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Leveling the Playing Field Or Stacking the Deck - the Unfair Advantage Critique of Perceived Disability Claims

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LEVELING THE PLAYING FIELD OR STACKING THE DECK? THE "UNFAIR ADVANTAGE" CRITIQUE OF PERCEIVED DISABILITY CLAIMS

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In Title I of the Americans with Disabilities Act of 1990 (ADA), Congress recognized that the fears, misperceptions, and stereotypes about disabled individuals are so pervasive that employment discrimination reaches beyond those who actually possess substantially limiting impairments. Accordingly, the ADA protects not only employees with actual disabilities, but also those nondisabled employees who mistakenly are "regarded as" disabled by their employers. In this Article, Professor Travis analyzes to what extent those with "perceived disabilities" should receive the same substantive safeguards as those who are actually disabled. Specifically, Professor Travis argues that applying the traditional forms of the ADA's "reasonable accommodations" and "essential functions" rules to perceived disabilities exceeds the ADA's narrow conception of equal employment opportunity. Because abandoning these protections would, in contrast, fall short of the ADA's objectives, the Article proposes a middle-ground alternative. This alternative uses a remedy analysis to reconceptualize the rules in a way that provides the broadest scope possible for the ADA's "regarded as" prong, while remaining consistent with the statute's fundamental goals.

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INTRODUCTION

Nearly a decade ago, Congress attempted to "level the playing field" for disabled individuals by enacting Title I of the Americans with Disabilities Act of 1990 (ADA).[1] Congress's goal was to create a

1. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–

"comprehensive national mandate" to eliminate disability discrimination in the workplace.[2] In taking this historic step, Congress recognized that fears, misperceptions, and stereotypes about the disabled were so pervasive that employment discrimination reached beyond the class of people who actually possess a substantially limiting impairment.[3] Accordingly, Congress drafted the ADA to protect not only people with actual disabilities, but also those who mistakenly are "regarded as" having a disability that they do not actually possess.[4] The ADA achieves this result by applying the same general antidiscrimination protection to those with "perceived disabilities" as it does to those whose disabilities are "real."[5] Unfortunately, the ADA is far less clear about whether and to what extent individuals who are only "regarded as" disabled are entitled to the same specific substantive safeguards as individuals who are actually disabled.[6] This Article addresses this question for two

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12117 (1994)); 136 CONG. REC. 10,874 (1990) (statement of Rep. Matsui) (explaining that the ADA "will make the playing field a little more even for those with disabilities to compete in the workplace" because "[s]o many doors are now closed . . . simply because their needs do not conform to the current rules of the game"); 136 CONG. REC. 10,856 (1990) (statement of Rep. Hoyer) (stating that the ADA "guarantees a level playing field" for individuals with disabilities); *see also* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 199 (3d Cir. 1997) (explaining that Congress enacted the ADA "in order to level the playing field for disabled individuals in the workplace"), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc); Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) ("Congress enacted the ADA to level the playing field for disabled people." (internal quotation marks omitted)).

2. 42 U.S.C. § 12101(b)(1); *see* S. REP. NO. 101-116, at 5 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (explaining the ADA's objective).

3. *See* S. REP. NO. 101-116, at 7; *see also* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.2(c), at II-10 to -11 (1992) (Sup. Docs. No. Y 3.Eq2:8T22) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL] ("Such protection is necessary, because, as the Supreme Court has stated and the Congress has reiterated, 'society's [. . .] myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments [sic].' " (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (alterations in original))).

4. 42 U.S.C. § 12102(2)(C).

5. *See id.* §§ 12102(2), 12112(a); *see also* Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469, 1472 (E.D. Va. 1994) (explaining that claims under the ADA's "regarded as" prong are "commonly referred to as 'perceived disability' cases").

6. *See Deane*, 7 AD Cases (BNA) at 199 ("[T]he extent to which individuals who are merely 'regarded as' disabled are entitled to be treated as though they are actually disabled was left far from clear."); Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345, 348 (1996) ("[T]he legal principles pertaining to perceived disabilities have been described as 'elusive, at best.' " (quoting Fourco Glass Co. v. West Va. Human Rights Comm'n, 383 S.E.2d 64, 66 n.* (W. Va. 1989))).

core elements of the ADA: the reasonable accommodations right and the essential functions limit.

As with other antidiscrimination statutes, the ADA requires a plaintiff to be "qualified" for the job in order to state an employment discrimination claim.[7] To be "qualified," however, a person with an actual disability need not perform every job function as originally conceived by the employer.[8] The ADA gives employees with disabilities a right to "reasonable accommodation" through changing the workplace to enable job performance, and the ADA deems disabled employees qualified as long as they can perform the "essential functions" of the job.[9] This Article analyzes how these qualification standards should apply to employees who are "regarded as" disabled. A plaintiff who is only regarded as disabled does not have the functional limitations that the ADA uses to distinguish persons with actual disabilities from those without; a plaintiff who is regarded as disabled is distinguished from other nondisabled individuals solely because of an employer's misperception. Nevertheless, most courts have assumed that the ADA's qualification standards apply identically to both perceived and actual disability claims.[10] By applying the qualification standards for actual disabilities identically to perceived disabilities, this interpretation treats perceived disability plaintiffs differently from all other nondisabled workers, who may be required to perform *all* job duties *without* changes in the work environment.

Of course, not every type of differential treatment is unfair or unjust. Sometimes, when individuals are different from others in a relevant way, treating them the same as others can itself be a form of discrimination.[11] This principle justifies the right to reasonable accommodations and the essential functions limit for individuals with actually disabling impairments. Individuals with actual disabilities face inequality not just from stereotypes, prejudice, and misperceptions. Because the workplace itself is often designed

7. 42 U.S.C. § 12112(a); *see also* 29 C.F.R. pt. 1630 app. Background (1999) (explaining how the ADA, "[l]ike the Civil Rights Act of 1964," bases employment opportunities on merit).

8. *See* 29 C.F.R. pt. 1630 app. Background.

9. 42 U.S.C. § 12111(8).

10. *See infra* notes 63–87 and accompanying text.

11. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.) ("[I]n order to treat some persons equally, we must treat them differently."). Justice Blackmun also joined an opinion concurring in the judgment in part and dissenting in part. *See id.* at 324 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgement in part and dissenting in part).

arbitrarily "around the unstated norm of an able-bodied worker,"[12] individuals with actual disabilities also may face a form of "structural" and/or "dynamic" discrimination that imposes additional employment barriers.[13] The ADA's reasonable accommodations and essential functions rules address this additional form of discrimination by providing those with actual disabilities the access necessary to compete on level ground with the nondisabled workforce. Thus, for those with actual disabilities, the reasonable accommodations right and the essential functions limit are a form of equal opportunity, not a form of advantage.

But can such differential treatment be justified as a form of equal opportunity for individuals whose disabilities are merely perceived? This Article argues that applying the difference-based qualification standards identically to perceived disability claims gives perceived disability plaintiffs an advantage over other nondisabled employees, as well as over those whose disabilities are real. This advantage is "unfair" in the very narrow sense that such treatment recognizes a difference between perceived disability plaintiffs and other nondisabled individuals that need not be recognized in order to achieve equal opportunity. Unlike employees with actual disabilities, employees with perceived disabilities have no equality-based claim to the use of the ADA's difference-based qualification standards: the only relevant distinction between employees with perceived disabilities and other nondisabled employees is an employer's mistaken beliefs. Employees with perceived disabilities are not affected by the pervasive forms of structural or dynamic discrimination faced by individuals with substantially limiting impairments. As a result, perceived disability claims should be governed by neither the reasonable accommodations right nor the essential functions limit—at least not in their traditional forms.

Accordingly, this Article begins by opposing the current majority

12. Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of the Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1609 (1991).

13. For a discussion of the origins of the term "structural discrimination," which refers to inequality created by the physical design and social organization of the workplace, see David Wasserman, *Distributive Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 147, 176–79 (1998). I take the term "dynamic discrimination" from work by Mark Kelman, who uses the term to describe employment decisions based on differences in employees' marginal productivity when those differences "are solely a function of readily changeable practices (generally work organization practices) that the employer should be obliged to alter." Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1160 (1991).

approach that applies the ADA's reasonable accommodations and essential functions rules identically to both perceived and actual disabilities. Part I explains the majority's "all" approach to perceived disability claims, which grants a cause of action and the full array of statutory remedies to perceived disability plaintiffs who seek workplace accommodation. By analyzing the statutory text, agency guidelines, and legislative history, as well as by comparing perceived disability claims to other forms of actionable employment discrimination under statutes that do not provide a right to accommodation or limit performance to essential job tasks, Parts II and III demonstrate how the "all" approach goes beyond the ADA's equal opportunity objective for perceived disability claims. By mandating differential treatment based on irrelevant individual differences, the "all" approach exceeds the ADA's level playing field goal and stacks the deck for perceived disability plaintiffs over other nondisabled individuals and those who are actually disabled.

While Parts II and III conclude that the majority's "all" approach improperly applies the reasonable accommodations and essential functions rules to perceived disability claims, these rules should not be jettisoned altogether. A handful of courts have rejected the majority position in favor of an equally improper "nothing" approach—an approach that denies a cause of action and, therefore, any remedy at all for perceived disability plaintiffs who seek accommodation on the job. Part IV explains the problems with this "nothing" approach, which ends up falling short of the ADA's level playing field objective by leaving some forms of invidious discrimination unchecked. Disability-based employment discrimination is still improper conduct, even if the employer's belief about the disability is incorrect and even for perceived disability plaintiffs who are "unqualified" for the job when they are correctly perceived by the employer. Individuals with perceived disabilities face very real inequality, and the law should provide recourse to punish the employer, deter the use of improper employment criteria, and facilitate more accurate perceptions.

Accordingly, Part IV proposes an alternative way to interpret the reasonable accommodations and essential functions rules for perceived disability claims. There are two main reasons why the current all-or-nothing approaches miss the ADA's equal opportunity target. First, those approaches assume that the only way to conceptualize accommodations is in terms of the operational work environment. Under this traditional approach, courts have envisioned accommodations narrowly as involving changes only to

physical, structural, procedural, or organizational aspects of the workplace that limit a disabled person's access and ability to compete.[14] While perceived disability plaintiffs do not need these types of traditional workplace modifications to eliminate barriers created by discriminatory operational designs, achieving equal opportunity for such people may require a different form of accommodation: accommodation involving the *perceptual* or *social* work environment, which can create very real barriers of its own.

Second, the all-or-nothing approaches frame the accommodations question solely as a liability issue by deciding either to grant or deny a cause of action to perceived disability plaintiffs who seek workplace accommodations. Part IV explains that the accommodations question is better framed as a remedies issue by deciding which remedies should and should not be available to perceived disability plaintiffs who *do* experience discrimination, but who do *not* experience the same type of harm as a plaintiff with an actual disability claim. Unlike the all-or-nothing approaches used today, this proposal would allow the largest number of perceived disability claims possible, while still remaining true to the ADA's goal of equal employment opportunity. By shifting the focus from liability to remedies, this proposal not only provides a more effective resolution to this specific ADA problem, but also illustrates the general power of judicial remedy analysis. The alternative set forth in this Article demonstrates how analytical line drawing at the remedy stage can be a far more precise instrument for achieving the exact size and shape of an intended substantive right than the rather blunt tools available through decisionmaking solely at the liability stage.

I. THE SOURCE OF THE "UNFAIR ADVANTAGE" CRITIQUE OF PERCEIVED DISABILITY CLAIMS

Understanding the "unfair advantage" critique of perceived disability claims first requires an explanation of the ADA's core concepts, requirements, and objectives. This Part describes the relevant statutory framework and illustrates the two current judicial interpretations of the ADA for perceived disability claims: the "all" and the "nothing" approaches.

14. For examples of traditional forms of reasonable accommodation, see *infra* notes 40–41 and accompanying text.

A. *The Framework of the Americans with Disabilities Act and the "Level Playing Field" Objective*

Title I of the ADA prohibits most private employers from engaging in disability-based employment discrimination.[15] Described as one of the century's most significant pieces of civil rights legislation,[16] the ADA greatly expanded federal protection for the disabled. Prior to 1990, federal protection was limited largely to the ADA's predecessor, the Rehabilitation Act of 1973,[17] which prohibits disability discrimination only by federal agencies,[18] large federal contractors,[19] and programs or activities receiving federal financial aid.[20] Although the Rehabilitation Act made some strides in reducing disability discrimination, Congress recognized that the Rehabilitation Act missed much of the "day-to-day" discrimination faced by disabled individuals.[21] The ADA therefore extended the

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15. *See* 42 U.S.C. §§ 12101–12117 (1994). Since July 26, 1992, Title I of the ADA has applied to all private employers that are "engaged in an industry affecting commerce" and that employ "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* § 12111(5)(A); *see* 29 C.F.R. § 1630.2(e)(1) (1999) (defining which employers are covered by the ADA).

16. *See, e.g.*, 136 CONG. REC. 17,376–77 (1990) (statement of Sen. Dole) (discussing the final passage of the ADA); John A. Conway, Comment, *The Americans with Disabilities Act: New Challenges in Airline Hiring Practices*, 59 J. AIR L. & COM. 945, 945 & n.2 (1994) (quoting a statement by President Bush's press secretary Marlin Fitzwater emphasizing the importance of the ADA as a civil rights law); *see also* 136 CONG. REC. 17,369 (1990) (statement of Sen. Harkin, chief sponsor of the ADA) (describing the ADA as the "Emancipation Proclamation" for the disabled); 135 CONG. REC. 19,807 (1989) (statement of Sen. Kennedy) (asserting that the ADA "has the potential to become one of the great civil rights laws of our generation").

17. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

18. *See* 29 U.S.C.A. § 791(b) (1999) (requiring affirmative action for disabled employees by "[e]ach department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch and the Smithsonian Institution"). Courts consistently have interpreted this statute's affirmative action requirement to include an antidiscrimination mandate. *See* ROBERT L. BURGDORF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 38 (1995).

19. *See* 29 U.S.C. § 793(a) (1994) (requiring businesses having federal contracts of $10,000 or more to "take affirmative action to employ and advance in employment qualified individuals with disabilities"). Courts consistently have interpreted this statute's affirmative action requirement to include an antidiscrimination mandate. *See* BURGDORF, *supra* note 18, at 38.

20. *See* 29 U.S.C. § 794(a) (prohibiting discrimination by "any program or activity receiving Federal financial assistance or ... any program or activity conducted by any Executive agency or by the United States Postal Service").

21. 42 U.S.C. § 12101(b)(4) (1994) (explaining that the purpose of exercising congressional authority was "to address the major areas of discrimination faced day-to-day by people with disabilities"); *see also* S. REP. NO. 101-116, at 6 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (finding that disability discrimination "still persists in such critical areas as

Rehabilitation Act's antidiscrimination provisions to cover most of private sector employment.[22]

Through this expansion, Congress hoped to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[23] To achieve this objective, the ADA broadly prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual," with regard to all terms and conditions of employment, including hiring, training, compensation, advancement, and termination.[24] This general prohibition translates into three specific requirements for stating a disability discrimination claim.[25] First, the plaintiff must have a "disability." Second, the plaintiff must be a "qualified individual" for the job. Third, the employer must take an adverse employment action against the plaintiff because of the plaintiff's disability.

An individual may establish a "disability" to meet the first ADA requirement either by (1) having a physical or mental impairment that substantially limits one or more major life activities,[26] or (2)

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employment in the private sector").

22. *See* 42 U.S.C. § 12111(5)(A). Because the ADA was viewed in some ways as an extension of the Rehabilitation Act, relevant case law developed under the Rehabilitation Act has been deemed generally applicable in interpreting analogous portions of the ADA. *See* 29 C.F.R. pt. 1630 app. § 1630.2(g) (1999). This Article therefore cites to Rehabilitation Act cases where helpful to analyze the ADA.

23. 42 U.S.C. § 12101(b)(1); *see* S. REP. NO. 101-116, at 5.

24. 42 U.S.C. § 12112(a); *see* 29 C.F.R. § 1630.4 (providing specific examples of the types of employment decisions that may not be colored by an individual's disability status).

25. *See* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996) (defining the requirements of a prima facie case under the ADA); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (same).

26. *See* 42 U.S.C. § 12102(2)(A). The Equal Employment Opportunity Commission's regulations define three of the terms in this statutory definition of an actual disability. A "physical or mental impairment" includes:

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

29 C.F.R. § 1630.2(h); *see id.* pt. 1630 app. § 1630.2(h) (explaining the definition of a physical or mental impairment). "[S]ubstantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general

being regarded as having such an impairment.[27] The first definition covers those with "actual" disabilities: individuals who currently experience a substantially limiting impairment. The second definition covers individuals who do not have, and typically have never had, an actual disability. Instead, the second definition covers individuals who are mistakenly "regarded as" being disabled by their employer. It is this second definition—the "perceived disability" prong—that is the focus of this Article's critique.

To establish a perceived disability, a plaintiff must prove that an employer regarded the plaintiff as having the type of disability covered by the actual disability prong. In other words, the plaintiff must show that the employer mistakenly regarded the plaintiff as having a physical or mental impairment that substantially limits one or more major life activities.[28] The Equal Employment Opportunity Commission (EEOC) has described three general types of perceived disabilities:[29]

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population can perform that same major life activity.

Id. § 1630.2(j)(1). To assess whether an individual is "substantially limited," the EEOC directs courts to consider "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2); *see id.* pt. 1630 app. § 1630.2(j) (explaining the definition of a substantial limitation). Finally, the term "major life activity" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* pt. 1630 § 1630.2(i). Major life activities include the "basic activities that the average person in the general population can perform with little or no difficulty." *Id.* app. § 1630.2(i) (adding sitting, standing, lifting, and reaching to the list of major life activities set forth in the statute).

27. *See* 42 U.S.C. § 12102(2)(C). The ADA also provides a third way to meet the disability requirement: by showing that the plaintiff has a "record of" a physical or mental impairment that substantially limits a major life activity. *Id.* § 12102(2)(B). The "record of" prong of the disability definition applies to individuals who previously had—but no longer have—an actual disability as defined in § 12102(2)(A). Because individuals covered under the ADA's "record of" prong are similar to individuals covered under the ADA's "regarded as" prong in that neither face the pervasive structural or dynamic discrimination faced by individuals with actual disabilities, *see infra* notes 179–80 and accompanying text, the arguments about perceived disabilities in Parts II and III should apply to claims under the "record of" prong as well.

28. *See* 42 U.S.C. § 12102(2)(A); 29 C.F.R. pt. 1630 app. § 1630.2(*l*); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2150 (1999).

