodation requirement is applicable to the latter two types of individuals with disabilities. Despite early indications that courts would not read the ADA to require accommodations for “regarded as” disabilities, an increasing number of courts are requiring that covered entities accommodate “regarded as” and “record of” disabilities.

In May 2003, we distributed a Q&A noting that the majority of courts had concluded that accommodations are not available for “regarded as” disabilities. In light of a shift in the caselaw in recent months, we have prepared a fact sheet that builds on the May 2003 Q&A, updates and expands the analysis of the caselaw provided, and adds a discussion of accommodations for individuals with “record of” disabilities.

The Statute

The plain language of the ADA seems to indicate that Congress did not intend to make any distinction between actual, regarded as, and record of disabilities with respect to the entitlement to reasonable accommodations or modifications. Title I defines “discrimination” to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” 42 U.S.C. § 12112(b)(5)(A). Title II defines a “qualified individual with a disability” to include an individual with a disability who meets essential eligibility requirements for programs or services “with or without reasonable modifications” *Id.* § 12131(2). Title III defines

discrimination to include “failure to make reasonable modifications . . . to individuals with disabilities. . . .” *Id.* § 12182(b)(2)(A)(ii).

The Caselaw

Currently the federal courts of appeals are split on the issue of whether persons with “regarded as” disabilities are entitled to accommodations. Negative decisions still predominate, with the Fifth, Sixth, Eighth and Ninth Circuits holding that accommodations are not required.¹ The most extensive analysis appears in *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003). In that case the Ninth Circuit considered the claims of a deputy marshal who was terminated by his employer after doctors determined that a wrist and thumb injury he had sustained during a training exercise permanently limited his ability to restrain prisoners and to hold a firearm. Kaplan was injured in 1995 and placed on light duty. He was later diagnosed as having rheumatoid arthritis, and the physician who performed “fitness for duty” examinations for the city concluded that his condition was permanent. Kaplan was terminated in 1995 based on the recommendation of that physician, who concluded that Kaplan might not be able to use a firearm effectively and might not be able to grasp and detain suspects. Kaplan’s supervisor concluded that he could not perform the essential functions of his job and posed a safety risk to himself and others.

In fact, Kaplan did not have rheumatoid arthritis, and he eventually recovered from his injury. In 1996, he sued the city for terminating him and claimed he should have been given the opportunity to qualify on the gun range. The Ninth Circuit reversed the district court’s grant of summary judgment for the city, finding that Kaplan had produced sufficient evidence that he was regarded as unable to perform any peace officer job in the state of Nevada, and therefore, was regarded as having a disability. *Kaplan v. City of North Las Vegas*, 2 Fed. Appx. 727 (9th Cir. 2001). When the case returned to the Ninth Circuit after remand, the court considered whether Kaplan was qualified and concluded that Kaplan was unable to perform the essential functions of a deputy marshal job without accommodation. At the time of his termination, he suffered from severe pain in his

¹ Two courts of appeals have declined to address the issue of “regarded as” accommodations. *Cameron v. Community Aid for Retarded Children*, 335 F.3d 60, 64 (2d Cir. 2003); *Mack v. Great Dane Trailers*, 308 F.3d 776, 778 n.2 (7th Cir. 2002).

right hand that prevented him from grasping objects for prolonged periods of time. Even if an opportunity to qualify at the pistol range might have proven that he could handle a firearm, he could not reliably restrain prisoners or other detainees at the time of his termination. 323 F.3d at 1230-31.

Because Kaplan had sought relief as someone who was “regarded as” having a disability rather than as someone with an actual disability, the court considered whether the ADA entitles “regarded as” plaintiffs to reasonable accommodations. *Id.* at 1231. While the language of the ADA does not differentiate between the three prongs of the “disability” definition for purposes of requiring reasonable accommodations, the Ninth Circuit concluded that the “absence of a stated distinction . . . is not tantamount to an explicit instruction by Congress that ‘regarded as’ individuals are entitled to accommodations.” *Id.* at 1232.