29. The ADA authorized the EEOC to issue implementing regulations, *see* 42 U.S.C. § 12116, and those regulations appear at 29 C.F.R. pt. 1630 (1999). The EEOC also prepared an "Interpretive Guidance" for Title I, which appears in an appendix to the EEOC regulations at 29 C.F.R. pt. 1630 app. (1999). To date, the United States Supreme Court has declined to rule on the weight of the EEOC regulations and has suggested that the regulations interpreting the term "disability" may be due no weight at all. *See Sutton*, 119 S. Ct. at 2145. Lower courts, however, generally give "substantial deference" to the regulations. *See, e.g.*, Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 203 n.10 (3d

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer . . . as constituting a substantially limiting impairment;
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> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
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> (3) The individual may have no impairment at all but is regarded by the employer . . . as having a substantially limiting impairment.[30]

The EEOC also has provided an example of each type of perceived disability.[31] The first type covers an employee who has controlled high blood pressure that does not limit the employee substantially in any major life activities but that the employer mistakenly views as substantially limiting.[32] If the employer reassigns the employee to less strenuous work based on unsubstantiated fears that the employee would suffer a heart attack, the employee has the first type of perceived disability.[33] The second type covers an employee who has a prominent facial scar or disfigurement or a condition that periodically causes an involuntary jerk of the head but that does not limit the person substantially in any major life activities.[34] If the employer treats the employee differently by reassigning the employee to a night shift because of customers'

Cir. 1997), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc). Although the EEOC's Interpretive Guidance is "not part of the regulations, but is, instead, the EEOC's interpretation of those regulations," Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996), most courts still give the Interpretive Guidance " 'considerable weight' " when the statute is ambiguous, unless the statute or legislative history indicates that Congress intended an alternative position. *E.g.*, Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). The EEOC also has published a technical assistance manual to assist employers with compliance problems. *See* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3. Although courts do not give the technical assistance manual the "substantial deference" given to regulations that are adopted formally under the Administrative Procedures Act, courts generally give the manual at least a modest degree of deference when interpreting the ADA. *See, e.g.*, *Deane*, 7 AD Cases (BNA) at 213 n.5.

30. 29 C.F.R. pt. 1630 app. § 1630.2(*l*) (explaining the scope of the perceived disability prong); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.2(c), at II-10 to -11; *see also* H.R. REP. NO. 101-485, pt. 3, at 29 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 445, 452–53 (describing the three types of perceived disability claims); *id.*, pt. 2, at 53, 1990 U.S.C.C.A.N. at 335–36 (same); S. REP. NO. 101-116, at 23 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (same).

31. *See* 29 C.F.R. pt. 1630 app. § 1630.2(*l*).

32. *See id.*

33. *See id.*

34. *See id.*

negative reactions, the employee would have the second type of perceived disability.[35] The third type covers an employee who has no history of illness but who is discharged because of the employer's mistaken belief that the individual has an infectious disease.[36]

These three types of perceived disabilities share one commonality: the plaintiff lacks a condition that, absent the misperceptions of others, substantially limits any of the plaintiff's major life activities. In other words, a perceived disability plaintiff lacks an actual disability,[37] just like all other nondisabled employees who, in contrast, are not protected by the ADA. The first two types of perceived disabilities also share another common feature. Individuals in the first two categories possess some physical or mental "impairment" that may limit job performance, although the impairment does not constitute an actually disabling condition. This common feature of the first two types of perceived disabilities is also shared with many nondisabled workers, who may have physical or mental impairments that impact performance but that do not rise to the level of a substantially limiting condition.[38] What makes these perceived disability plaintiffs different from other nondisabled individuals is employers' mistaken perception that they possess actual disabilities (or the employers' ratification of the misperceptions of others). These mistaken perceptions by the employers—not any physical or mental characteristic of the employees—allows these individuals to meet the "disability" requirement for an ADA discrimination claim.

After proving the first requirement of having a "disability," either actual or perceived, the plaintiff must establish the second ADA requirement: that the plaintiff is a "qualified individual" for the job. Rather than providing different definitions of a "qualified individual" to correspond with the different types of disabilities, the ADA has only a single definition. A "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[39] This single definition, which appears to apply to both actual and perceived

35. *See id.*

36. *See id.*

37. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2160 (1999); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.2(c), at II-10.

38. *See* 29 C.F.R. pt. 1630 app. § 1630.2(j) ("Many impairments do not impact an individual's life to the degree that they constitute disabling impairments.").

39. 42 U.S.C. § 12111(8) (1994).

disabilities, is the genesis of the "unfair advantage" critique. To understand the potential advantage for perceived disability plaintiffs requires an explanation of the two core components of this single definition: (1) the right given to the employee to receive "reasonable accommodations"; and (2) the limit placed on the employer to require performance of only the "essential functions" of the job.

In general, reasonable accommodations include any type of modification or adjustment to the operational work environment, including the manner or circumstances in which the position is customarily performed, to allow a disabled employee to do the job.[40] Typically, a reasonable accommodation involves "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[41] These typical accommodations focus on eliminating the performance impact that results when an employee with a substantially limiting impairment is required to perform a job in an operational environment constructed around the narrow vision of an able-bodied employee.

Individuals with disabilities not only are entitled to reasonable accommodations to enable job performance, but they also are required to perform only the "essential" functions of the job. Essential job functions are the "fundamental job duties of the employment position."[42] For a duty to be an essential function, the employer actually must require the employee to perform the duty, and removing the duty must alter the position fundamentally.[43] Thus, a particular duty may be essential if the reason that the position exists is to perform that function, or if the task is highly specialized and the

40. *See* 29 C.F.R. § 1630.2(o)(1)(i)–(iii).

41. 42 U.S.C. § 12111(9)(B); *see* 29 C.F.R. § 1630.2(o)(2)(i)–(ii) (identifying typical accommodations, including facility modification and job restructuring); *id.* pt. 1630 app. § 1630.2(o) (listing other forms of reasonable accommodation, including "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment," "[p]roviding personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips," or "making employer provided transportation accessible, and providing reserved parking spaces"); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.10, at III-16 to -33 (providing detailed examples of reasonable accommodations). An accommodation is not considered "reasonable" if it would impose an "undue hardship" on the employer. 42 U.S.C. §§ 12111(10), 12112(5)(A); 29 C.F.R. §§ 1630.2(p), 1630.15(d); *id.* pt. 1630 app. §§ 1630.2(p), 1630.15(d).

42. 29 C.F.R. § 1630.2(n)(1).

43. *See id.* pt. 1630 app. § 1630.2(n).

applicant is hired specifically for the ability to perform the task, or if a limited number of employees exist to whom the employer could redistribute the task.[44] Duties that fall outside the essential job functions are considered "marginal."[45] Under the ADA's definition of a "qualified individual," a plaintiff must be able to perform only the essential job functions to satisfy the second requirement of an ADA claim.[46] Disabled employees are still considered "qualified" even if they cannot perform marginal job tasks.

Because the ADA affirmatively obligates employers to provide reasonable accommodations to allow disabled employees to perform essential job functions, the failure to do so is considered a form of disability discrimination.[47] The ADA prohibits seven types of "discrimination,"[48] all but one of which mirror the types of discrimination covered by Title VII of the Civil Rights Act of 1964 ("Title VII") and the case law interpreting that statute.[49] The one additional type is the failure to reasonably accommodate. An employer commits unlawful discrimination by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" or by "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such

44. *See id.* § 1630.2(n)(2)(i)–(iii); *id.* pt. 1630 app. § 1630.2(n). Courts must give "consideration" to the employer's judgment about which job functions are essential and treat prior written job descriptions as "evidence" in making that assessment. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n)(3)(i)–(ii); *id.* pt. 1630 app. § 1630.2(n). The EEOC also instructs courts to consider: "[1] The amount of time spent on the job performing the function; [2] the consequences of not requiring the incumbent to perform the function; [3] The terms of a collective bargaining agreement; [4] The work experience of past incumbents in the job; and/or [5] the current work experience of incumbents in similar jobs." *Id.* § 1630.2(n)(3)(iii)–(vii); *see id.* app. § 1630.2(n) (providing examples of these criteria).

45. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.3(2), at II-12 .

46. *See* 29 C.F.R. § 1630.2(n)(1).

47. *See* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. pt. 1630 app. § 1630.9 ("The obligation to make reasonable accommodation is a form of non-discrimination."); *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8–9 (1996) (explaining that the concept of reasonable accommodation is not only "integral to defining the class of protected individuals," but also "constitutes a separate species of discrimination").

48. *See* 42 U.S.C. § 12112(b)(1)–(7).

49. *See* Karlan & Rutherglen, *supra* note 47, at 5–6 & nn.18–21 (explaining in detail the parallel discrimination provisions in the ADA and Title VII). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a) (1994).

covered entity to make reasonable accommodation."[50]

By constructing the reasonable accommodations and essential functions rules as part of the ADA's antidiscrimination provisions, Congress envisioned them as a means of providing equal opportunity, not as a way to advantage individuals with disabilities over those without.[51] As one court has noted, "[w]ith the passage of the ADA, Congress intended not to erect impenetrable spheres of protection around the disabled, but hoped merely 'to level the playing field' for them."[52] A level playing field means "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability."[53] Congress recognized that a simple antidiscrimination mandate would fall short of a "level playing field" for some individuals with actual disabilities who may have vocationally relevant characteristics that impact performance in the arbitrarily designed, conventional workplace.[54] As will be explained in Parts II.C and III.C, the reasonable accommodations and essential functions rules are needed to achieve equal opportunity for those individuals.

This theory of equal opportunity runs into some difficulty in the context of perceived disability claims. Objectively, a perceived

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50. 42 U.S.C. § 12112(b)(5)(A)–(B); *see* 29 C.F.R. § 1630.9(a)–(b) (explaining the prohibition against failing to provide reasonable accommodation).

51. *See* H.R. REP. NO. 101-485, pt. 3, at 39 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 445, 462 ("This reasonable accommodation requirement is central to the non-discrimination mandate of the ADA."); *id.*, pt. 2, at 55, 71, 1990 U.S.C.C.A.N. at 337, 353–54 (describing the essential functions limit as a means of eliminating bias); S. REP. NO. 101-116, at 31 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (describing the accommodations duty as "a form of non-discrimination").

52. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 (3d Cir. 1997) (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995)), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc).

53. 29 C.F.R. pt. 1630 app. § 1630.9; *see also* 42 U.S.C. § 12101(a)(8) (stating that the ADA's goal is to "assure equality of opportunity"); *id.* § 12101(a)(9) (explaining that discrimination "denies people with disabilities the opportunity to compete on an equal basis"); 29 C.F.R. pt. 1630 app. Background (stating that the ADA "seeks to ensure access to equal employment opportunities based on merit" and to allow the disabled "to receive equal opportunities to compete"); *id.* ("The ADA is a federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."); *id.* pt. 1630 app. § 1630.1(a) (describing the ADA as an "anti-discrimination" statute that "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given").

54. *See* 136 CONG. REC. 10,874 (1990) (statement of Rep. Matsui) (explaining that the ADA "will make the playing field a little more even for those with disabilities to compete in the workplace" because "[s]o many doors are now closed . . . simply because their needs do not conform to the current rules of the game"); *infra* Parts II.C and III.C.

disability plaintiff is the same in vocationally relevant ways as a "similarly situated employee without a disability."[55] As a group, perceived disability plaintiffs do not face the structural discrimination faced by individuals with actual disabilities. Those with perceived disabilities, along with the rest of the nondisabled workforce, make up the able-bodied majority around which the operational workplace was designed. The only relevant difference between a perceived disability plaintiff and any other nondisabled worker is an employer's subjective misperception. Unfortunately, the ADA does not explain whether someone who is only perceived to be disabled should be subject to the same "qualified individual" test as someone with an actual disability, even though the perceived disability plaintiff has no substantially limiting impairment. This issue matters most for individuals in the first two categories of perceived disabilities—individuals who do possess some type of nondisabling physical or mental impairment that may make them unable to perform some required job functions without accommodation. The question is whether the employer's misperception—which is what qualifies these otherwise nondisabled employees for ADA protection—should entitle perceived disability plaintiffs to the same reasonable accommodations right and essential functions limit as those who are actually disabled.

B. *Challenge to the "Level Playing Field" Assumption in Perceived Disability Cases*

To illustrate the potential advantage that results from applying the same qualification standards for actual disability claims to perceived disability claims—and to illustrate the difference between the two—consider a hypothetical employer and three hypothetical employees. Employees *A*, *B*, and *C* all work as nursing assistants for ABC Company. Employee *A* is the only one who has an actual disability, lower body paralysis, which requires the use of a wheelchair. Lower body paralysis substantially limits Employee *A* in at least the major life activities of walking and standing,[56] which creates additional employment barriers for Employee *A* in many conventional workplaces that are designed around the unstated norm of an employee who can work while standing. Because of Employee

55. 29 C.F.R. pt. 1630 app. § 1630.9 (describing this standard for assessing equal opportunity).

56. *See* 29 C.F.R. pt. 1630 app. § 1630.2(i), (j); *see also id.* § 1630.2(h) (defining "impairment"); *cf. id.* pt. 1630 app. § 1630.2(i) (explaining that "[a]n individual who uses artificial legs would likewise be substantially limited").

A's lower body paralysis, Employee *A* is unable to climb a ladder to restock supplies on the top shelf of the storeroom. Restocking the top shelf is a required, but nonessential, function of a nursing assistant's job.[57] Employee *A* is also unable to lift a post-operative patient from a transport gurney into a regular hospital bed. Employee *A* has sufficient upper body strength and dexterity to perform this task, but the transport gurney was designed at a height that makes it difficult for Employee *A* to reach, precluding Employee *A* from exhibiting *A*'s skill in this essential lifting task. Employee *A* could perform the task if the transport gurney was designed at a lower height or equipped with an adjustable height mechanism, or Employee *A* could perform the task with the help of another nursing assistant. Employee *A* can perform all of the other functions of the job.

Unlike Employee *A*, Employee *B* does not have an actual disability. Employee *B* has mild carpal tunnel syndrome in one wrist, which does not limit Employee *B* substantially in any major life activities.[58] But Employee *B*'s nondisabling impairment does impact Employee *B*'s ability to do the nursing assistant's job. Because of Employee *B*'s carpal tunnel syndrome, Employee *B* has exactly the same performance limits as Employee *A*. Employee *B* is unable to climb the ladder to restock the top shelf because that nonessential task requires both hands to perform sustained gripping—one hand grasping the ladder rail and the other replacing items on the shelf. Employee *B* is also unable to lift a post-operative patient from a transport gurney into a regular hospital bed because the carpal tunnel syndrome prevents Employee *B* from manipulating very heavy objects at a certain height. Just like Employee *A*, Employee *B* could

57. For an explanation of the difference between essential and nonessential functions, see *supra* notes 42–46 and accompanying text.

58. While courts have reached different outcomes on whether carpal tunnel syndrome constitutes an actual disability, many have held that it does not. *See* Kathleen M. Sheil, Note, *The Americans with Disabilities Act: Are Your Wrists Protected?*, 23 J. CORP. L. 325, 331–41 (1998) (summarizing the case law on this issue). The other facts for the hypothetical Employee *B* are based loosely on the facts in *Deane v. Pocono Medical Center*, 7 AD Cases (BNA) 189, 199–202 (3d Cir. 1997), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc). In *Deane*, the plaintiff had a nondisabling wrist injury that prevented her from performing the essential lifting tasks of her position as a registered nurse on the medical/surgical floor of a medical center. *See id.* at 199–200. Even though Deane's wrist injury imposed some lifting restrictions, the wrist injury did not constitute an actual disability because it did not substantially limit Deane's ability to lift or to do other major life activities. *See id.* at 199–202. Deane was not substantially limited in her ability to work because there were many registered nursing jobs on floors other than the medical/surgical floor (e.g., in pediatrics or oncology) for which heavy lifting was not required. *See id.*

perform the essential lifting function with a redesigned gurney or with another nursing assistant's help, and Employee *B* can perform all of the other functions of the job.

Like Employee *B*, Employee *C* also lacks an actual disability. Employee *C* has a knee injury that only affects Employee *C*'s leg strength within a certain range of motion. Although Employee *C* is not actually disabled because the knee injury does not limit Employee *C* substantially in any major life activities, Employee *C*'s knee injury impacts Employee *C*'s ability to do the nursing assistant's job in exactly the same way as Employees *A* and *B*. Employee *C* is unable to climb the step ladder to restock the top shelf because the narrow rungs and steep incline exceed Employee *C*'s comfortable range of motion. Employee *C* is also unable to lift a patient from a transport gurney into a regular hospital bed because of the pivoting motion required. Just like Employees *A* and *B*, Employee *C* could perform the essential lifting function with a redesigned gurney or another nursing assistant's help, and Employee *C* can perform all of the other job functions.

Employees *B* and *C* both have nondisabling conditions that impact their ability to perform the job in exactly the same way. While Employees *B* and *C* are physically identical for purposes of the job, assume that ABC Company's perception of them is not the same. ABC Company incorrectly views Employee *B*'s mild carpal tunnel syndrome as a disability—in other words, the company believes that mild carpal tunnel syndrome is always a substantially limiting impairment, even though it is not. In contrast, ABC Company accurately perceives Employee *C*'s knee injury as a limiting but nondisabling condition.

ABC Company wants to fire all three employees. Because Employee *A*'s lower body paralysis is an actual disability, Employee *A* is protected by the ADA. If ABC Company fired Employee *A*, Employee *A* could state a viable discrimination claim. To be "qualified" for the job, the ADA would require Employee *A* to perform only the essential lifting function (not the marginal restocking function), and ABC Company could be required either to redesign the transport gurney or to provide an assistant to help Employee *A* perform the lifting task.[59] In contrast, Employee *C*

59. *Cf.* 29 C.F.R. pt. 1630 app. § 1630.2(o) ("Providing personal assistants, such as a page turner for an employee with no hands ... may also be a reasonable accommodation."). For an explanation of conventional forms of reasonable accommodation, see *supra* notes 40–41 and accompanying text.

would not have an ADA claim. Because Employee *C* has neither an actual nor a perceived disability, Employee *C* is not protected by the ADA. ABC Company could fire Employee *C* for not performing the marginal restocking function or for not performing the essential patient-lifting function, and ABC would be under no obligation to modify workplace operations to assist Employee *C* in the essential lifting task.[60]

What about Employee *B*, who has a nondisabling condition like Employee *C*, but whom the employer perceives to be disabled like Employee *A*? Although Employee *B*'s mild carpal tunnel syndrome is not an actual disability, Employee *B* has a perceived disability and therefore meets the "disability" requirement of an ADA claim. If courts interpret the "qualified individual" requirement to apply identically to perceived and actual disabilities, then Employees *B* and *A* would fare exactly the same. If ABC Company fired Employee *B*, then Employee *B* would have a viable claim and the full array of statutory remedies, just like Employee *A*. Although Employee *B*'s disability is perceived, rather than actual, the traditional qualification rules would require Employee *B* to perform only the essential lifting function (not the marginal restocking function), and ABC Company could be required to provide a redesigned gurney or an assistant to enable Employee *B* to perform the lifting task. This would be the case even if ABC's misperception was not shared by a single other employer.[61] Even though Employees *B* and *C* are objectively the most similar, such an interpretation would place Employee *B* in a far better position than Employee *C*, solely because of ABC Company's incorrect perception of Employee *B*.

The ADA intends the divergent outcome between Employee *A* (the worker with an actual disability) and Employee *C* (the correctly

60. This Article does not argue that the outcome for Employee *C* (who may face adverse employment decisions for the inability to perform a marginal job function or for needing accommodations to perform an essential job function) is necessarily a desirable, morally just, or even an economically efficient outcome. This Article simply notes that such an outcome is permissible under current law. As long as the employee is not a member of an identifiable and legally protected class, employers currently are free to make those types of employment decisions. Similarly, this Article ultimately argues that treating Employee *B* identically to Employee *A* is "incorrect" only in the narrow sense that such treatment would be inconsistent with the ADA's stated goals and legislative intent.

61. *See* EEOC v. Texas Bus Lines, 923 F. Supp. 965, 975 (S.D. Tex. 1996) (holding that the ADA's perceived disability prong applies "whether or not the employer's perception was shared by others in the field"); 29 C.F.R. pt. 1630 app. § 1630.2(*l*) (stating that an employee could be covered by the perceived disability prong "whether or not the employer's or other covered entity's perception were shared by others in the field").

perceived, nondisabled worker), which results from applying the difference-based qualification standards to Employee *A*. Employee *A* is a member of a "discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment," and systematically excluded from the conventional workplace[62]—in this case, because most workplaces are designed arbitrarily around the unstated norm of an employee who can work while standing. The question is whether courts should interpret the ADA to create the same divergent outcome between Employee *B* (the misperceived but otherwise nondisabled worker) and Employee *C* (the correctly perceived, nondisabled worker). Can a divergent outcome between Employees *B* and *C* be justified by the ADA's goal of equal opportunity, just like the divergent outcome between Employees *A* and *C*? While almost no court has taken time to analyze this justification question, the vast majority of courts have answered the basic interpretation question in the affirmative. This majority approach—the "all" approach—equates a misperceived Employee *B* with a disabled Employee *A*, granting both employees a cause of action and all available statutory remedies.

Some courts explicitly have adopted this "all" interpretation by directly applying the reasonable accommodations and essential functions elements of the "qualified individual" test identically to actual and perceived disability claims. In *Katz v. City Metal Co.*,[63] for example, a scrap metal salesperson claimed that his employer failed to accommodate his perceived disability. Although the plaintiff had physical limitations after a heart attack, including "great difficulty breathing," the need to "keep his stress to a minimum," and being "extremely limited in his ability to walk," he did not have an actual disability.[64] Nonetheless, the First Circuit denied the employer's summary judgment motion and allowed the case to go forward on a perceived disability theory, even though the plaintiff could not perform all of the job duties as originally designed.[65] The court explained that while the perceived disability prong does protect

62. 42 U.S.C. § 12101(a)(7) (1994); *see also* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2152 (1999) (Ginsberg, J, concurring) (relying on the "discrete and insular minority" concept to determine the proper scope of the ADA's actual disability prong).

63. 87 F.3d 26, 33 (1st Cir. 1996). For general discussions of *Katz*, see Michael D. Moberly, *Letting* Katz *Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 612–14 (1998), and Allen Dudley, Comment, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for "Regarded As" Disabled Individuals*, 7 GEO. MASON L. REV. 389, 398–99 (1999).

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

65. *See id.*

individuals who are not "disabled at all," Congress "had principally in mind the more usual case in which a plaintiff has a long-term medical condition of some kind, and the employer exaggerates its significance."[66] The court therefore held that the "second element of proof" for perceived disability claims is the "ability to perform the essential functions of the job with or without reasonable accommodation," just like it is for actual disability claims.[67] Because the employer arguably perceived the plaintiff as disabled after his heart attack, the court denied the employer's summary judgment motion and gave the plaintiff the opportunity to prove that he could perform the essential job functions of a scrap metal salesperson *with* accommodations, such as an initial limited-capacity position or part-time work.[68]

The *Katz* court thereby endorsed the use of the ADA's difference-based qualification standards for someone whose "disability" exists solely in the employer's mind. If the employer had perceived the plaintiff's nondisabling impairments correctly, the plaintiff would have been like our hypothetical Employee *C* and would have lacked recourse for termination. But because the employer incorrectly perceived the plaintiff's impairments as disabling, the employee was entitled to reasonable accommodations and was not required to perform marginal job duties, just like our actually disabled Employee *A*. While the *Katz* court thus interpreted the ADA to apply the qualification standards identically to actual and perceived disabilities, the opinion conspicuously lacked an analysis of whether that interpretation was consistent with the ADA's level playing field objective for perceived disability claims.

Several district courts have reached the same conclusion as *Katz* by similarly applying the reasonable accommodations right and the essential functions limit identically to actual and perceived disabilities. For example, in *Stradley v. Lafourche Communications, Inc.*,[69] the plaintiff claimed that he was fired because the employer mistakenly viewed his depression and acute anxiety as disabling. Although the plaintiff's disability was only perceived, the plaintiff needed accommodation to perform the essential job function of

66. *Id.*

67. *Id.*

68. *See id*; *see also* Harris v. Thigpen, 941 F.2d 1495, 1527 (11th Cir. 1991) (holding that prison officials who perceived HIV-positive inmates as disabled had an "affirmative obligation under the [Rehabilitation] Act to pursue and implement such alternative, reasonable accommodations as are possible").

69. 869 F. Supp. 442, 443 (E.D. La. 1994).

regular attendance.[70] The court applied the same definition of a "qualified individual" as for actual disabilities and denied the employer's summary judgment motion.[71] Although the plaintiff's limitations did not stem from an actual disability, the court still analyzed whether the plaintiff "was able to perform his job with reasonable accommodation," such as restructuring the company's paid and unpaid leave rules or transferring the employee to a less stressful position.[72] As in *Katz*, if the employer's perception of the plaintiff's condition had been accurate, the plaintiff would have been similar to our hypothetical Employee *C* and lawfully could have been terminated for poor attendance. However, as in *Katz*, the *Stradley* court applied the "qualified individual" test identically for the perceived disability, thereby equating the plaintiff with our hypothetical Employee *A*. As in *Katz*, the *Stradley* court reached this conclusion without analyzing whether the difference-based qualification standards were consistent with the ADA's equal opportunity goal.[73]

While many courts ultimately dismiss perceived disability claims, even losing claims provide support for the pervasive view that the reasonable accommodations and essential functions rules apply identically to actual and perceived disabilities. In some cases, courts dismiss perceived disability claims because accommodating the

70. *See id.*

71. *See id.* at 444, 445.

72. *Id.* (internal quotation marks omitted).

73. *Id.*; *see also* Pinkerton v. City of Tampa, 981 F. Supp. 1455, 1457 (M.D. Fla. 1997) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by a police officer with a nondisabling hand impairment and denying the employer's summary judgment motion because "[m]aterial issues of fact remain as to whether the City regarded Plaintiff as disabled, whether Plaintiff can perform the essential functions of her position, and if not, whether a reasonable accommodation by the City of Tampa would enable her to do so"); Matczak v. Frankford Candy & Chocolate Co., 950 F. Supp. 693, 697 (E.D. Pa. 1997) ("Since a jury could find that plaintiff was regarded as having a disability, ... [and] plaintiff was capable of performing his job with the accommodations defendant made[,] ... plaintiff meets the test for a 'qualified individual with a disability.' "), *rev'd in part on other grounds*, 136 F.3d 933 (3d Cir. 1997); Muller v. Hotsy Corp., 917 F. Supp. 1389, 1406, 1408, 1411–12 (N.D. Iowa 1996) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by a plant foreperson with a nondisabling spinal injury and denying the employer's summary judgment motion because the plaintiff "raised material fact question[s]" regarding accommodations for her perceived disability); Spath v. Berry Plastics Corp., 900 F. Supp. 893, 903–04 (N.D. Ohio 1995) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by a sales representative with a nondisabling ankle injury and denying the employer's summary judgment motion in part because the employer "produced no evidence of its inability to accommodate [the employee's] perceived disability" by allowing her to work from home).

plaintiffs' nondisabling impairments is impossible,[74] and in other cases, courts dismiss because the employer provided all reasonable accommodations available.[75] Although the perceived disability claims were unsuccessful in these cases, courts in both scenarios first had to accept the threshold proposition that perceived disability plaintiffs are entitled to reasonable accommodations to perform the essential functions of their jobs in order to dismiss the cases on accommodation-related grounds.

Gerdes v. Swift-Eckrich, Inc.[76] is a typical case in which the court dismissed a perceived disability claim, but nevertheless assumed that the "qualified individual" standards apply. In *Gerdes*, a maintenance supervisor at a meat-processing plant claimed that "his employer failed to accommodate his perceived disability" by not modifying his job to meet the physical limits imposed by his nondisabling coronary-artery disease.[77] The court agreed that the plaintiff was entitled to the

74. *See, e.g.*, McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1523–26 (N.D. Tex. 1996) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by an employee with nondisabling sarcoidosis, but denying the claim because reassignment was the only possible accommodation and no other jobs were available); Adams v. Budget Rent A Car Sys., Inc., No. C-95-1140 DLJ, 1996 WL 549399, at *4–5 (N.D. Cal. Apr. 11, 1996) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by a customer service representative with nondisabling tendinitis, but dismissing the claim because all requested accommodations were unreasonable or were not shown to improve performance); Lamury v. Boeing Co., No. 94-1225-PFK, 1995 WL 643835, at *6 (D. Kan. Oct. 5, 1995) (applying the reasonable accommodations and essential functions rules to a perceived disability claim, but denying the claim because "[e]ven if [the plaintiff] is regarded as disabled under the ADA, there is no evidence that [the employer] could have made reasonable accommodation for her in her former position of sheet metal assembler"); *see also* Joe v. West, No. 97-1975, 1998 WL 77770, at *1–2 (4th Cir. Feb. 24, 1998) (affirming the lower court's application of the reasonable accommodations and essential functions rules to a perceived disability claim by a medical data technician with eye strain and holding that the plaintiff failed to create a triable issue of fact concerning whether she could perform the essential functions with an accommodation).

75. *See, e.g.*, Porter v. Mesquite Indep. Sch. Dist., No. 96-CV-3311-BF, 1998 WL 329361, at *5–9 (N.D. Tex. June 11, 1998) (applying the reasonable accommodations and essential functions rules to a perceived disability claim by a music teacher with a nondisabling knee and back injury, but denying the claim because, inter alia, the employer adequately accommodated by rearranging the teacher's class schedule and by limiting her classes and extracurricular activities); *see also* Corrigan v. Perry, No. 97-1511, 1998 WL 129929, at *7 (4th Cir. Mar. 24, 1998) (applying the reasonable accommodations and essential functions rules to a material handler's perceived disability claim under the Rehabilitation Act, but dismissing the claim because the plaintiff "fail[ed] to establish that he was denied reasonable accommodation" for his nondisabling back and neck injuries and because the employer adequately accommodated through limited duty and job restructuring).

76. 949 F. Supp. 1386, 1399 (N.D. Iowa 1996), *aff'd*, 125 F.3d 634 (8th Cir. 1997).

77. *Id.*

reasonable accommodations right and the essential functions limit.[78] Although the court ultimately granted the employer summary judgment because, among other things, no reasonable accommodations would allow the employee to perform the job, the court assumed that the employee had a right to reasonable accommodations in the first place,[79] rather than treating the plaintiff like our nondisabled Employee *C* and dismissing the claim at the outset.

Many other courts, while not yet holding explicitly that the reasonable accommodations and essential functions rules apply to perceived disability claims, have at least reached this conclusion implicitly. They have done so by providing a single analysis of the "qualified individual" test when a plaintiff brings alternative claims of actual and perceived disability discrimination in the same case.[80] In

78. *See id.* at 1401–02 (holding that even if the employee "could generate a genuine issue of material fact as to perceived disability, he would still be required to show that he is . . . a 'qualified individual with a disability' in order to invoke protection under Title I of the ADA" and that "[t]he ADA defines a 'qualified individual with a disability' as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires' " (internal citations and emphasis omitted) (quoting 42 U.S.C. §§ 12111(8), 12112(a) (1994))).

79. *See id.* at 1399. The Eighth Circuit affirmed because the plaintiff could not prove that a perceived disability existed; therefore, the court did not need to address the appropriate qualification standards. *See Gerdes*, 125 F.3d at 637–38. Nevertheless, the Eighth Circuit indicated in dicta that the reasonable accommodations and essential functions rules would apply. *See id.* at 636–37. Even though the court noted that the plaintiff "does not assert that he is actually disabled, but rests his ADA claim on the premise that [the employer] regarded him as such," *id.* at 637 n.5, the court still stated that, "[t]o establish a prima facie case of discrimination under the ADA, [the plaintiff] must show . . . that he is qualified to perform the essential functions of the job with or without accommodation," *id.* at 637 & n.4 (citation omitted).

80. *See, e.g.*, Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 802, 805–09 (5th Cir. 1997) (providing a single analysis of the "qualified individual" test for both the actual and perceived disability claims of an "expediter," who assisted manufacturers by delivering supplies, unloading trucks, and storing inventory, but dismissing both claims because the job alterations or new job that the plaintiff sought for his heart problems were unreasonable accommodations as a matter of law); Rogers v. International Marine Terminals, Inc., 87 F.3d 755, 759–60 & n.3 (5th Cir. 1996) (holding that the plaintiff's failure to identify a reasonable accommodation that would allow him to perform a mechanic's job with an ankle injury required dismissal of his actual disability claim and "also dispose[d] of" his perceived disability claim); Pellack v. Thorek Hosp. & Med. Ctr., 9 F. Supp. 2d 984, 988–90 (N.D. Ill. 1998) (providing a single analysis of the "qualified individual" test for both the actual and perceived disability claims of a medical assistant with foot impairments, but dismissing both claims because, inter alia, the employer reasonably accommodated the plaintiff by reassigning her to a receptionist job); Kalekiristos v. CTF Hotel Management Corp., 958 F. Supp. 641, 655–64 (D.D.C. 1997) (providing a single analysis of the "qualified individual" test for both the actual and perceived disability claims of a laundry attendant with back pain, but dismissing both

Doll v. Brown,[81] for example, an electrician who lost his larynx from cancer claimed that his employer discriminated against him by denying him a promotion because of his actual disability, or, in the alternative, because of his perceived disability. The court denied the employer's summary judgment motion on *both* claims because a triable question of fact existed as to whether the employer "excluded plaintiff from promotion without ever considering whether or not he could perform the position of foreman *with* accommodation."[82] Similarly, in *Smith v. Kitterman, Inc.*,[83] the court found a triable issue of fact as to whether the plaintiff could perform the essential manual functions of a secondary operator with reasonable job restructuring, part-time or modified work schedules, reassignment, or modified equipment or devices to accommodate her carpal tunnel syndrome. That finding precluded the employer's summary judgment motion on both the plaintiff's actual and perceived disability claims, indicating the court's implicit view that the reasonable accommodations and essential functions rules apply identically to both.[84]

In an even greater number of cases, courts at least have taken this interpretational stance in dicta. These courts referred to the "qualified individual" definition as the governing test for a perceived disability claim (or for both an actual and a perceived disability claim), but did not apply the test because the case could be decided on other grounds. In some cases, courts did not apply the difference-based qualification standards to perceived disability claims because the plaintiffs failed to prove that the employers regarded them as truly disabled.[85] In other cases, courts did not apply the difference-

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claims because, inter alia, the employer provided a reasonable accommodation), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997) (unpublished table decision); Marschand v. Norfolk & W. Ry. Co., 876 F. Supp. 1528, 1537–44 (N.D. Ind. 1995) (providing a single analysis of the "qualified individual" test for both the actual and perceived disability claims of a train engineer with post-traumatic stress disorder, but dismissing both claims because, inter alia, the employer provided all accommodations required), *aff'd*, 81 F.3d 714 (7th Cir. 1996); *see also* Cook v. Rhode Island, 10 F.3d 17, 26–28 & 27 n.11 (1st Cir. 1993) (providing a single analysis of the Rehabilitation Act's "qualified individual" test for both the actual and perceived disability claims of an institutional attendant who was terminated for being morbidly obese); Chandler v. City of Dallas, 2 F.3d 1385, 1390–91, 1393 (5th Cir. 1993) (providing a single analysis of the Rehabilitation Act's "qualified individual" test for both the actual and perceived disability claims of a plaintiff with insulin-dependent diabetes and a plaintiff with poor eyesight who both sought driver positions).

81. No. 93-C-4410, 1994 WL 323307, at *4–5, *7 (N.D. Ill. June 24, 1994), *rev'd in part on other grounds*, 75 F.3d 1200 (7th Cir. 1996).

82. *Id.* (emphasis added).

83. 897 F. Supp. 423, 429–30 (W.D. Mo. 1995).

84. *See id.*

85. *See, e.g.*, Cody v. Cigna Healthcare of St. Louis, Inc., 139 F.3d 595, 596, 598–99

based qualification standards to the perceived disability claims because the plaintiffs alleged the ability to do the job without accommodation.[86] Nevertheless, these cases are significant. They illustrate the overwhelming tendency for courts automatically to apply the terms of the "qualified individual" test identically to actual and perceived disability claims. Thus, these cases provide further evidence that the majority of courts would treat our hypothetical Employee *B* (the misperceived but otherwise nondisabled worker)

(8th Cir. 1998) (noting in dicta that the ADA's reasonable accommodations and essential functions rules applied to both the actual and perceived disability claims of a nurse with depression and anxiety, but not applying the rules to the latter claim because the plaintiff failed to demonstrate a perceived disability); Walker v. Consolidated Biscuit Co., No. 96-3747, 1997 WL 359054, at *3–4 (6th Cir. June 26, 1997) (same decision for a plaintiff with rosacea); Webb v. Mercy Hosp., 102 F.3d 958, 959 (8th Cir. 1996) (same decision for a nurse who was dismissed for disruptive behavior); Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 911, 915 (11th Cir. 1996) (same decision for a plaintiff with malignant lymphoma); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1443 (10th Cir. 1996) (same decision for an airplane mechanic with impaired vision); Gaddy v. Four B Corp., 953 F. Supp. 331, 336 (D. Kan. 1997) (same decision for a courtesy clerk with asthma); McIntosh v. Brookdale Hosp. Med. Ctr., 942 F. Supp. 813, 819–22 (E.D.N.Y. 1996) (same decision for a registered nurse with hypertension), *aff'd*, 125 F.3d 844 (2d Cir. 1997) (unpublished table decision); *see also* Partlow v. Runyon, 826 F. Supp. 40, 43, 46 (D.N.H. 1993) (noting in dicta that the Rehabilitation Act's reasonable accommodations and essential functions rules applied to the perceived disability claim of an auto mechanic with degenerative joint disease, but finding it "unnecessary to address the availability of reasonable accommodations" because the plaintiff failed to demonstrate a perceived disability). Arguably, the United States Supreme Court recently made this same implicit assumption in *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2144 (1999) (citing the single definition of a "qualified individual with a disability" and, "[i]n turn," citing to both the actual and perceived disability portions of the "disability" definition).