The Ninth Circuit followed the analysis of a previous Eighth Circuit decision. *Weber v. Strippit*, 186 F.3d 907 (8th Cir. 1999), reasoned that “[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.” *Id.* at 916. According to the Eighth Circuit, Congress could not have intended the ADA to require accommodations for employees whose impairments did not rise to the level of actual disabilities but whose employers wrongly perceived them to be disabled, while denying accommodations for employees with similar impairments whose employers did *not* mistake their condition. *Id.* at 917.

The Ninth Circuit added that a reading of the ADA to require accommodations for “regarded as” plaintiffs would have the “perverse and troubling result” that impaired employees would be better off if their employers treated them as disabled. This “would do nothing to encourage the employers to see their employees’ talents clearly.” 323 F.3d at 1232. Instead, it would create a windfall for employees who perpetuated their employers’ misperception of a disability. *Id.* Requiring accommodations for “those not truly disabled” would waste employers’ resources that would be “better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential.” *Id.*

Two other circuit courts have concluded that the ADA does not require accommodations for “regarded as” disabilities. *See Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (concluding without explanation that “the defendant correctly contends that a finding on this basis [that an individual is

regarded as having a disability] would obviate the Company's obligation to reasonably accommodate Workman"); *Newberry v. East Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998) (concluding without explanation that "an employer need not provide reasonable accommodations to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment"). Neither of these decisions provides any analysis of this issue.

Until recently, the only positive federal appellate decision concerning accommodations for "regarded as" disabilities was the First Circuit's decision in *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996). *Katz* involved a scrap metal salesman who was terminated after taking time off due to limitations on breathing, walking and working immediately following a heart attack and angioplasty. The Court concluded that Katz had presented sufficient evidence to overcome summary judgment with respect to whether he was regarded as substantially limited in major life activities and whether he could perform his job with reasonable accommodations. *Id.* at 32, 33. The Court seemed to assume that reasonable accommodations were required for "regarded as" disabilities. It did not offer any analysis of this issue, however, but merely noted in describing the "regarded as" prong that:

Congress, when it provided for perception to be the basis of disability status, probably had principally in mind the more usual case in which a plaintiff has a long-term medical condition of some kind [as opposed to no impairment at all], and the employer exaggerates its significance by failing to make a reasonable accommodation.

Id. at 33.

Recently, the Third Circuit joined the First Circuit in concluding that reasonable accommodations are required for "regarded as" disabilities. Significantly, previous Third Circuit cases had, in dicta, expressed skepticism that accommodations are required for such disabilities. *See, e.g., Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 142 n.12 (3d Cir. 1998) (en banc) (declining to decide this issue but noting that there was "considerable force" to the argument that "regarded as" plaintiffs are not entitled to accommodations); *Taylor v. Pathmark Stores*, 177 F.3d 180, 195 (3d Cir. 1999) ("... it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to an

accommodation”). In *Williams v. Philadelphia Housing Auth. Police Dep’t*, 380 F.3d 751 (3d Cir. 2004), however, the Third Circuit explicitly held that “regarded as” plaintiffs are entitled to reasonable accommodations and provided extensive analysis supporting that conclusion.

Williams involved a police officer who lost his job, after working for the housing authority for 24 years, when his depression made him unable to carry a gun. The employer’s psychologist evaluated Williams after a period of leave and concluded that he was not able to resume active duty because he should not carry a weapon. He could, however, be given an alternate work assignment for a minimum of three months and then be re-evaluated for fitness to return to active duty. *Id.* at 757. Williams requested reassignment to the housing authority’s training unit, and his request was denied because he could not carry a weapon. He then requested reassignment to the radio room, and the employer did not respond. *Id.* The employer later argued that reassignment to the radio room was not a reasonable accommodation because it would require Williams to be around others with firearms, which the employer felt he could not do. *Id.* at 768. The employer acknowledged that Williams *would* be qualified for the radio room if his only limitation was in *carrying* a weapon. *Id.*