86. *See, e.g.*, Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1233 (9th Cir. 1998) (noting in dicta that the reasonable accommodations and essential functions rules applied to both the actual and perceived disability claims of a monocular-visioned truck driver, but having no need to apply the rules because the plaintiff could do the job without accommodation), *rev'd on other grounds*, 119 S. Ct. 2162 (1999); Doane v. City of Omaha, 115 F.3d 624, 625–28 (8th Cir. 1997) (same decision for a police officer who was blind in one eye), *overruled on other grounds by Sutton*, 119 S. Ct. at 2143; EEOC v. Texas Bus Lines, 923 F. Supp. 965, 969–74 (S.D. Tex. 1996) (same decision for a morbidly obese van driver); *see also* Polesnak v. R.H. Management Sys., Inc., No. Civ. A. 95-1705, 1997 WL 109245, at *4 (W.D. Pa. Jan. 3, 1997) (noting in dicta that the reasonable accommodations and essential functions rules applied to both the "real or perceived disability" claims of an obese restaurant manager, but finding no need to apply at least the accommodations rule because the plaintiff "was otherwise qualified to perform the essential functions of a restaurant manager" without accommodation); Schnake v. Johnson County Community College, 961 F. Supp. 1478, 1481–82 (D. Kan. 1997) (same decision for an administrative secretary with erratic behavior); Lee v. Trustees of Dartmouth College, 958 F. Supp. 37, 40, 43–45 (D.N.H. 1997) (noting in dicta that the Rehabilitation Act's reasonable accommodations and essential functions rules applied to the plaintiff's perceived disability claim, but finding no need to apply the rules because the plaintiff could do the job without accommodations).

just like Employee *A* (the worker with an actual disability), rather than like Employee *C* (the correctly perceived, nondisabled worker). This majority assumption that the "qualified individual" test applies identically to actual and perceived disabilities appears to be shared by plaintiffs (and the plaintiffs' bar) as well.[87]

Very recently, however, a small minority of courts have started to reject this majority interpretation.[88] Despite the ADA's single definition of a "qualified individual," these courts have questioned the appropriateness of mechanically applying the reasonable accommodations and essential functions rules to perceived disability claims. Instead, these courts have interpreted the ADA to reach an

87. In some cases, courts did not issue dicta on whether the qualification rules applied to perceived disability cases when the case could be dismissed on other grounds. Nevertheless, those cases at least illustrate the *plaintiffs'* consistent belief that the reasonable accommodations and essential functions rules apply to their perceived disability claims. *See, e.g.*, Witter v. Delta Air Lines, Inc., 138 F.3d 1366, 1369 (11th Cir. 1998) (dismissing a perceived disability claim by a pilot with psychological conditions for failure to demonstrate a perceived disability and, therefore, not addressing the plaintiff's allegation that the employer "discriminated against him on the basis of a perceived disability by . . . not offering a reasonable accommodation"); Yinger v. City of Dearborn, No. 96-2384, 1997 WL 735323, at *1 (6th Cir. Nov. 18, 1997) (dismissing on res judicata grounds a perceived disability claim by a police officer with a paranoid personality disorder and, therefore, not addressing the plaintiff's allegation "that defendants . . . failed to accommodate his perceived disability in violation of the ADA"); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1441 (W.D. Wis. 1996) (noting arguments by both parties that assumed that the reasonable accommodations and essential functions rules would apply identically to the plaintiff's actual and perceived disability claims, but not addressing the qualification issue because the plaintiff failed to demonstrate that his diabetes was an actual or perceived disability); *see also* Lewin v. Medical College of Hampton Rds., 910 F. Supp. 1161, 1170–71 (E.D. Va. 1996) (dismissing a perceived disability claim by a medical student with psychological conditions because the alleged perceived disability did not meet the Rehabilitation Act's requirements and, therefore, not addressing the plaintiff's allegation that the school discriminated by not "attempting to make a reasonable accommodation for that perceived disability"), *aff'd*, 131 F.3d 135 (4th Cir. 1997) (unpublished table decision); Biddle v. Rubin, No. 95-C-1505, 1996 WL 14001, *10–11 (N.D. Ill. Jan. 9, 1996) (dismissing a perceived disability claim by a national bank examiner who was fired for sexual harassment because the plaintiff failed to demonstrate a perceived disability under the Rehabilitation Act and, therefore, not addressing the plaintiff's allegation that the employer "was obligated to determine . . . whether a reasonable accommodation of the perceived condition was possible").

88. *See, e.g.*, Weber v. Strippit, Inc., 186 F.3d 907, 915–17 (8th Cir. 1999), *cert. denied*, 120 S. Ct 794 (2000); Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 199, 208 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc); Keck v. New York State Office of Alcoholism & Substance Abuse Servs., 10 F. Supp. 2d 194, 198 (N.D.N.Y. 1998) (dicta); Wilson v. Georgia-Pacific Corp., 4 F. Supp. 2d 1164, 1172 (N.D. Ga. 1998); Coleman v. Keebler Co., 997 F. Supp. 1102, 1119 (N.D. Ind. 1998); Balliett v. Heydt, Nos. Civ. A. 95-5184, 95-7182, 1997 WL 611609, at *6 (E.D. Pa. Sept. 25, 1997) (mem.), *aff'd sub nom.* Balliet v. Heydt, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision), *cert. denied*, 120 S. Ct. 186 (1999); Cannizzaro v. Neiman Marcus, Inc., 979 F. Supp. 465, 475 (N.D. Tex. 1997) (dicta).

outcome at the opposite extreme by altogether denying the claims of perceived disability plaintiffs who seek accommodation on the job. This new interpretation—the "nothing" approach—leaves the Employee *B*s of the workforce without any remedy at all.

The most significant of these cases is the Third Circuit's decision in *Deane v. Pocono Medical Center*.[89] Stacy Deane's situation was in many ways like that of our hypothetical Employee *B*, the misperceived but otherwise nondisabled worker. Deane was working as a registered nurse at the Pocono Medical Center when a patient grabbed and twisted her wrist, causing a sprain and tearing cartilage.[90] After Deane took time off to rehabilitate the injury, her physician released her back to "light duty," but her residual injury left her unable to lift more than fifteen to twenty pounds.[91] The Medical Center decided that it could not accommodate Deane's limitations in her old position.[92] Because there were no alternative job openings for a registered nurse, the Medical Center told Deane that she could not return to work because of her "handicap" and terminated her employment.[93] Deane sued the Medical Center for disability discrimination under the ADA.[94]

By the time Deane's case reached the Third Circuit, she had abandoned any claim of actual disability.[95] Although Deane's wrist injury was clearly an "impairment,"[96] the injury did not substantially limit any major life activities.[97] Instead, Deane argued that the Medical Center mistakenly "regarded her" as disabled by viewing her limitations as "far worse than they actually were."[98] Although she agreed that she could not do her old nursing job as designed, Deane

89. 7 AD Cases (BNA) 198, 199–200, 208 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc). For a general discussion of *Deane*, see Dudley, *supra* note 63, at 399–408.

90. *See Deane*, 7 AD Cases (BNA) at 200.

91. *Id.* (internal quotation marks omitted). Deane was also unable to perform repetitive manual tasks, such as typing, *see id.*, but that limit did not play a role in the court's analysis.

92. *See id.*

93. *Id.* (internal quotation marks omitted).

94. *See id.*

95. *See id.*

96. 29 C.F.R. pt. 1630 app. § 1630.2(h)(1) (1999) (defining physical impairment).

97. *See Deane*, 7 AD Cases (BNA) at 201.

98. *Id.* Specifically, Deane alleged that the Medical Center incorrectly

> believed that she was unable to lift more than ten pounds, push or pull anything, assist patients in emergency situations, move or assist patients in the activities of daily living, perform any patient care job at [the Medical Center] or any other hospital, perform CPR, use the rest of her body to assist patients, work with psychiatric patients, or use medical equipment.

Id.

claimed that she could do the job with a reasonable accommodation for her lifting restriction.[99] Deane claimed that the Medical Center discriminated against her on the basis of a perceived disability by failing to accommodate her and by terminating her employment.[100] Although Deane conceded that she was not actually disabled, she nevertheless claimed that she was entitled to an accommodation for her nondisabling wrist injury in order to perform the job's essential lifting tasks.[101] As in most perceived disability cases, neither the defendant-employer nor the district court questioned this fundamental assertion.[102]

Nevertheless, the Third Circuit panel decided to raise the issue sua sponte. The court correctly noted first that the ADA requires the plaintiff to show a disability—which Deane could do by proving that the Medical Center regarded her as disabled—and, second, that the ADA requires the plaintiff to be a "qualified individual" for the job.[103] While the court correctly quoted the ADA's definition of a "qualified individual" as one who, " 'with or without reasonable accommodation, can perform the essential functions of the employment position,' "[104] the majority did *not* apply that definition mechanically to the plaintiff's case, as nearly all prior courts had done.

The *Deane* court began with the "common sense notion" that any employee, "disabled or otherwise," must be able to perform *all* job functions, unless the law removes that obligation.[105] The court

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99. *See id.* at 201, 207, 210. Specifically, Deane suggested that the Medical Center should have provided her with one of the following accommodations:

> (1) the use of an assistant to help her move or lift patients; (2) the implementation of a functional nursing approach, in which nurses would perform only certain types of nursing tasks; and (3) the use of a Hoyer lift to move or lift patients . . . [or] transfer[] to another unit within the medical center such as the pediatrics, oncology, or nursery units, which would not have required heavy lifting.

Id. at 201.

100. *See id.* at 200.

101. *See id.* at 201.

102. *See id.* at 211 (Becker, J., dissenting) (noting that the issue of whether "a 'regarded as' plaintiff is not statutorily entitled to an accommodation . . . was not briefed by the parties"). The district court granted summary judgment to the Medical Center on grounds unrelated to the accommodations or essential functions issues. *See id.* at 204. The district court held, among other things, that Deane failed to establish the first ADA requirement of a "disability" because she could not show that the Medical Center erroneously believed that her wrist injury substantially limited a major life activity. *See id.*

103. *See id.* at 202, 205.

104. *Id.* at 205 (quoting 42 U.S.C. § 12111(8) (1994)).

105. *Id.* at 206.

had no doubt that the ADA removed that obligation for individuals with actual disabilities. For such individuals, the court explained, "Congress recognized that reasonable accommodations would often be necessary to, in a sense, compensate for the individual's disability and allow him or her to compete with the non-disabled."[106] The court viewed the essential functions limit as one such accommodation.[107] In other words, excusing an employee from performing marginal job functions was itself a form of reasonable accommodation that helped " 'level the playing field' " for the actually disabled.[108]

Because Deane's impairment did not "rise to the level of being a[n actual] disability," the court viewed Deane as "at most statutorily disabled."[109] The court explained that, were it not for her employer's misperception, Deane would not have been protected by the ADA at all.[110] Even though Deane had a nondisabling impairment that affected her job performance, the court did not believe that her's was the type of impairment that needed accommodating in order to achieve equal opportunity.[111] Accordingly, the court held that the reasonable accommodations right and the essential functions limit do not apply to perceived disability claims at all.[112] The court held that "if an individual is perceived to be but is not actually disabled, he or she cannot be considered a 'qualified individual with a disability' unless he or she can, without accommodation, perform all the essential as well as the marginal functions of the position held or

106. *Id.* at 208.

107. *See id.* at 206.

108. *Id.* at 206, 208 (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995)).

109. *Id.* at 208.

110. *See id.*

111. *See id.* at 207–08 (explaining that, because "the ADA requires an employer to accommodate only those limitations caused by the individual's disability," "[o]nce accommodated . . . , an individual should be on an equal playing field with others and thereafter would be on his or her own to deal with any non-disabling impairments just as would any similarly impaired person without a disability").

112. *See id.* at 209. Judge Becker dissented on the essential functions issue. *See id.* at 211–16 (Becker, J., dissenting). On the reasonable accommodations issue, he agreed to "assume arguendo that the majority is correct that a 'regarded as' plaintiff is not statutorily entitled to an accommodation." *Id.* at 211 (Becker, J., dissenting). Nevertheless, he noted his "uncertainty" about the question, which was "not briefed by the parties" and which could have "wider, unforeseen ramifications that would render this holding unwise." *Id.* (Becker, J., dissenting). The parties' silence did not deter Judge Becker from taking a position on the essential functions issue, on which he disagreed with the majority opinion. Judge Becker concluded that the plain language of the statute required the court to apply the essential functions limit to perceived disability claims. *See id.* at 211 (Becker, J., dissenting). For analysis of this statutory interpretation question, see *infra* Part III.A.

sought."[113] To hold otherwise, the court concluded, would give a perceived disability plaintiff an "undeserved windfall."[114] Therefore, because Stacy Deane needed accommodations to do her nursing job, the court affirmed summary judgment for the Medical Center.[115] Thus, for purposes of the reasonable accommodations and essential functions rules, the *Deane* panel holding would treat our hypothetical Employee *B*, whose only disability is in the employer's mind, just like our nondisabled Employee *C*, rather than our actually disabled Employee *A*, thereby leaving Employee *B* with neither a claim nor a remedy under the ADA.

The *Deane* panel's groundbreaking decision ultimately did not prevail. The Third Circuit granted rehearing en banc, and the en banc court unraveled the panel's decision.[116] The en banc court first reversed the panel's holding on the essential functions rule, instead adopting the mainstream view that a perceived disability plaintiff need only perform the essential job functions, just like a plaintiff who has an actual disability.[117] Based on that decision, the court only had to decide the reasonable accommodations issue if the task that Deane could not perform (lifting patients) was an essential function of her nursing job. The en banc court remanded for a ruling on that essential functions question, thereby avoiding a decision on whether plaintiffs with perceived disabilities have a right to reasonable accommodation.[118]

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113. *Deane*, 7 AD Cases (BNA) at 209.

114. *Id.* at 208.

115. *See id.* at 205, 207, 210.

116. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 142–49 (3d Cir. 1998) (en banc).

117. *See id.* at 140, 146–47 (holding "that the plain language of the ADA requires proof only of a [perceived disability] plaintiff['s] ability to perform a position's essential functions"). Interestingly, neither party supported the panel's position that a perceived disability plaintiff must perform all job functions to be deemed qualified. *See id.* at 140. For further discussion of the statutory interpretation arguments, see *infra* Part III.A.

118. *See Deane*, 142 F.3d at 140–41, 148 n.12 ("[A]s resolution of [the reasonable accommodations] issue is not necessary to final disposition of this appeal, we will not decide it."). Judge Greenberg dissented from this portion of the en banc decision. *See id.* at 150 (Greenberg, J., dissenting). He would have taken the opportunity to decide the reasonable accommodations issue, and he would have concluded, as the vacated panel majority had, that "Congress did not pass the ADA to permit persons without a disability to demand accommodations." *Id.* (Greenberg, J., dissenting). *Deane* is not the only case in which a court has "decided not to decide" when confronted head-on with the "unfair advantage" question. *See, e.g.*, Lee v. Publix Supermarkets, Inc., No. 95-40474-RH, 1998 WL 344377, at *4 n.11 (N.D. Fla. Mar. 16, 1998) (acknowledging that "[t]here is some question as to whether [the plaintiff] would be entitled to reasonable accommodation if he did not in fact suffer from a disability, but was merely perceived as being disabled," but declining to answer the question); *see also* Mitchell v. Crowell, 966 F. Supp. 1071, 1079 n.9 (N.D. Ala. 1996) (stating that "the court need not decide the issue of whether one who is

After the Third Circuit's en banc decision, there is not a single circuit court that has accepted the so-called "unfair advantage" critique. Only one circuit court has declined to apply the reasonable accommodations rule to perceived disabilities,[119] and no circuit court has questioned the applicability of the essential functions rule. Although district courts within the Third Circuit were bound to follow the *Deane* panel decision before it was vacated en banc,[120] their application of the reasonable accommodations rule to perceived disability claims has now lost its foundation, and their application of the essential functions rule is now defunct. Of the very small number of district courts in other circuits that have questioned the mainstream interpretation, most have done so by using the reasoning of the later-vacated *Deane* panel decision.[121] Only a few district courts have concluded without reference to the *Deane* panel opinion that the reasonable accommodations right does not apply to perceived disabilities, and those courts have done so without meaningful analysis.[122] No district court independently has reached

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perceived as 'disabled' is entitled to reasonable accommodation" under the Rehabilitation Act because, even if the right existed, there was no way to reasonably accommodate a public safety officer whose psychological problems prevented her from obtaining security clearance).

119. *See* Weber v. Strippit, Inc., 186 F.3d 907, 915–17 (8th Cir. 1999) (holding that the district court did not err in failing to give the jury a "reasonable accommodation" instruction for the plaintiff's perceived disability claim because "an employer need only accommodate actual disabilities"), *cert. denied*, 120 S. Ct. 794 (2000). Whether the right to reasonable accommodations applies to perceived disability claims remains unresolved in the Third Circuit. *See* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 195–96 (3d Cir. 1999) (stating that "[w]e have yet to resolve" the issue of "whether a 'regarded as' plaintiff is entitled to accommodation even though he is not disabled"); Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 153 n.2 (3d Cir. 1999) ("[I]t remains an open question in this circuit whether employees are entitled to accommodations if they can only satisfy the 'regarded as' prong for demonstrating a disability.").

120. *See, e.g.*, Balliett v. Heydt, Nos. Civ. A. 95-5184, 95-7182, 1997 WL 611609, at *6 (E.D. Pa. Sept. 25, 1997) (mem.) (dismissing a claim by a police officer seeking accommodations for a perceived mental disability because, "[p]ursuant to *Deane*, ... defendants are not required to provide a reasonable accommodation for 'regarding' plaintiff as disabled"), *aff'd sub nom.* Balliet v. Heydt, 176 F.3d 471 (3d Cir. 1999) (unpublished table decision), *cert. denied*, 120 S. Ct. 186 (1999); Kotas v. Eastman Kodak Co., No. Civ. A. 95-CV-1634, 1997 WL 570907, at *9 (E.D. Pa. Sept. 4, 1997) (mem.) (noting in dicta the *Deane* panel's rule that perceived disability claims are not governed by the reasonable accommodations and essential functions rules), *aff'd*, 166 F.3d 1205 (3d Cir. 1998) (unpublished table decision).

121. *See, e.g.*, Coleman v. Keebler Co., 997 F. Supp. 1102, 1119 (N.D. Ind. 1998) (citing the *Deane* panel decision, as quoted in *Balliett*, 1997 WL 611609, at *6, to support the position that perceived disability claimants are not entitled to reasonable accommodations).

122. *See, e.g.*, Matlock v. City of Dallas, No. Civ. A. 3:97-CV-2735, 1999 WL 1032601, at *5 (N.D. Tex. Nov. 12, 1999) (mem.) (following *Weber*, 186 F.3d at 917, to deny a claim

the *Deane* panel's conclusion that the essential functions limit does not apply to perceived disability claims. Thus, the overwhelming weight of current authority supports an identical application of the difference-based qualification standards to both actual and perceived disability claims (the "all" approach); a very limited amount of authority supports an absolute bar on applying the rules to perceived disabilities (the "nothing" approach); and virtually no authority exists for any position in between those two extremes.