Williams sued, claiming that he was substantially limited in working in law enforcement (based on his inability to carry a weapon) and interacting with others, that he was regarded as disabled in working based on the employer’s erroneous perception that he could not have access to or be around others with firearms, and that the employer denied him reasonable accommodations. The district court granted summary judgment for the employer on Williams’ discrimination claim. The court concluded, *inter alia*, that Williams was not a person with a disability because he was not substantially limited in doing a broad range of jobs nor in interacting with others, nor was he regarded as substantially limited in doing a broad range of jobs. 230 F. Supp.2d 631 (E.D. Pa. 2002).

The Third Circuit reversed, concluding that a reasonable juror could find that Williams had an “actual” disability based on his limitation in performing a class of law enforcement jobs due to his inability to carry a gun, and that the employer regarded Williams as disabled in working based on its perception that he could not have access to a gun or be around others carrying firearms. *Id.* at 764-67. The Court also held that a reasonable juror could conclude that Williams was a qualified employee, with the accommodation of being reassigned to the radio

room. *Id.* at 768. Moreover, this was true even if jurors concluded that Williams had only a “regarded as” disability. *Id.*

The Court stated:

While we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a ‘regarded as’ disabled employee would produce ‘bizarre results,’ we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of the text. Here, and in what seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results.

Id. at 774.

To support this conclusion, the Court pointed to the plain language of the ADA, which does not distinguish between “actual” and “regarded as” disabilities in requiring reasonable accommodations. *Id.* The Court also relied on the ADA’s legislative history discussing Congress’s intent to adopt the framework of *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). *Arline* explained, in the context of Section 504 of the Rehabilitation Act, that the negative reactions of others may be just as disabling as an actual impairment. The Third Circuit concluded that the ADA was thus “written to protect one who is ‘disabled’ by virtue of being ‘regarded as’ disabled in the same way as one who is ‘disabled’ by virtue of being ‘actually disabled.’” *Id.* It noted that in this case, the employer’s perceptions had limited Williams’ employment: “. . . but for PHA’s erroneous perception that Williams was unable to be around firearms because of his mental impairment, Williams would have been eligible for a radio room assignment.” *Id.* Finally, the Court noted that the plaintiff in *Arline* had a “regarded as” disability and the Supreme Court nonetheless held that such employees were entitled to reasonable accommodations. *Id.* at 775.

The Third Circuit dismissed the argument that making accommodations for employees with “regarded as” disabilities would give them a “windfall” over employees with the same impairments who were not erroneously regarded as disabled. An employee similarly situated to Williams in that he was unable to carry a gun, but who was not perceived as having the additional limitation of being around others with firearms, would not have been entitled to reassignment to the radio room as an accommodation. However, Williams was *denied* reassignment *because* of the employer’s perception about his disability. Absent that perception,

the record in this case demonstrated, a radio room assignment would have been made available to him and others similarly situated. *Id.*

Thus, the Third Circuit's analysis suggests that where an employee can demonstrate that she was treated adversely based on a perceived disability, the employee is entitled to reasonable accommodations that would place her in the same position that she would likely have been in absent the perception of disability. The Court gave another example, positing that an employee with a back impairment that causes discomfort but is not an actual disability works at a cashier job that requires her to stand all day. The employer wrongly perceives her as unable to stand for more than an hour, and fires her based on that perception. The Court concluded that the employer might be required to accommodate her by, for example, providing a stool. *Id.* at 776 n.19. While a similarly situated employee who was not perceived as unable to stand for more than an hour would not have been entitled to that accommodation, that employee also presumably would not be fired.