Courts have reached these conclusions largely without the guidance of the EEOC. The EEOC "has not taken an official position" on whether the reasonable accommodations and essential functions rules should apply to perceived disability claims under the ADA.[123] But the EEOC has taken a stance on perceived disability claims under the portion of the Rehabilitation Act that prohibits disability discrimination by federal agencies.[124] In a series of EEOC decisions on appeal from federal agencies, the EEOC adopted half of the "all" approach and half of the "nothing" approach by holding (without developed analysis) that a perceived disability plaintiff *is* entitled to the essential functions limit, but is *not* entitled to the reasonable accommodations right.[125] With respect to the

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by a police officer seeking accommodation for his perceived hearing disability); Keck v. New York State Office of Alcoholism & Substance Abuse Servs., 10 F. Supp. 2d 194, 198 (N.D.N.Y. 1998) (stating in dicta, without analysis or authority, that there "can be no claim of discrimination based on failure to accommodate a disability where there is no actual disability"); Wilson v. Georgia-Pacific Corp., 4 F. Supp. 2d 1164, 1172 (N.D. Ga. 1998) (holding that "where the employee informs the employer that he can no longer perform all of his job duties, the employer does not 'regard' plaintiff as disabled," and rather than triggering a duty to accommodate, "the 'regarded as disabled' component should generally disappear"); Cannizzaro v. Neiman Marcus, Inc., 979 F. Supp. 465, 475 (N.D. Tex. 1997) (citing a Rehabilitation Act case to conclude, in dicta, that "the duty to make a reasonable accommodation arises only when the individual is disabled" and that "no such duty arises when the individual merely is 'regarded as' being disabled as defined under the ADA"); *see also* Burch v. Henderson, No. 97-1095-CV-W-6, 2000 WL 97184, at *18 (W.D. Mo. Jan. 27, 2000) (relying on *Weber*, 186 F.3d at 917, to note in dicta that perceived disability plaintiffs do not have a right to accommodation under the Rehabilitation Act).

123. *Deane*, 142 F.3d at 148 n.12 (citing the EEOC's Amicus Curiae Brief).

124. *See* 29 U.S.C.A. § 791 (1999); *supra* note 18 (explaining the scope of this provision).

125. *See, e.g.*, Clair v. Apfel, No. 01961246, 1998 WL 56612, at *2 (EEOC Feb. 4, 1998) (stating that "an individual who is merely regarded as having a disability, and does not actually have such a substantially limiting impairment, does not require a reasonable accommodation" under the Rehabilitation Act); Huddy v. Runyon, No. 01953454, 1997 WL 348684, at *2 (EEOC June 19, 1997) (stating the same); Schultz v. Runyon, No. 01943634, 1996 WL 562981, at *10 (EEOC Sept. 26, 1996) (stating the same); Olsen v. Runyon, No. 01943977, 1995 WL 710567, at *6 (EEOC Nov. 29, 1995) (stating the same); Bookspan v. Dalton, No. 01933203, 1995 WL 384514, at *8 n.2 (EEOC June 22, 1995)

accommodations rule, the EEOC used the same liability focus as the majority's "all" interpretation, denying a cause of action altogether to perceived disability plaintiffs who need accommodations to perform the job.[126]

The next two Parts of this Article explain what is wrong with the majority's "all" approach, which interprets the ADA's qualification tests identically for actual and perceived disability claims. Part II argues that applying the reasonable accommodations right to perceived disability claims in exactly the same way as actual disability claims creates an unfair advantage that is inconsistent with the ADA's equal opportunity goal, and Part III makes the same argument for the essential functions rule.

II. DOES THE ADA UNFAIRLY ADVANTAGE PERCEIVED DISABILITY PLAINTIFFS BY GIVING THEM A RIGHT TO "REASONABLE ACCOMMODATIONS"?

The right to reasonable accommodations, as traditionally conceptualized, should not apply to perceived disability claims in exactly the same way that it applies to claims of actual disability. Although most courts have reached the opposite conclusion by cursory reference to the plain language of the statute, Section A demonstrates that a thorough analysis of the statute, the EEOC's regulations and guidelines, and the legislative history does not provide such a definitive answer. To the contrary, these sources support the view that perceived disability plaintiffs are *not* entitled to

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(stating the same); Adams v. Reno, No. 03940156, 1995 WL 56878, at *6 (EEOC Feb. 2, 1995) (stating the same); Crisostomo v. Bentsen, No. 01933372, 1994 WL 745883, at *6 (EEOC Sept. 1, 1994) (stating the same); Brown v. Runyon, No. 01934737, 1994 WL 746185, at *7 n.3 (EEOC Aug. 16, 1994) (stating the same); Howard v. Widnall, No. 01931905, 1994 WL 747979, at *5 (EEOC May 12, 1994) (stating the same); *see also Cannizzaro*, 979 F. Supp. at 475 (citing EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ADA CASE STUDY TRAINING: TRAINERS MANUAL, CASE STUDY 6 (1996), to support a holding that perceived disability plaintiffs have no right to reasonable accommodations).

Some have argued incorrectly that the Supreme Court already reached the opposite conclusion in a 1987 Rehabilitation Act case. *See, e.g., Deane*, 142 F.3d at 148 n.12 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 288–89 (1987)). That argument is incorrect because *Arline* did not address the issue. *Arline*, 480 U.S. at 288–89. *Arline* was decided under the "record of" prong of the Rehabilitation Act. *Id.* at 280–81. Although the Court commented at length on the "regarded as" prong, the case did not decide a perceived disability claim. *See id.* Although a portion of the Rehabilitation Act relied on by *Arline* has since been amended, *see* Shiring v. Runyon, 90 F.3d 827, 831–32 (3d Cir. 1996), the amendment also fails to address the issue of accommodating perceived disabilities, *see* 29 U.S.C. § 794(d) (1994).

126. *See, e.g., Huddy*, 1997 WL 348684, at *2 (holding that a perceived disability claim by a plaintiff needing workplace accommodations "would fail").

traditional forms of workplace accommodation. Section B bolsters this conclusion by comparing perceived disability claims to other forms of actionable employment discrimination under Title VII, which provides no equivalent right to accommodation. Section C explains why applying the accommodations right identically to employees with perceived and actual disabilities unfairly advantages perceived disability plaintiffs by singling them out on the basis of irrelevant individual characteristics, thereby exceeding the ADA's equal opportunity goal.

A. Lessons from the Statutory Text, Agency Guidelines, and Legislative Intent

As explained above, most courts have granted perceived disability plaintiffs the right to reasonable accommodations by mechanically applying the definition of a "qualified individual" to all discrimination claims, whether actual or perceived.[127] In fact, the statutory language is far more ambiguous. Most significantly, the statute does not indicate whether an employer must accommodate *any* performance limitation of a protected employee or only those limitations that are caused by the disability itself.[128] The ADA's general antidiscrimination rule prohibits employers from "discriminat[ing] against a qualified individual with a disability *because of the disability*."[129] One form of discrimination is "not

127. *See supra* notes 63–87 and accompanying text. The ADA's general antidiscrimination rule says that "[n]o covered entity shall discriminate against a qualified individual with a disability" regarding the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a) (1994). The ADA defines an "individual with a disability" to include those with substantially limiting impairments that are either actual *or* perceived. *Id.* § 12102(2)(A), (C). In turn, an individual with a disability is "qualified" if the individual can perform the essential job functions "with or without reasonable accommodation." *Id.* § 12111(8). By simply substituting the definitions for the terms in the general antidiscrimination rule, courts and commentators have concluded that an employer may not discriminate against a perceived disability plaintiff who can do the job with reasonable accommodations and that the failure to reasonably accommodate a perceived disability is a form of actionable discrimination. *See* Moberly, *supra* note 63, at 634 (arguing that the statutory language "strongly suggests that the ADA's reasonable accommodation requirement extends to some individuals who are protected under the perceived disability theory"); John M. Vande Walle, Note, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 919 & nn.191–92 (1998) (citing the definition of "qualified individual" in 42 U.S.C. § 12111(8) as the only support for concluding that "the act of perceiving the employee as disabled obligates the employer to make reasonable accommodation").

128. *See* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 207 (3d Cir. 1997), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc).

129. 42 U.S.C. § 12112(a) (emphasis added).

making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[130] Even if "disability" includes perceived disabilities, these two provisions arguably limit the employer's accommodation duty to only those limitations that are *caused by* the disability—either actual or perceived.[131] A perceived disability is defined by an employer's mistaken belief, not by any physical or mental characteristic of the employee. Accordingly, any performance limitations from a nondisabling impairment are not *caused by* the perceived disability, even if the nondisabling impairment is what triggered the employer's misperception.[132] Thus, an employer may not be discriminating against a perceived disability plaintiff "because of the disability" when the employer refuses to accommodate a nondisabling impairment that is not the statutory basis for the plaintiff's protected status.[133]

Because the statutory terms cannot answer this question definitively,[134] courts should look to additional interpretational sources.[135] The EEOC has issued implementing regulations, interpretive guidelines, and a technical assistance manual to help courts decipher Title I of the ADA.[136] As with the statute itself, a cursory reading of the EEOC's documents provides superficial

130. *Id.* § 12112(b)(5)(A).

131. *See Deane*, 7 AD Cases (BNA) at 207; *cf.* Bank of Am. Nat'l Trust & Sav. Ass'n. v. 203 N. Lasalle St. Partnership, 119 S. Ct. 1411, 1420 (1999) (interpreting the phrase "on account of" in the Bankruptcy Code consistent with its common meaning, "because of," which identifies "a causal relationship").

132. *See Deane*, 7 AD Cases (BNA) at 208.

133. *See id.*; *see also Deane*, 142 F.3d at 148 n.12 (noting the "considerable force" of the employer's argument that "it simply makes no sense to talk of accommodations for any physical impairments because, by definition, the impairments are not the statutory cause of the plaintiff's disability"); Alderson v. Postmaster Gen., 598 F. Supp. 49, 54–55 (W.D. Okla. 1984) (citing similar language in the Rehabilitation Act to hold that the Rehabilitation Act does not require employers to accommodate limitations of a perceived disability plaintiff).

134. *See* Moberly, *supra* note 63, at 641 ("Among the issues that cannot be resolved simply by reviewing the statutory language is the extent to which the employer's duty to accommodate extends to individuals who, while not actually disabled, are erroneously perceived to have a disability."); *id.* at 634 (noting that the statutory language "may not definitively resolve the issue").

135. A court may refer to legislative intent when the statutory language is ambiguous. *See Ex parte* Collett, 337 U.S. 55, 61 (1949). When the statute and congressional intent are unclear, courts should give effect to permissible constructions of the statute by administrative agencies. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

136. *See* 29 C.F.R. pt. 1630 (1999); *id.* pt. 1630 app.; EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3. For a discussion of the weight that courts give to these EEOC publications, see *supra* note 29.

support for applying the reasonable accommodations rule to perceived disabilities.[137] The EEOC regulations and guidelines both parrot the statutory definitions that seem to apply the single "qualified individual" test to both actual and perceived disability claims.[138] Upon closer inspection, however, the same ambiguities appear in the EEOC documents as in the statute itself.

Although the EEOC has not stated specifically whether plaintiffs with perceived disabilities have the same right as plaintiffs with actual disabilities to receive the traditional forms of operational workplace accommodation,[139] all of the EEOC's documents indicate that the answer is "no." The EEOC materials suggest, in even stronger terms than the statute, that an employer is obligated to accommodate only those vocational limitations that are *caused by* the disability. Like the statute, the EEOC regulations begin by articulating the general prohibition against "discriminat[ing] *on the basis of disability* against a qualified individual."[140] The EEOC's interpretive guidelines then restate the qualification test with even more explicit causal language than the statute.[141] According to the EEOC, "[a]n individual with a disability is 'otherwise qualified,' . . . if he or she is qualified for a job, except that, *because of the disability*, he or she needs a reasonable accommodation."[142] The EEOC then translates this qualification test into a description of the employer's obligations, explaining that "[e]mployers are obligated to make reasonable accommodation only to the physical or mental limitations *resulting from the disability* of a qualified individual with a disability."[143] When a qualified individual with a disability requests a reasonable accommodation, the EEOC directs the employer to ascertain "the precise job-related limitations *imposed by the individual's disability*" and to determine a way to

137. *See, e.g.*, Lee v. Trustees of Dartmouth College, 958 F. Supp. 37, 43 (D.N.H. 1997) (applying the reasonable accommodations rule to a perceived disability claim because the "regulations define a 'qualified handicapped person' as one who, 'with or without reasonable accommodation, can perform the essential functions of the position' " (quoting 29 C.F.R. § 1630.2(m)).

138. 29 C.F.R. § 1630.4 (prohibiting employment discrimination "against a qualified individual with a disability"); *id.* pt. 1630 app. § 1630.2(m) (same); *id.* § 1630.2(g) (defining an individual with a "disability" to include those with either actual or perceived disabilities); *id.* pt. 1630 app. § 1630.2(g) (same); *id.* § 1630.2(m) (defining a "[q]ualified individual with a disability" to include those who can perform the essential job functions, "with or without reasonable accommodation"); *id.* pt. 1630 app. § 1630.2(o) (same).

139. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (citing the EEOC's Amicus Curiae Brief).

140. 29 C.F.R. § 1630.4 (emphasis added).

141. *See id.* pt. 1630 app. § 1630.9.

142. *Id.* (emphasis added).

143. *Id.* (emphasis added).

accommodate and overcome only those particular performance limitations.[144] As the EEOC explains further in its technical assistance manual: "The reasonable accommodation obligation applies only to accommodations that reduce barriers to employment related to a person's disability; it does not apply to accommodations that a disabled person may request for some other reason."[145]

While these EEOC documents make no explicit distinction between actual and perceived disabilities, the connection between accommodations and disability-based limitations creates a very different result when applied to each type of disability. For individuals with actual disabilities, the "disability" is defined by the employee's substantially limiting impairment. Because the conventional workplace is designed unnecessarily around an able-bodied norm that excludes the different performance modes of employees with substantially limiting impairments, the employee's performance limitations are "because of," "resulting from," or "imposed by" the actual disability, thereby triggering the right to accommodation. That is not the case for individuals whose disabilities are only perceived. For perceived disability plaintiffs, the "disability" is defined by the employer's misperception, not by the employee's physical or mental impairment. If a perceived disability plaintiff happens to have a nondisabling impairment that limits job performance, those limitations are not "because of," "resulting from," or "imposed by" the plaintiff's "disability," which exists only in the form of the employer's misperception. Therefore, any such limitations should not trigger the right to traditional forms of operational workplace accommodation. The EEOC's link between accommodations and disability-based limitations should require perceived disability plaintiffs to deal with any nondisabling impairments on their own, "just as would any similarly impaired person without a disability."[146]

Although the statute and EEOC materials thus indicate that perceived disability plaintiffs should not have a right to traditional forms of workplace accommodation, neither source makes this conclusion explicit. Therefore, it is useful to analyze the legislative intent and statutory purpose to help clarify this ambiguity.[147]

144. *Id.* (emphasis added).

145. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.4, at III-4 (emphasis omitted).

146. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc).

147. *See Ex parte* Collett, 337 U.S. 55, 61 (1949) (stating, in a Federal Employees

Unfortunately, the legislative history of the perceived disability prong is sparse,[148] and, like the statute, it fails to address the issue directly.

Legislative silence on this issue may be traced back to the piecemeal development of the ADA's predecessor, the Rehabilitation Act of 1973.[149] The Rehabilitation Act, which prohibits disability discrimination in much of the public sector,[150] originally defined the protected category to include only those with actually disabling impairments.[151] The Rehabilitation Act required that the employee be "otherwise qualified"[152] for the job, and the implementing regulations defined "otherwise qualified" to mean that the individual must be able to perform the essential job functions "with or without reasonable accommodation."[153]

One year after enacting the Rehabilitation Act, Congress correctly recognized that individuals who mistakenly are regarded as disabled also face unequal employment opportunities, so Congress amended the Act to add perceived disabilities to the protected category.[154] Nevertheless, when Congress expanded the definition of who is "handicapped," it made no other substantive changes to the Act or its implementing regulations. The authors apparently assumed that once an employee with a perceived disability was deemed to be "handicapped," the rest of the Rehabilitation Act and its regulations would apply just as appropriately as for actual disabilities. There is no evidence that Congress considered whether the qualification

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Liability Act claim, the general principle that legislative history is instructive when statutory language is ambiguous).

148. *See* Risa M. Mish, *"Regarded as Disabled" Claims Under the ADA: Safety Net or Catch-All?*, 1 U. PA. J. LAB. & EMP. L. 159, 160 (1998); *see also Deane*, 7 AD Cases (BNA) at 202 (noting that there is "little legislative history to assist" courts in determining "the meaning and application of vague terms and concepts" in the ADA).

149. *See* 29 U.S.C. §§ 701–796 (1994).

150. *See supra* notes 17–20 and accompanying text.

151. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (originally codified at 29 U.S.C. § 706(6)(a) (1976)).

152. *Id.* § 504, 87 Stat. at 394 (originally codified as amended at 29 U.S.C. § 794 (1994)).

153. 45 C.F.R. § 84.3(k)(1) (1999).

154. *See* Amendments to the Rehabilitation Act of 1973, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 705(20)(B)(i)–(iii) (1999)). The Joint Conference Report for the 1974 Amendments explained that

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

S. REP. NO. 93-1297, at 39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389; *see also* School Bd. of Nassau County v. Arline, 480 U.S. 273, 278–79 (1987) (discussing the intent behind the 1974 Amendments).

standards made sense for perceived disabilities, even though the core concept of "reasonable accommodations" had been created solely with actual disabilities in mind. Evidently, Congress assumed that, because people with perceived disabilities face unequal employment opportunities, *all* of the Rehabilitation Act's substantive provisions—which originally were designed to provide equal opportunity to those with actual disabilities—would advance that goal just as well for those whose disabilities were only perceived.

Because Congress's primary objective for the ADA was to expand the Rehabilitation Act's protection into the private sector, Congress adopted the core structure, terms, and requirements of the Rehabilitation Act.[155] Although the ADA replaced the word "handicapped" with the word "disabled," the ADA otherwise incorporated the primary definitions directly from the amended Rehabilitation Act and its regulations.[156] Thus, the question of whether the reasonable accommodations aspect of the qualification test should apply to perceived disability claims remained unaddressed. While the drafters of both statutes clearly intended the reasonable accommodations rule as part of the "level playing field"

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155. *See* H.R. REP. NO. 101-485, pt. 2, at 28, 50, 54–55 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 303, 310, 332, 336–37 (emphasizing the need to eliminate discrimination in private sector employment); S. REP. NO. 101-116, at 5–6, 18–19 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (same); *id.* at 21, 26 (explaining that the definition of a "qualified individual with a disability" is comparable to the definition in the Rehabilitation Act's implementing regulations); 135 CONG. REC. 8520 (1989) (statement of Sen. Jeffords) (describing the ADA's goal to extend application of the Rehabilitation Act and other federal statutes into the private sector).

156. *See* H.R. REP. NO. 101-485, pt. 2, at 50–51, 1990 U.S.C.C.A.N. at 332–33; 136 CONG. REC. 10,857 (1990) (statement of Rep. Owens); 136 CONG. REC. 10,856 (1990) (statement of Rep. Hoyer); *see also* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2153 (1999) ("The [ADA's] definition of disability is drawn almost verbatim from the Rehabilitation Act of 1973." (internal quotation marks omitted)). *Compare* 42 U.S.C. § 12102(2) (1994) (defining the protected categories to include actual and perceived disabilities), *with* 29 U.S.C.A. § 705(20)(B) (1999) (same). *Compare* 42 U.S.C. § 12111(8) (defining a qualified individual as one who could perform essential job tasks "with or without reasonable accommodations"), *with* 29 C.F.R. § 1614.203(a)(6) (1999) (same), 41 C.F.R. § 60-741.2(t) (1999) (same), *and* 45 C.F.R. § 84.3(k)(1) (1999) (same). Congress used the word "disabilities" in the ADA, rather than the word "handicaps" that was used in the Rehabilitation Act, in order to "reflect[] the preference of persons with disabilities." 29 C.F.R. pt. 1630 app. § 1630.1(a). Subsequently, the same change was made to the Rehabilitation Act. *See* Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, sec. 403, § 6(9), 112 Stat. 1092, 1101 (codified as amended at 29 U.S.C.A. § 705(9) (1999)). Congress, however, intended the ADA's definition of a "disability" to be the same as the Rehabilitation Act's definition of an "individual with handicaps," and Congress intended case law under the Rehabilitation Act to apply to the ADA. *See* H.R. REP. NO. 101-485, pt. 3, at 27, 1990 U.S.C.C.A.N. at 450; *id.* pt. 2, at 50, 1990 U.S.C.C.A.N. at 332; S. REP. NO. 101-116, at 21; 29 C.F.R. pt. 1630 app. § 1630.2(g).

objective for actual disabilities, they apparently did not consider whether that provision would have the same effect for perceived disability claims.[157]

Congress's failure to consider the ramifications of applying the reasonable accommodations rule to perceived disability claims was made all the more likely by the shared congressional image of a "prototypic" perceived disability. Throughout the congressional discussions, legislators repeatedly referred to a limited number of easily understood illustrations to explain the need for the "regarded as" prong. Those examples all involved nondisabled individuals with misperceived impairments that did not otherwise impact the individuals' ability to perform any job functions.[158] For instance, legislators described adverse employment decisions taken against people with cosmetic impairments, such as burn scars, or with asymptomatic conditions, such as a symptomless back anomaly discovered on an x-ray.[159] As these examples illustrate, there is no indication that Congress "gave any thought whatsoever to individuals who . . . are not actually disabled but who are impaired to the extent that they would require accommodation,"[160] which makes it

157. If courts had addressed this issue under the Rehabilitation Act prior to Congress's enactment of the ADA, one could argue that Congress implicitly accepted the judicial interpretation by adopting the same language for the ADA. This argument fails, however, because there was virtually no case law on perceived disability claims under the Rehabilitation Act prior to the ADA's enactment. *See* Cook v. Rhode Island, 10 F.3d 17, 22 (1st Cir. 1993) (explaining that cases on perceived disability claims were "hen's-teeth rare"). The EEOC also had not taken a position on perceived disability plaintiffs' right to reasonable accommodations under the Rehabilitation Act until after Congress enacted the ADA. *See supra* notes 124–25 and accompanying text.

158. *See* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 203 n.11, 210 (3d Cir. 1997) (noting that "none of the examples provided by Congress indicates a concern for nondisabled individuals who are impaired so as to require accommodation"), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc). *But see id.* at 213 (Becker, J., dissenting) (arguing that discrimination against an individual with a nondisabling impairment that requires accommodation is "exactly the scenario the 'regarded as' claim was designed to prevent" because Congress viewed those individuals as most at risk of harm from myths, fears, and misperceptions).

159. *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 29–31, 1990 U.S.C.C.A.N. at 452–54; *id.* pt. 2, at 53, 1990 U.S.C.C.A.N. at 335–36; S. REP. NO. 101-116, at 24.

160. *Deane*, 7 AD Cases (BNA) at 203 n.11 (citing H.R. REP. NO. 101-485, pt. 3, at 29–33, 1990 U.S.C.C.A.N. at 452–56); *see also* Dudley, *supra* note 63, at 411 (arguing that an employee whose nondisabling impairment creates "a discernible work-production deficiency" does not "fit the 'regarded as' image" that Congress had in mind).

Some commentators have argued that Congress's silence on this issue proves that Congress affirmatively intended to exclude coverage for nondisabled individuals who have some form of limiting impairment. *See, e.g.*, *Deane*, 7 AD Cases (BNA) at 210, 203 n.11 (stating that because Congress illustrated the "regarded as" prong with examples of nondisabled individuals who could perform all job functions on their own, one could argue

unsurprising that Congress failed to consider the impact of the reasonable accommodations rule.

Although the legislative history does not answer the question directly, it does provide some indirect clues. At first blush, the history superficially supports the mainstream view that equates perceived and actual disabilities for all purposes, including reasonable accommodations. Congress acknowledged that a perceived disability may prevent someone from obtaining equal employment opportunities and that an employer's misperception can cause harm that is both real and substantial.[161] Through the perceived disability prong, Congress recognized that " 'society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.' "[162] Although an individual with a perceived disability lacks a substantially limiting impairment, Congress explained that the "reactions of others may prove just as disabling," and that the reactions can themselves " 'substantially limit that person's ability to work.' "[163]

Despite this general connection between actual and perceived

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that Congress must not have intended to protect individuals who have nondisabling impairments that need accommodation); Mish, *supra* note 148, at 161 (arguing that the ADA's language and legislative history "make clear that the 'regarded as disabled' provision is intended to benefit only those employees erroneously perceived to be disabled, and who are in fact fully able to perform the essential functions of that job"); Dudley, *supra* note 63, at 410 (arguing that the legislative history shows no intent to "confer[] protective status on individuals with an impairment that negatively affects their performance of requisite job functions merely because the employer considered the impairment in making his decision" and that Congress only intended to protect workers with impairments that do not "have any negative effect at all on the individual's ability to perform the functions of the job"). That argument proves too much. While it is correct that Congress did not consider this class of potential plaintiffs when enacting the "regarded as" prong, whether that omission was deliberate or not is speculation. *See Deane*, 7 AD Cases (BNA) at 203 n.11. While this Part of the Article agrees that perceived disability plaintiffs should not be entitled to traditional forms of accommodation, Part IV argues that the ADA does protect these individuals, just with a limited set of remedies.

161. *See, e.g.*, H.R. REP. NO. 101-485, pt. 3, at 29–31, 1990 U.S.C.C.A.N. at 452–53; *id.* pt. 2, at 53, 1990 U.S.C.C.A.N. at 335; S. REP. NO. 101-116, at 23–24.

162. S. REP. No. 101-116, at 23–24 (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987)); *see* H.R. REP. NO. 101-485, pt. 3, at 29–30, 1990 U.S.C.C.A.N. at 452–54 (same); *id.* 101-485, pt. 2, at 53, 1990 U.S.C.C.A.N. at 335 (same); 29 C.F.R. pt. 1630 app. § 1630.2(*l*) (1999) (same).

163. H.R. REP. NO. 101-485, pt. 3, at 30, 1990 U.S.C.C.A.N. at 453 (quoting *Arline*, 480 U.S. at 283–84); *see id.* pt. 2, at 53, 1990 U.S.C.C.A.N. at 335 (quoting *Arline*, 480 U.S. at 283, to articulate the rationale for the "regarded as" prong, which was based on the substantially limiting effect that misperceptions can have on otherwise-nondisabled individuals); S. REP. NO. 101-116, at 23–24 (same); 29 C.F.R. pt. 1630 app. § 1630.2(*l*) (same).

disabilities, a more comprehensive review of the legislative history shows that Congress indeed viewed perceived disabilities as quite different from those that are "real." While one purpose for protecting employees with actual disabilities was to eliminate the impact of the conventional workplace design,[164] the principle reason for protecting employees with perceived disabilities was to eliminate the impact of an employer's mistaken beliefs.[165] The perceived disability prong "focuses on the reactions and perceptions of the relevant decisionmakers," not on the functional limitations of the employee.[166] For perceived disabilities, the focus is solely on the employer's state of mind.[167]

Because perceived disabilities obtain protected status due to the disabling effects of the employer's misperceptions, perceived disability cases should not trigger the right to traditional, operational accommodations.[168] Congress viewed accommodations as a way "to

164. *See* H.R. REP. NO. 101-485, pt. 2, at 29, 1990 U.S.C.C.A.N. at 310–11 (stating that discrimination against people with disabilities "includes harms resulting from the construction of transportation, architectural, and communication barriers or the adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect"); S. REP. NO. 101-116, at 6 (same); 136 CONG. REC. 10,874 (1990) (statement of Rep. Matsui) (explaining that the ADA "will make the playing field a little more even for those with disabilities to compete in the workplace" because "[s]o many doors are now closed ... simply because their needs do not conform to the current rules of the game").

165. *See* H.R. REP. NO. 101-485, pt. 3, at 29–31, 1990 U.S.C.C.A.N. at 452–54 ("The perception of the covered entity is a key element of this test."); *id.* pt. 2, at 53, 1990 U.S.C.C.A.N. at 335–36 (focusing on the reactions that others have to an otherwise nondisabled individual); S. REP. NO. 101-116, at 23–24 (same).

166. Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 172 (4th Cir. 1997) (en banc), *overruled on other grounds by* Bragdon v. Abbott, 524 U.S. 624 (1998); *see* H.R. REP. NO. 101-485, pt. 3, at 30, 1990 U.S.C.C.A.N. at 452–53 (focusing on the employer rather than the employee); *id.* pt. 2, at 53, 1990 U.S.C.C.A.N. at 335 (focusing on the reactions that others have to an otherwise nondisabled individual); S. REP. NO. 101-116, at 23–24 (same); *see also* Olson v. General Elec. Astrospace, 101 F.3d 947, 953 (3d Cir. 1996) (stating that an impairment's effect on others is what defines a perceived disability claim); Kelly v. Drexel Univ., 94 F.3d 102, 108–09 (3d Cir. 1996) (explaining that the analysis of a perceived disability claim focuses not on the employee's abilities, "but rather on the reactions and perceptions of the persons interacting or working with him"); Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) ("The focus [of perceived disabilities] is on the impairment's effect upon the attitudes of others."); Byrne v. Board of Educ., Sch. of W. Allis-W. Milwaukee, 979 F.2d 560, 567 (7th Cir. 1992) (explaining that the perceived disability prong "focuses on the effect that the physical or mental condition has on others").

167. *See* H.R. REP. NO. 101-485, pt. 3, at 30–31, 1990 U.S.C.C.A.N. at 452–53; *see also* ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 1007 (1999) (commenting on the Rehabilitation Act and identifying the employer's state of mind as the core of the "regarded as" prong).

168. *See* HADLEY, *supra* note 167, at 1007 ("Because the focus is on the employer's state of mind, [perceived disability] cases do not raise true issues of reasonable

remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[169] This view implies that accommodations be given only for the actual source of the employee's statutorily defined "disability."[170] Like the EEOC's documents, the legislative history indicates that a causal link is needed between the disability and the performance limitations that the employer is obligated to accommodate.[171] For employees with actual disabilities, the source of the statutorily defined "disability" is the employee's substantially limiting physical or mental impairment.[172] Accordingly, traditional accommodations for actual disabilities involve physical, structural, or organizational modifications to the workplace to allow employees who do have substantially limiting impairments to compete in a conventional workplace designed for employees who do not. In contrast, the disabling attribute that creates unequal employment opportunity for perceived disability plaintiffs lies in the perceptual or social, rather than the operational, work environment. What makes a perceived disability plaintiff disabled "is not the individual's impairment, if impairment there be, but the employer's unfounded stereotypes, fear or simple misperception that the impairment is serious enough to be disabling."[173] While the employee's nondisabling impairment may have triggered the employer's mistaken belief, which in turn limits equal opportunity, the nondisabling impairment is not the statutorily defined source of the inequality that Congress intended the ADA to

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accommodation."); *id.* at 1012 ("When an employee is regarded as having a disabling condition she does not indeed possess there is no need for the agency to accommodate that condition.").

169. 29 C.F.R. pt. 1630 app. Background (1999); *see* H.R. REP. NO. 101-485, pt. 2, at 65, 1990 U.S.C.C.A.N. at 347–48 ("[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed."); S. REP. NO. 101-116, at 34 (same); *see also* Vande Walle, *supra* note 127, at 928 n.253 (summarizing the legislative history regarding congressional intent to remove barriers to the integrated participation of disabled individuals in the workplace).

170. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 (3d Cir. 1997) (concluding that congressional intent "virtually mandate[s]" that accommodations be given "only for that which actually renders an employee disabled" (citing 29 C.F.R. pt. 1630 app. Background)), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc).

171. *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 66, 1990 U.S.C.C.A.N. at 348 (stating that employers must "identif[y] the barriers to job performance caused by the disability"); S. REP. NO. 101-116, at 35 (same).

172. *See* 42 U.S.C. § 12102(2)(A) (1994).

173. *Deane*, 7 AD Cases (BNA) at 208; *see also* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.2, at III-2 (explaining that some people are restricted in employment opportunities "only by barriers in other people's minds").

prevent.[174]

Thus, Congress's focus on the employer's state of mind in perceived disability cases, in conjunction with the EEOC documents and statutory provisions linking accommodations to limits that are *caused by* the disability, indicates that traditional accommodations of the operational work environment should not apply to perceived disability claims. Our hypothetical Employee *B*, for example, should not be entitled to a redesigned gurney or an assistant to help lift patients because Employee *B*'s lifting limitation is caused by Employee *B*'s nondisabling carpal tunnel syndrome, not by the employer's disabling misperceptions about Employee *B*'s condition. That is not to say that individuals with nondisabling but "somehow limiting" impairments should not be covered by the ADA at all (that is, Employee *B* should not necessarily end up with exactly the same fate as our nondisabled Employee *C*). As discussed in Part IV, this critique demonstrates instead that perceived disability claims must be governed by a different conceptualization of the reasonable accommodations rule.

B. Comparing Perceived Disability Claims to Other Types of Actionable Employment Discrimination

Comparing disability discrimination to other types of employment discrimination provides further support for not granting reasonable accommodations in exactly the same way to perceived as to actual disability claims.[175] Although both perceived and actual disability discrimination have much in common with discrimination on the basis of other protected categories, perceived disability discrimination is the most analogous to conduct covered by other civil rights statutes, which do *not* provide a right to operational workplace

174. *See Deane*, 7 AD Cases (BNA) at 208.

175. In both Parts II.B and II.C, I undertake this type of comparison, recognizing the potentially significant problems in drawing analogies between different forms of discrimination. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397, 398–410 (explaining in particular how comparing sex discrimination to race discrimination inadvertently may marginalize and obscure the role of race and the unique history of racism). Yet analogies and comparisons are "necessary tools to teach and explain," to "deepen our consciousness," and to "permit us to progress in our thinking." *Id.* at 398, 400. Using analogies is thus a two-edged sword, "provid[ing] both the key to greater comprehension and the danger of false understanding." *Id.* at 398. By focusing primarily on the statutory approach to various forms of employment discrimination, Parts II.B and II.C represent an admittedly imperfect attempt to wield one edge of the sword without the other.

accommodations.[176]

The ADA and other civil rights statutes share the same goal of equal employment opportunity. The ADA's preamble begins by noting some general similarities between disability discrimination and "discrimination on the basis of race, color, sex, national origin, religion, or age."[177] Like the members of those other protected categories,

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[178]

Yet despite this sweeping analogy, disability discrimination is in some ways quite unique. Like the members of Title VII's protected categories, individuals with actual disabilities face inequality because of employer bias, myth, and misperception. But unlike members of Title VII's protected categories, individuals with actual disabilities also face "structural discrimination," which occurs when physical structures and social practices that are designed for a single group effectively exclude the members of another group,[179] and/or "dynamic discrimination," which occurs when a purportedly objective performance deficiency results solely from readily changeable

176. Title VII contains a very limited version of an accommodations right for religious-based discrimination. *See* 42 U.S.C. § 2000e(j) (1994) (prohibiting employment decisions based on religion "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"). Because religion raises constitutional questions under the Establishment Clause that are not raised in the disability context, however, courts have interpreted Title VII's religious accommodations provision extremely narrowly. *See* Karlan & Rutherglen, *supra* note 47, at 6–7. Because the religious accommodations provision in Title VII places employers "under only a very slight legal obligation," that provision is not comparable to the unique, broad accommodations rule in the ADA. *Id.*; *see also* H.R. REP. NO. 101-485, pt. 3, at 40, 1990 U.S.C.C.A.N. at 463 (distinguishing the ADA's "significant" accommodation duty from Title VII's "insignificant" duty to accommodate religious beliefs).

177. 42 U.S.C. § 12101(a)(4) (1994); *see id.* § 12101(a)(7) (describing the individuals with disabilities as "a discrete and insular minority").

178. *Id.* § 12101(a)(7).

179. Wasserman, *supra* note 13, at 178; *see also* H.R. REP. NO. 101-485, pt. 2, at 29, 1990 U.S.C.C.A.N. at 311 (describing structural forms of discrimination); S. REP. NO. 101-116, at 6 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (same).

organizational practices.[180] Thus, unlike other protected categories in which the defining characteristic of group membership is "rarely if ever relevant to an individual's ability to perform a given job," the substantially limiting impairments that define the disabled may, in some instances, be related to vocational capability.[181] It is not that actual disabilities necessarily limit a person's ability to do a job, but rather that the conventional workplace design often reflects an unstated "able-bodied" norm, which creates very real—albeit socially constructed—performance limitations.[182]

Because of the structural and/or dynamic discrimination faced by those with actual disabilities, a simple antidiscrimination mandate is insufficient to achieve equal employment opportunity for some individuals with substantially limiting impairments.[183] For that reason, the ADA's definition of "discrimination" includes the failure to reasonably accommodate.[184] The ADA's reasonable accommodations right correctly acknowledges the "social model of disability," which views the functional deficits associated with disability as "an alterable cultural artifact."[185] The duty to accommodate was needed to eliminate unnecessary barriers for

180. Kelman, *supra* note 13, at 1160–61, 1170–83 (describing forms of dynamic discrimination in general-ability job tests); *see also* H.R. REP. NO. 101-485, pt. 2, at 29, 1990 U.S.C.C.A.N. at 311 (describing dynamic forms of discrimination that result from "the adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect"); S. REP. NO. 101-116, at 6 (same).

181. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1428 (1991).

182. *See* Murphy, *supra* note 12, at 1614; *see also* Anita Silvers, *Formal Justice*, *in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY, *supra* note 13, at 13, 62 (noting that the "supportiveness, adaptability, and accessibility of the environment can have an enormous effect on whether impairment limits function"). As Anita Silvers has explained, individuals with disabilities face inequality from members of the nondisabled, dominant majority who "impose on others a social or communal situation that best suits themselves, regardless of whether it is the most productive option for everyone." Silvers, *supra*, at 73.

183. *See* Cooper, *supra* note 181, at 1428–29.

184. *See* 42 U.S.C. § 12112(b)(5) (1994); Cooper, *supra* note 181, at 1428–29; *see also* S. REP. NO. 101-116, at 6 (explaining that disability discrimination "includes harms resulting from the construction of . . . architectural[] and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference—of benign neglect"); 136 CONG. REC. 19,800 (1990) (statement of Rep. Fish) (asserting that "it is not disability which limits one's ability to participate in life, but it is societal barriers"); 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin) (asserting that it is often not the disability that is limiting, but "the obstacles placed in the way by an indifferent society").

185. Silvers, *supra* note 182, at 74–76.

disabled individuals who objectively could not perform a job as conventionally designed, but who could perform on level ground with reasonable redesign of workplace operations to eliminate the exclusionary impact of hidden, able-bodied assumptions.[186] In contrast, accommodations were viewed as unnecessary to equalize opportunity for members of Title VII's protected categories, who were expected to compete evenly in the conventional workplace once employers were prohibited from acting on stereotypical assumptions, mistaken perceptions, and erroneous beliefs.[187]

While the rationale for reasonable accommodations makes sense for actual disabilities, the discrimination against employees with

186. *See* Cooper, *supra* note 181, at 1429–30; *see also* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541–42 (7th Cir. 1995) (explaining that employment decisions based on "a vocationally relevant disability" are not analogous to other forms of employment discrimination, but are nevertheless protected under the ADA's expanded definition of "discrimination").