An increasing number of district courts have concluded that reasonable accommodations are required for "regarded as" disabilities. *See, e.g., Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151, 163-71 (E.D.N.Y. 2002), *vacated in part on other grounds*, 2004 WL 2223317 (2d Cir. Oct. 5, 2004); *Jewell v. Reid's Confectionary Co.*, 172 F. Supp.2d 212, 218-219 (D. Me. 2001) ("it is hardly a 'bizarre result' to hold the employer accountable" if it wrongly regards an employee as disabled and takes adverse action instead of exploring accommodations); *Lorinz v. Turner Const. Co.*, 2004 WL 1196699, * 8 n.7 (E.D.N.Y. May 25, 2004) (assuming without discussion that reasonable accommodations were required for a "regarded as" disability); *Miller v. Heritage Prod., Inc.*, 2004 WL 1087370, * 10 (S.D. Ind. Apr. 21, 2004) (citing *Jacques* and *Katz* with approval).

Jacques contains an extensive analysis, concluding that accommodations are required for "regarded as" disabilities based on (1) the plain language of the statute, (2) the legislative history describing the intent to adopt the *Arline* framework, and (3) a "practical" view of the statute in which requiring accommodations for "regarded as" disabilities serves as a prophylactic measure to prevent capable employees who are not actually disabled from losing their jobs.²

² The court analogized this prophylactic measure to the requirement that employers engage in a flexible interactive process to determine what accommodations are appropriate.

200 F. Supp.2d at 163-71. *Jacques* offered two examples of situations where accommodating employees with “regarded as” disabilities would be appropriate: (1) where an employee’s coworkers refuse to work with him due to fear that his multiple sclerosis will make him an unreliable employee, and he is fired based on the employer’s mistaken belief that he is substantially limited in working, and (2) where an employee with a mild form of schizophrenia is unable to interact with her coworkers because they believe she is “crazy,” and her employer, who mistakenly believes her schizophrenia substantially limits her ability to interact with others, fires her.

The issue of whether accommodations are required for “record of” disabilities has been discussed by the courts far less than for “regarded as” disabilities. We were able to find only one reported case that explicitly discussed accommodations for “record of” disabilities. In *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499 (7th Cir. 1998), the Court discussed but did not decide the issue. The case involved an employee with attention deficit disorder whose disability made it difficult for her to keep up with assignments. Her repeated requests for accommodations were denied, and she sued her employer for failing to accommodate her. The district court granted summary judgment for the employer on the ground that the employee was not a person with a disability. The Seventh Circuit affirmed in part and reversed in part, finding that the employee was not substantially limited in working, speaking, learning, but that a reasonable juror could conclude that she had a record of substantial limitations in learning.

The Court noted that “[t]he precise scope of the ‘record of impairment’ prong of the statute is not entirely clear as it relates to the right to demand reasonable accommodations of the employer.” 133 F.3d at 510. The Court posited the situation of a person with a recurring condition who qualified as a person with a “record of” disability based on previous hospitalization for the condition. Such a person would be entitled to reasonable accommodations for any limitations resulting from the recurrence, according to the Court. *Id.* at 510 n.6. The panel seemed to be referring to limitations that are *substantial* (meaning the person would also have an “actual” disability); it proceeded to ask, “But does the employer incur a duty to accommodate an employee based on her history of a substantially limiting impairment, even if her current limitations are not substantial?” If so, the Court stated, the “record of” prong “grants the ADA a significantly broader sweep than it would otherwise have.” *Id.* The Court declined to answer the question, as the only issue before it was the threshold question of whether the plaintiff was a person with a disability. *Id.*

Discussion

While there has been much less discussion of accommodations for “record of” disabilities by the courts, there are strong arguments supporting the need for accommodations to “record of” disabilities. One can readily conceive of examples where an individual with a “record of” disability would need accommodations because of the history of the disability, rather than simply because of a current impairment that does not rise to the level of a disability. One such accommodation might be waiving a non-essential rule that excludes anyone with a criminal record and screens out a person with a criminal history in the distant past due to mental illness that is now controlled. Another example is a flexible work schedule to allow a person with a history of severe depression, now mitigated, to receive treatment needed to prevent the recurrence of disabling symptoms.