187. *See* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 n.21 (3d Cir. 1997), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc); *see also* Karlan & Rutherglen, *supra* note 47, at 1–3, 38–39 (explaining how the ADA offers "a fundamentally different approach" than Title VII in conceptualizing discrimination because the ADA "incorporates a more explicit understanding of the contingency of existing job configurations"). This is not to say that Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and other employment discrimination laws were necessarily correct in their assumption that equal employment opportunity may be achieved without reasonable accommodations in the conventional workplace. For a persuasive discussion of the potential benefits of extending the reasonable accommodations concept to antidiscrimination law more generally, see Karlan & Rutherglen, *supra* note 47, at 2–5, 38–41. Indeed, contemporary antidiscrimination norms can provide compelling arguments for why members of Title VII's protected categories should be entitled to accommodations to modify aspects of the workplace that are designed arbitrarily around the dominant group in that particular category—for example, women may have a plausible antidiscrimination claim for accommodations to modify aspects of the workplace that are arbitrarily designed around men. *See* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 25–49 (1995) (analyzing how current laws might be used to support accommodations for pregnant women); Karlan & Rutherglen, *supra* note 47, 2–5, 38–41 (analyzing whether or not the right to accommodation should apply in some form to women); Wasserman, *supra* note 13, at 178–79 (describing how the "structural discrimination" argument has been made as part of the "feminist critique of earlier civil rights law"). But arguments grounded in contemporary antidiscrimination norms cannot advance a claim for accommodations by a member of the *dominant* group in a particular category—i.e., antidiscrimination norms cannot justify granting a nondisabled employee accommodations to modify aspects of the workplace that are designed around the nondisabled simply because the nondisabled worker is misperceived as disabled. Such an individual faces discrimination because of the misperception, but not because the workplace is designed around a dominant group to whom the individual does not belong, since the individual is in fact part of the nondisabled majority. To make an argument for accommodations in that situation would require a theory of nondiscrimination divorced from protected categories or arguments grounded in something other than antidiscrimination norms.

perceived disabilities is more analogous to racial and other forms of invidious discrimination. Congress explicitly recognized this analogy when it amended the Rehabilitation Act in 1974 to add perceived disabilities to the list of protected categories, a list that was later adopted by the ADA.[188] Because individuals with perceived disabilities are objectively similar to other nondisabled individuals (any or all of whom may possess nondisabling impairments), perceived disability plaintiffs are "analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic."[189] Perceived disability plaintiffs are only *believed* to possess a substantially limiting impairment, and, just like members of other protected categories, they are denied equal employment opportunities as a result of "archaic attitudes, erroneous perceptions, and myths."[190] In claims of perceived disability discrimination, as with claims of racial and other forms of invidious discrimination, the barrier to equal employment opportunity is an employer's reliance on social group biases unrelated to an individual's actual ability to perform;[191] the barrier is an employer's misperception that an irrelevant attribute makes the employee somehow inferior.[192] Because the only "evil" that the perceived disability prong is intended to combat is the same "evil" targeted by other civil rights statutes, the rationale for the ADA's reasonable accommodations rule breaks down: the structural and/or dynamic forms of employment discrimination supporting accommodations for those with actual disabilities are absent from perceived disability claims.[193]

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188. *See* S. REP. NO. 93-1297, at 39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389. Congress explained that

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

Id.

189. *Vande Zande*, 44 F.3d at 541; *see Deane*, 7 AD Cases (BNA) at 208 n.21.

190. *Deane*, 7 AD Cases (BNA) at 208 n.21 (internal quotation marks and citation omitted); *see Vande Zande*, 44 F.3d at 541.

191. *See* Cooper, *supra* note 181, at 1427–28.

192. *See Deane*, 7 AD Cases (BNA) at 208 n.21 (citing *Vande Zande*, 44 F.3d at 541).

193. *See id.* (concluding that "[b]ecause the type of discrimination faced by those who are perceived to be disabled so closely resembles discrimination on the basis of race, with the only significant difference being the object of the misperception, we see no reason not to treat them in like fashion"). According to Karlan and Rutherglen,

> [a] disabled individual who could perform the job in its present form, but whom the employer refuses to hire because of a mistaken belief that she cannot

Perceived disability claims are also analogous to discrimination claims covered under other civil rights statutes because they share the same underlying concept of justice.[194] Title VII and other employment discrimination statutes are consistent with the "corrective justice" rationale.[195] Corrective justice focuses on transactional moral wrongs and attempts to achieve equitable interactions "without reference to any external criterion that measures the relative worth of the parties."[196] Under a relational theory, corrective justice imposes a duty on one individual to correct a moral wrong inflicted on another.[197] Under an annulment theory, corrective justice seeks to rectify unjust losses caused by the wrongdoing.[198] While the focus of these two theories of corrective

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perform the requisite tasks or out of revulsion against the worker's disability (such as a disfiguring cosmetic condition), is simply a victim of traditional discrimination and reasonable accommodation is irrelevant to her claim.

Karlan & Rutherglen, *supra* note 47, at 8.

194. This Article discusses two concepts of justice, corrective and distributive, using what commentators have described as Aristotle's classic distinction between the two. *See, e.g.*, Anita L. Allen & Maria H. Morales, *Hobbes, Formalism, and Corrective Justice*, 77 IOWA L. REV. 713, 731 (1992) (explaining Aristotle's distinction between corrective and distributive justice); Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 118 (1992) (citing Book V of Aristotle's *Nichomachean Ethics* as the basis for the classic distinction between corrective and distributive justice); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 404–09 (1992) (analyzing Aristotle's accounts of justice).

195. *See* Vande Walle, *supra* note 127, at 898, 923–24; *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 495–96 n.308 (1997) (arguing that Title VII's "quasi-tort concerns" entitle a sexual harassment plaintiff to "a corrective justice right to have her working environment restored"); Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMP. & LAB. L. 209, 255–56 (1995) (arguing that at least Title VII's disparate treatment component involves "a form of corrective justice" to restore employees' entitlements). *But see* Malin, *supra* note 194, at 123 (arguing that, although Title VII appears to be solely corrective, "much of Title VII is distributive in nature, going beyond correcting the transactional inequalities that result from deliberately racist employment decisions").

196. Vande Walle, *supra* note 127, at 898.

197. *See* Allen & Morales, *supra* note 194, at 714 (stating that relational conceptions of corrective justice assert that "personal wrongdoing" imposes reparative or compensatory obligations on the wrongdoer); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 435–36, 439 (1992) (explaining that the relational view of corrective justice "emphasizes the wrong one does and not the losses that might result as a consequence"); *see also* Malin, *supra* note 194, at 119 (stating that the "key" to corrective justice is redressing damage caused by a "moral wrong in a particular transaction"); Vande Walle, *supra* note 127, at 923 (stating that the concern of corrective justice is whether one party has inflicted a "moral wrong").

198. *See* Allen & Morales, *supra* note 194, at 714–15 (stating that annulment conceptions of corrective justice require wrongful losses to be compensated); Coleman, *supra* note 197, at 429–30, 435–36, 441 (explaining that the annulment view of corrective

justice is slightly different, both theories seek to vindicate a moral interest:[199] to restore equality between two parties by forcing the wrongdoer to compensate for the improper harm.[200] Employment discrimination covered under Title VII and other civil rights statutes primarily fits the corrective justice model because the law declares decisionmaking based on race, color, national origin, or sex to be a "moral wrong," and it requires compensation for the unjust loss caused by the employer's wrongdoing.[201] By prohibiting actions based on characteristics that *all* persons possess, and therefore focusing solely on restoring the equality that was disturbed by the employer's improper conduct, these statutes are consistent with a corrective justice rationale.[202]

The ADA, in contrast, arguably goes beyond the concept of corrective justice to include a component of "distributive justice" as well. Although both forms of justice strive to create equality,[203] distributive justice is not concerned primarily with evaluating the moral propriety of the parties' behavior.[204] Rather, distributive justice emphasizes the parties' broader relationship to society.[205] While corrective justice "joins the parties directly, through the harm that one of them inflicts on the other," distributive justice relates the parties indirectly through some external arrangement of societal benefits and burdens.[206] Distributive justice evaluates each party

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justice does not emphasize the wrongdoing or the wrongdoer, but rather the resulting "wrongful losses"); *see also* Vande Walle, *supra* note 127, at 898 (stating that the concern of corrective justice is "whether one party has inflicted an unjust loss on another"). Coleman has proposed a "mixed conception" of corrective justice that combines elements of both the classic annulment and relational theories. *See* Coleman, *supra* note 197, at 437–44; *see also* Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 408 (1992) (criticizing Coleman's conception of corrective justice as "simultaneously too complex and too simple").

199. *See* Matthew S. O'Connell, Note, *Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law*, 85 GEO. L.J. 1717, 1718 (1997) (applying a "mixed conception" of corrective justice to defamation law).

200. *See* Vande Walle, *supra* note 127, at 923.

201. *See supra* notes 195–96 and accompanying text.

202. *See* Vande Walle, *supra* note 127, at 898, 923–24.

203. *See* Malin, *supra* note 194, at 119.

204. *See* Vande Walle, *supra* note 127, at 923.

205. *See* Malin, *supra* note 194, at 119 (explaining that "[d]istributive justice requires proportional equality whereby each individual has a share in the distribution of goods in society in proportion to that individual's merit"); Vande Walle, *supra* note 127, at 923 (explaining distributive justice in terms of societal goals, rather than individual transactions).

206. Weinrib, *supra* note 194, at 415; *see also* Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515–16 (1992) (arguing that distributive justice traditionally has been viewed "as including those

against established, external criteria—criteria that *not* all persons possess—and judges' equality in relationship to those politically determined characteristics.[207] Distributive justice identifies a group that merits a greater distribution of resources because of some marker of "merit," and it redistributes societal goods accordingly.[208]

The ADA's duty to reasonably accommodate, the breach of which is *not* a form of actionable discrimination under Title VII, is arguably consistent with a distributive justice rationale: "[T]he ADA identifies a criterion (the possession of a disability) against which individuals are measured and requires a distribution of goods from the employer to individuals who meet that criterion."[209] To achieve equal opportunity for some disabled individuals, the ADA's antidiscrimination provisions must go beyond a simple mandate preventing discriminatory decisions by the employer (i.e., beyond corrective justice) to remove unnecessary employment barriers (i.e., to a redistributive approach).[210] Because some disabled individuals possess attributes that are vocationally relevant in the nondisabled majority's conventional workplace, the ADA identifies them as a group that merits a greater distribution of societal goods in the form of reasonable accommodations to level the workplace playing field.[211] Unlike the forms of compensation required under other civil rights statutes, the ADA's duty of reasonable accommodation requires redistribution "because of the employee's status, not because the employer has committed a moral wrong."[212]

Some commentators take issue with using the term "distributive

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principles that ought to regulate the fair distribution of common burdens and benefits among individuals or groups of individuals").

207. *See* Vande Walle, *supra* note 127, at 897, 923; Weinrib, *supra* note 194, at 408; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 999 (1988); *see also* O'Connell, *supra* note 199, at 1720–21 (explaining Weinrib's theory of distributive justice as one that "allocates costs and benefits in proportion to some external criterion" that is political in nature).

208. *See* Allen & Morales, *supra* note 194, at 731 (explaining that distributive justice "concerns the proper apportionment or allocation of goods"); Malin, *supra* note 194, at 119 (explaining that "distributive justice requires the distribution of goods among individuals in accordance with some mediated criteria of merit"); Weinrib, *supra* note 194, at 408 (describing distributive justice as involving an external criterion that "determines the parties' comparative merit for a particular distribution"). Courts may resolve distributive justice claims between individuals when each party typifies the classes that are subject to the redistributional rights and obligations. *See* Malin, *supra* note 194, at 120–21, 129.

209. Vande Walle, *supra* note 127, at 897.

210. *See id.* at 925, 929.

211. *See id.* at 925.

212. *Id.*

justice" to characterize reasonable accommodations for individuals with actual disabilities.[213] Anita Silvers, for example, argues that reasonable accommodations are not distributive in nature because, rather than identifying a class as deserving of certain resources, the ADA simply commits resources "to correct the disadvantaging outcomes of exclusionary past practice."[214] Silvers sees a bright line between direct resource allocation to individuals with disabilities "in virtue of disability"—which she characterizes as distributive, and to which she is normatively opposed—and indirect resource allocation "to rectify the lingering results of the biased past"—which she characterizes as non-distributive and which she finds entirely appropriate under a formal justice rationale.[215] Yet, to the extent that reasonable accommodations are viewed as an employer's input cost into hiring a particular employee and to the extent that the ADA requires employers to ignore such input costs and ground decisions on employees' gross rather than net product, the line between formal and distributive justice seems somewhat less bright. As David Wasserman has explained, even if the accommodation right is "not concerned only with who gets what," it still is distributive because it assesses the fairness of the physical and social organization in terms of its impact on individual members of society, and it requires some metric of comparative advantage.[216] Thus, regardless of terminology, entitlement to accommodations requires a normative basis for directing the commitment of resources. According to Silvers, the normative basis is one of access, which directs the commitment of resources to the "biased" and "exclusionary" aspects of the work environment that were designed unnecessarily around able-bodied individuals who happen not to possess substantially limiting impairments.[217]

Because those with perceived disabilities do not possess any vocationally relevant characteristics not possessed by some members of the nondisabled majority and because those with perceived disabilities do not face any resulting structural or dynamic barriers to

213. *See, e.g.*, Silvers, *supra* note 182, at 34–35.

214. *Id.*

215. *Id.* at 34–35, 138–41 (arguing that "conceiving of people with disabilities as equal and thereby as deserving only such differentiated treatment as is needed to reform social practice that excludes them" is profoundly different than "thinking of them as deficient and thereby as deserving of special benefits, entitlements, and exemptions to sustain them in their exclusion from the mainstream of commercial and civic life").

216. Wasserman, *supra* note 13, at 190; *see also id.* at 147–49 (blurring the line between formal and distributive justice).

217. Silvers, *supra* note 182, at 34–35, 73–76, 120–21.

equal employment opportunity, there is no basis for applying the ADA's reasonable accommodations right—under either a distributive justice or a formal justice rationale. Like the forms of discrimination addressed by Title VII, the ADA's perceived disability prong addresses only the internal quality of the employer-employee transaction: it asks solely whether the employer inflicted an unjust loss that must be corrected.[218] Rather than determining if the employee fits the statutorily defined criteria, the perceived disability prong analyzes the employer's perception.[219] Just like Title VII protects those in other enumerated categories, the ADA protects perceived disability plaintiffs not because of their status as individuals deserving a greater allocation of societal goods, but because it condemns the employer's conduct.[220] Thus, the perceived disability prong shares the same corrective justice rationale as other employment discrimination statutes, which only provide restorative compensation, not a right to reasonable accommodations.[221] Because the distributive justice rationale for the ADA's additional form of antidiscrimination protection does not apply to perceived disability claims, those claimants should not be entitled to the redistribution or resource-commitment rights that are granted under the reasonable accommodations rule.[222]

Comparing perceived disability claims to other forms of actionable employment discrimination therefore provides further support for concluding that traditional forms of workplace accommodation should not apply to perceived disability claims. Our hypothetical Employee *B*, for example, should not be entitled to a redesigned gurney or an assistant to help lift patients because Employee *B* possesses no statutorily relevant characteristics that

218. *See* Vande Walle, *supra* note 127, at 931.

219. *See id.*

220. *See id.* at 897–99.

221. *See id.*

222. While Vande Walle correctly recognizes that the perceived disability prong is inconsistent with the distributive justice rationale of the ADA's reasonable accommodations rule, he reaches a different conclusion. *See id.* at 937. Vande Walle does not conclude that the ADA's accommodations rule should only apply to actual disability claims. Instead, Vande Walle starts with the assumption that the ADA *does* grant accommodations to both actual and perceived disability claims, based on the plain language of the single definition of a "qualified individual." *See id.* at 919 & nn.191–92. Vande Walle then tries to justify why the ADA gives that right to perceived disability plaintiffs who do not fit the external criteria for distributive justice. *See id.* at 931–37. In contrast, this Article challenges the underlying assumption that the ADA grants perceived disability plaintiffs the right to accommodations, and it uses the corrective and distributive theories of justice as one reason to support that challenge.

create unique employment barriers; many members of the nondisabled majority, like our hypothetical Employee *C*, possess similarly nondisabling impairments. The only thing that distinguishes Employee *B*'s nondisabling carpal tunnel syndrome from Employee *C*'s nondisabling knee injury is the employer's misperception. There are no external criteria to support a redistribution of resources to Employee *B* over Employee *C* or over other nondisabled individuals. The employer's conduct is the cause of Employee *B*'s unequal opportunity, just like employees protected under other antidiscrimination laws.

Once again, this analysis does not necessarily require that Employee *B* be treated identically to our nondisabled Employee *C*, who is not covered by the ADA at all. The employer's conduct is just as morally wrong when directed against Employee *B*, who is only mistakenly regarded as disabled, as it is when directed against our hypothetical Employee *A*, whose lower body paralysis is an actually disabling condition. Thus, as with the prior analysis of the ADA's statutory language and legislative intent, this analysis demonstrates only that individuals with nondisabling, but vocationally limiting, impairments must be governed by a different conception of the reasonable accommodations rule, which is developed in depth in Part IV.[223]

C. Distinguishing Equal Opportunity from Unfair Advantage

While the ADA's reasonable accommodations rule is unique among employment discrimination statutes, the ADA's fundamental goal of equal employment opportunity is not. This Section defines that goal in greater detail and explains how the duty of reasonable accommodation is consistent with that goal for those with actual disabilities. This Section then demonstrates that applying the traditional conception of workplace accommodations to perceived disabilities goes *beyond* equal opportunity and advantages perceived disability plaintiffs over other nondisabled individuals, as well as over individuals with actually disabling impairments. Thus, applying the ADA's accommodations rule identically to actual and perceived disability claims not only would be inconsistent with the interpretational authorities discussed in Section A and with the

223. *See* Moberly, *supra* note 63, at 639–40 (arguing that, even though perceived disability claims are analogous to Title VII discrimination claims, the ADA still might impose affirmative obligations on employers to remove barriers for perceived disability plaintiffs).

applicable theory of justice discussed in Section B, but also would be inconsistent with the ADA's fundamental goal.

The ADA is touted—and explicitly touts itself—as equal opportunity legislation.[224] The ADA judges equal opportunity narrowly in terms of formal, rather than material, equality, and equal access is its normative core.[225] The ADA is not intended to be an "affirmative action" statute in the way that the term traditionally has been used in connection with other laws.[226] The ADA does not

224. *See* 42 U.S.C. § 12101(a)(8) (1994) (listing "equality of opportunity" as one of the ADA's goals); *id.* § 12101(a)(9) (stating that the ADA's goal is to combat discrimination that "denies people with disabilities the opportunity to compete on an equal basis"); 29 C.F.R. pt. 1630 app. Background (1999) (stating that the ADA's purpose is to allow the disabled "to receive equal opportunities to compete"); *id.* pt. 1630 app. § 1630.9 (explaining that the ADA's goal is to give the disabled "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability"); Karlan & Rutherglen, *supra* note 47, at 25 (describing "equal opportunity" as "the fundamental goal of the ADA" and analyzing the appropriate conception of that phrase).