The question of whether accommodations are needed for “regarded as” disabilities seems somewhat more challenging. In most of the cases where plaintiffs have sought accommodations for “regarded as” disabilities, the accommodation was needed not to address the erroneous perception of disability, but rather to address an actual impairment which did not rise to the level of a disability. The courts holding that accommodations are not required for “regarded as” disabilities have stressed the seeming unfairness of an interpretation of the ADA that requires accommodations for some individuals and denies accommodations to other individuals with the same level of impairment, simply because of an employer’s erroneous perception about one group. Even if the language of the ADA requires accommodations regardless of which prong of the disability definition a person falls under, the accommodations must be provided only in situations where they are necessitated by a disability. It would be difficult in many situations to argue that accommodations are necessary to accommodate an employer’s wrongful perception rather than to accommodate an actual impairment that is not a disability.

Williams and *Jacques* posit a number of situations in which accommodations would be required because of the employer’s perception rather than because of the impairment – where the employer’s perception results in adverse employment action that could be averted by making accommodations. In *Williams*, the Court discussed an employer’s refusal to transfer an employee based on an erroneous perception of disability, where the employer would have transferred him but for that perception. In *Jacques*, the Court discussed situations where the employer fires an employee based on an incorrect perception about the employee’s

limitations due to coworkers' prejudices or misperceptions. In both situations, however, the adverse action would be cognizable as a violation of the ADA due to straightforward differential treatment based on disability. While one can argue that employees in these situations have claims both for straightforward discrimination and failure to accommodate, the purpose of the ADA's reasonable accommodation mandate was not to address situations where individuals are treated *differently* based on prejudice or stereotyping, but rather to address situations where individuals with disabilities are treated the *same*, but different treatment is needed in order to level the playing field.

It may be argued, however, that Congress intended to impose an obligation to accommodate employees who are "regarded as" disabled as a prophylactic measure to prevent individuals who are wrongly perceived as disabled from losing their jobs. *Jacques* discussed the ADA's intent to address problems pragmatically and likened the requirement of accommodating wrongful perceptions to the requirement of engaging in an interactive process with the employee to find an appropriate accommodation – both requirements are designed to prevent employees from being fired or subjected to other adverse employment actions. If an employer regards an individual as disabled, it can be argued, the employer should be required to act in accordance with the obligation to accommodate that he would have if his belief were correct. And doing so would obviate the need for litigation in some circumstances.³

Practice Tips

While the caselaw has begun to take a positive turn for plaintiffs seeking accommodations for "regarded as" disabilities, whether these individuals and individuals with "record of" disabilities must be accommodated is far from clear in many jurisdictions. Accordingly, advocates should proceed with caution in pursuing these claims. Advocates with clients seeking accommodations would be

³ One vulnerability of the argument that an employer must obligate a *perception* of disability is that Title I requires accommodations to the "known physical or mental *limitations* of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Titles II and III do not speak explicitly about accommodating limitations, but simply require covered entities to accommodate disabilities. *Id.* §§ 12131(2), 12182(b)(2)(A)(ii).

well advised to make the strongest case possible that the client has an actual disability or, failing that, a record of a disability.

If the client is seeking accommodations for a “regarded as” or “record of” disability, the strongest case to make is that the accommodations are needed because of the employer’s (or other covered entity’s) erroneous *perception* or the client’s *history* of substantial limitations, rather than simply to address a current impairment that does not rise to the level of a disability. A client is most likely to be able to demonstrate the need for accommodations for a “regarded as” disability in situations such as those described in *Williams* and *Jacques*, where: (1) the accommodation sought would have prevented adverse action from being taken against the client based entirely on the perception of disability, or (2) the accommodation is needed to enable the person to continue working – such as reassignment where the employee’s coworkers refuse to work with him due to an incorrect perception that he has a disability.