This Article does not argue that equal opportunity *should* be the only goal of disability discrimination law, merely that it is the stated goal of the ADA. Other commentators have set forth arguments advocating broader goals for disability discrimination law. *See, e.g.*, Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 212 (1994) (advocating "an extension of the requirements of the ADA via explicit hiring quotas and marketable discrimination rights"); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 124 (1998) (suggesting "a national employment policy for persons with disabilities" that would include "strengthened affirmative action obligations to hire and promote persons with disabilities" and "non-remedial employment setasides"); Ben Cristal, Note, *Going Beyond the Judicially Prescribed Boundaries of the Americans with Disabilities Act*, 13 HOFSTRA LAB. L.J. 493, 511 (1996) (advocating that the Social Security Administration subsidize the cost of accommodations that would otherwise place undue hardships on employers).

225. *See* Silvers, *supra* note 182, at 120–21 ("[T]he ADA constrains the nondisabled majority from actions that deny the disabled access to the opportunities for social participation the rest of the population enjoys.").

226. *See* Daniel B. Frier, Comment, *Age Discrimination and the ADA: How the ADA May Be Used to Arm Older Americans Against Age Discrimination by Employers Who Would Otherwise Escape Liability Under the ADEA*, 66 TEMP. L. REV. 173, 190 (1993) ("[T]he ADA is not meant as an affirmative action program designed to ensure the employment of disabled employees over that of better qualified, non-disabled employees."); *see also* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 107–08 (1997) ("The ADA was not conceived as an affirmative action statute, but rather as one of equal opportunity." (footnote omitted)); Murphy, *supra* note 12, at 1610 ("In the eyes of Congress, reasonable accommodation and affirmative action are thus quite separate.").

Like commentators, courts have been quick to recognize this distinction. *See, e.g.*, Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (recognizing that the ADA does not require affirmative action in favor of the disabled); Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1031 (6th Cir. 1995) (same); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (same); Howard v. North Miss. Med. Ctr., 939 F.

require priority hiring, reassignment, or promotion of the disabled over the nondisabled, nor does it require active recruitment to increase the number of disabled individuals in the workplace.[227] Having a disability is not a "plus" in the hiring equation.[228] Although the ADA does impose affirmative obligations on the employer, "[t]he ADA seeks only to establish a level playing field for disabled and non-disabled employees alike."[229]

How can the ADA's reasonable accommodations rule be squared with its overarching goal of equal employment opportunity? As explained in Part II.A, for most forms of employment discrimination equal opportunity may be achieved, at least theoretically, through a simple antidiscrimination mandate. For racial and other forms of invidious discrimination, employers discriminate by basing their decisions on traits that are vocationally irrelevant. Discrimination occurs when employees who are "fundamentally the same are treated differently for illegitimate reasons."[230] In that scenario, a "sameness model" of antidiscrimination applies.[231] A sameness model requires employers to treat employees identically, "regardless of the presence or absence of a particular [trait]."[232] When the trait that defines an individual's protected status is vocationally irrelevant, prohibiting the employer from considering

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Supp. 505, 507 (N.D. Miss. 1996) (same); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397–98 (E.D. Tex. 1995) (same).

227. *See Foreman*, 117 F.3d at 810; *Daugherty*, 56 F.3d at 700; *see also* 29 C.F.R. pt. 1630 app. Background (explaining that, although the ADA "focuses on eradicating barriers," employers still may apply the "same performance standards and requirements that employers expect of persons who are not disabled").

228. Murphy, *supra* note 12, at 1627; *see* S. REP. NO. 101-116, at 26–27 (1989) (Sup. Docs. No. Y 1.1/5:101-116) ("[T]he employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability."); 136 CONG. REC. 10,868 (1990) (statement of Rep. Edwards) (stating that the ADA does not "require employers to give preference to persons with disabilities"); *see also* 29 C.F.R. pt. 1630 app. § 1630.1(a) (explaining that the ADA "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given").

229. Frier, *supra* note 226, at 190; *see also* Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) (explaining the ADA's "level playing field" objective); 136 CONG. REC. 10,856 (1990) (statement of Rep. Hoyer) ("[The ADA] does not guarantee a job—or anything else. It guarantees a level playing field."); Bruce A. Miller, *The Americans with Disabilities Act and the Unionized Workplace*, 74 MICH. B.J. 1180, 1180 (1995) ("[The] ADA requires that disabled individuals, otherwise qualified for a job, be allowed to compete on a level playing field by means of reasonable accommodation provided by their employers.").

230. Karlan & Rutherglen, *supra* note 47, at 10.

231. *Id.*

232. *Id.*

that trait should, in theory, achieve equal employment opportunity.[233] To achieve equal opportunity, the employer simply must treat similar employees similarly.

While the ADA's duty of reasonable accommodation is obviously inconsistent with a sameness model, it is nevertheless entirely consistent with the ADA's goal of equal opportunity for individuals with actual disabilities. For race, color, national origin, and sex, inequality is created when an employer acts on a difference that is not relevant; for actual disabilities, inequality also may be created when an employer fails to act on a difference that is. Unlike race, color, national origin, and sex, which typically are irrelevant to job performance, a substantially limiting physical or mental impairment may be vocationally relevant.[234] While this vocationally relevant difference is not intrinsic but rather relational—in other words, it exists because of the misalignment between a worker with a disability and a workplace that is designed around the able-bodied majority—the difference is nonetheless quite real.[235] Thus, for some individuals with actual disabilities, simply prohibiting employers from considering the disability (in a presumptively immutable workplace) inevitably will fall short of equal opportunity.[236] In fact, treating some individuals with disabilities the same as the nondisabled majority may be a form of oppression in and of itself.[237] Allowing an employer to

233. *See id.*

234. *See* Cooper, *supra* note 181, at 1428.

235. *See* Murphy, *supra* note 12, at 1613–14 (citing MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990); Martha Minow, *The Supreme Court, 1986 Term—Forword: Justice Engendered*, 101 HARV. L. REV. 10, 34–35 (1987); Martha Minow, *Learning to Live with the Dilemma of Differences: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS., Spring 1985, at 157, 159, 160, 206); *see also* S. REP. NO. 101-116, at 6 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (explaining that disability discrimination "includes harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference"); 136 CONG. REC. 10,870 (1990) (statement of Rep. Fish) (asserting that "it is not disability which limits one's ability to participate in life, but it is societal barriers"); 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin) (asserting that it is often not the disability that is limiting, but "the obstacles placed in the way by an indifferent society").

236. *See* Cooper, *supra* note 181, at 1435 ("Whereas the nondiscrimination mandate under Title VII may be implemented through equal treatment, the orientation of the workplace toward individuals who are not disabled means that mere equal treatment will leave in place substantial barriers to equal opportunity."); Murphy, *supra* note 12, at 1610 ("[D]ifferential treatment is often necessary to eliminate such discrimination.").

237. *See* Karlan & Rutherglen, *supra* note 47, at 10; *see also* Silvers, *supra* note 182, at 126–27 ("[T]reating people similarly will not be treating them equally in cases in which the actions instrumental to pursuing opportunity are so narrowly or rigidly constrained as to

require the same output from a nondisabled employee and a disabled employee whose wheelchair is too wide to pass through the doorway of the work site, for example, would continue to subordinate an otherwise equally capable individual.

To achieve equal opportunity between those who possess a socially constructed, vocationally relevant limitation and those who do not requires instead a "difference model" of antidiscrimination. A difference model requires employers to take the relevant trait into account, rather than ignoring it, in order to eliminate its impact on employment opportunity.[238] To treat the employee in the wheelchair the same as the nondisabled employee, for example, would require the employer to acknowledge their different modes of entering the work site and to eliminate the impact of that difference by widening the doorway to allow the disabled employee to perform. In this way, a difference model of antidiscrimination recognizes that "in order to treat some persons equally, we must treat them differently."[239]

Differential treatment under the ADA's reasonable accommodations rule does not mean preferential treatment.[240] The reasonable accommodations rule is "a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."[241] Employees with disabilities who may be unable to perform in a conventional workplace may be able to

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exclude people with (certain) impairments.").

238. *See* Karlan & Rutherglen, *supra* note 47, at 14; *see also* Cooper, *supra* note 181, at 1428–29 (explaining that, because a disability "may indeed be directly relevant to an individual's capabilities," the ADA could only eliminate employment barriers by modifying the definition of discrimination to include a duty to reasonably accommodate).

239. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.); *see also* Karlan & Rutherglen, *supra* note 47, at 10 (citing *Bakke* to describe the difference model of antidiscrimination); Murphy, *supra* note 12, at 1620 ("Recognizing that equal treatment itself may be discriminatory is a necessary step toward ending discrimination based on disability.").

240. *See* Miller, *supra* note 229, at 1180; Barbara C. Neff, *"Reasonable Accommodation" Under the ADA: Employers' Duties and Defenses*, 64 DEF. COUNS. J. 110, 111 (1997).

241. 29 C.F.R. pt. 1630 app. § 1630.9 (1999); *see* H.R. REP. NO. 101-485, pt. 2, at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347 (Sup. Docs. No. Y 1.1/8:101-485) ("[T]he reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed."); S. REP. NO. 101-116, at 34 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (same); 29 C.F.R. § 1630.2(o)(1)(iii) (stating that the essence of reasonable accommodation is to enable a disabled employee "to enjoy equal benefits and privileges of employment as are enjoyed by a covered entity's other similarly situated employees without disabilities"); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.2, at III-2 ("[T]he ADA requires reasonable accommodation as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities." (emphasis omitted)).

perform just as well as or better than nondisabled workers once the unnecessary barriers of the conventional workplace are eliminated.[242] For employees with actual disabilities, accommodations are not part of an affirmative action program of priorities.[243] Accommodations are simply a unique form of equal opportunity. The ADA requires employers to view the workplace as mutable and to adjust the physical or structural work environment, equipment, or operations so that individuals with disabilities can compete on level ground with the nondisabled majority, around whom the environment was originally constructed.[244] For that reason, it is incorrect to view a reasonable accommodation as "advantaging" an individual with an actual disability.[245] An accommodation merely refashions an existing work site "to eliminate bias against the group of people whom that individual represents."[246] Although the reasonable accommodations rule is a "difference-based" form of equal opportunity, while a simple antidiscrimination rule is "sameness-based," both methods achieve

242. *See* S. REP. NO. 101-116, at 28–29 (citing a study of 1452 physically impaired employees at E.I. du Pont de Nemours and Company finding that "the disabled worker performed as well as or better than their non-disabled co-workers," with 91% of disabled workers rated average or better in performance, 93% rated average or better for turnover rate, 79% rated average or better in attendance, and more than 50% rated above average in safety); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.2, at III-2 (explaining the enabling role played by reasonable accommodations); *see also* H.R. REP. NO. 101-485, pt. 2, at 58–59, 1990 U.S.C.C.A.N. at 340–41 (citing the du Pont study as evidence that "disabled workers performed as well as or better than the non-disabled co-workers"); 136 CONG. REC. 11,460 (1990) (statement of Rep. Owens) (citing the du Pont study as "the first of many to show that disabled employees ... have equal or better attendance, performance, and safety records than average"); 136 CONG. REC. 10,874 (1990) (statement of Rep. Kleczka) (stating that employers report that workers with disabilities "usually work harder and longer than able-bodied counterparts").

243. *See* Conway, *supra* note 16, at 952 ("[T]he goal of reasonable accommodations [is] to ensure equal opportunity to the disabled rather than requiring employers to develop affirmative action programs."); Cooper, *supra* note 181, at 1428–29 (explaining why reasonable accommodations for actual disabilities are a form of antidiscrimination, not a form of affirmative action); *see also* 29 C.F.R. pt. 1630 app. § 1630.9 ("The reasonable accommodation that is required ... should provide ... equal employment opportunity[,] [which] means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.").

244. *See* 136 CONG. REC. 10,874 (1990) (statement of Rep. Matsui) (explaining that the ADA "will make the playing field a little more even for those with disabilities to compete in the workplace" because "[s]o many doors are now closed ... simply because their needs do not conform to the current rules of the game"); 29 C.F.R. pt. 1630 app. § 1630.2(o) ("In general, an 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.").

245. Silvers, *supra* note 182, at 132.

246. *Id.*

the same goal. Once the workplace playing field is leveled through reasonable accommodations, the ADA requires the disabled to meet the same employment standards as all other employees.[247]

The ADA's reasonable accommodations rule also differs from traditional "affirmative action" in its focus on the present, rather than the past. The traditional concept of affirmative action is remedial or reparative in nature: it provides favorable treatment to make up for past wrongs.[248] In contrast, accommodation is not primarily remedial.[249] Accommodation is not directed at overcoming the effects of past discrimination, but rather at dismantling present obstacles created by the nondisabled majority's workplace operations.[250] Because affirmative action is remedial, it may require "more than merely allowing the members of a protected class to compete on equal terms with others" in order to increase participation and make up for past inequality.[251] In contrast, accommodation simply requires the employer to consider "unconventional" operational methods to allow disabled individuals to demonstrate their present abilities.[252] Unlike affirmative action that temporarily may require favorable treatment to make up for the past, accommodation does not require the employer to change its ultimate performance criteria.[253] Critics who oppose affirmative action because of an alleged disconnect between the historically injured parties and the present-day reparation recipients cannot oppose the ADA's accommodations rule on that ground because "past disregard of people with disabilities punishes current as well as earlier members of this class" through the lasting, exclusionary workplace infrastructure.[254]

Because the duty to accommodate is intended only as a form of equal opportunity, the ADA treats the duty as part of its

247. *See* Frier, *supra* note 226, at 190; Rebecca Mastrangela, Comment, *Does the Americans with Disabilities Act of 1990 Impose an Undue Burden on Employers?*, 32 DUQ. L. REV. 269, 270 (1994); *see also* 29 C.F.R. pt. 1630 app. Background (stating that "the ADA seeks to ensure access to equal employment opportunities based on merit" and for the disabled "to receive equal opportunities to compete" for a job).

248. *See* Silvers, *supra* note 182, at 128; Cooper, *supra* note 181, at 1431–32.

249. *See* Cooper, *supra* note 181, at 1431–32; Murphy, *supra* note 12, at 1627–28.

250. *See* Cooper, *supra* note 181, at 1431; *see also* Murphy, *supra* note 12, at 1628 (arguing that the accommodation inquiry is simply "whether an identifiable barrier exists that can be removed by the employer," while an affirmative action inquiry, in contrast, asks "whether an individual belongs to a group that has been harmed by past discrimination," which would entitle the individual to "a preference in the hiring process").

251. Cooper, *supra* note 181, at 1431–32.

252. *See id.* at 1432.

253. *See id.* at 1431–32.

254. Silvers, *supra* note 182, at 128.

antidiscrimination provisions.[255] Because the workplace design is oriented unnecessarily toward the nondisabled, nondiscrimination requires more than passively avoiding bias.[256] Instead, nondiscrimination requires modifying the workplace to allow individuals with disabilities an equal chance to compete.[257] Accordingly, the failure to make reasonable accommodations *is* one of the seven forms of disability-based discrimination prohibited by the ADA.[258] Accommodation is best described as "active nondiscrimination" because it achieves equal opportunity through positive steps.[259] Individuals with actual disabilities who receive

255. *See* H.R. REP. NO. 101-485, pt. 3, at 39 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 445, 462 ("This reasonable accommodation requirement is central to the non-discrimination mandate of the ADA."); S. REP. NO. 101-116, at 31 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (describing the accommodations duty as "a form of non-discrimination"); 29 C.F.R. pt. 1630 app. § 1630.9 (1999) ("The obligation to make reasonable accommodation is a form of non-discrimination."); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 1, at I-5 ("Reasonable accommodation is a critical component of the ADA's assurance of nondiscrimination."); *id.* § 2.3(c), at II-22 ("Reasonable accommodation is a key nondiscrimination requirement . . . ." (emphasis omitted)); *id.* § 3.2, at III-1 (same); Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 211–12 (1993) ("The ADA requires that employers reasonably accommodate their disabled employees as part of its nondiscrimination scheme, rather than merely mandating equal treatment or viewing accommodation to be affirmative action."); Cooper, *supra* note 181, at 1435 ("Congress has clearly stated its position that reasonable accommodation is not the equivalent of affirmative action, but rather is an integral part of the ADA's nondiscrimination mandate."); *see also* 42 U.S.C. § 12101(b)(1) (1994) (describing the ADA as an antidiscrimination statute); 29 C.F.R. pt. 1630 app. Background (same); *id.* pt. 1630 app. § 1630.1(a) (same).

256. *See* Murphy, *supra* note 12, at 1607–09.

257. *See id.*

258. *See* 42 U.S.C. § 12112(b)(5)(A)–(B); 29 C.F.R. § 1630.9(a)–(b); *see also* Karlan & Rutherglen, *supra* note 47, at 8–9 (explaining that the concept of reasonable accommodation is not only "integral to defining the class of protected individuals" but also that failure to make reasonable accommodations "constitutes a separate species of discrimination").

259. Murphy, *supra* note 12, at 1607–09; *see also* Carol D. Rasnic, *A Comparative Analysis of Federal Statutes for the Disabled Worker in the Federal Republic of Germany and the United States*, 9 ARIZ. J. INT'L & COMP. L. 283, 327–28 (1992) ("[The ADA] is not an affirmative action law, but is an effort by the legislature to provide whatever is needed to put the disabled on a plane parallel to that of his non-handicapped peers.").

Because of the common use of the term "affirmative action," the ADA's accommodation rule is better described as "active nondiscrimination." The term "affirmative action" may be used if it is defined with sufficient precision. William Van Alstyne provides the necessary precision with his nuanced taxonomy of the types of conduct that at various times have been called "affirmative action." *See* William W. Van Alstyne, *Affirmative Action and Racial Discrimination Under Law: A Preliminary Review*, *in* 1 SELECTED AFFIRMATIVE ACTION TOPICS IN EMPLOYMENT AND BUSINESS SET-ASIDES: A CONSULTATION/HEARING OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 180 (1985). Van Alstyne deems some forms of affirmative action unacceptable

reasonable accommodations do not receive an "advantage" over nondisabled employees.[260] Those with actual disabilities are just recipients of an appropriately difference-based form of equal opportunity law.

While reasonable accommodations thus help "level the playing field" for individuals with actual disabilities, the same is not true for those whose disabilities are only perceived. To determine whether accommodations are consistent with equal opportunity for claims under the "regarded as" prong, we must compare those with perceived disabilities to those without.[261] As the EEOC guidelines explain, the proper goal of the reasonable accommodations rule is to provide "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as

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because they "encourage or require ... discrimination" by using "quotas," "queues," "targets," or "presumptions" that determine each person's civil rights at least in part by their membership in a protected class. *Id.* at 180, 182, 186–87. This Article avoids the term "affirmative action" because quotas and similar types of conduct are most likely to be associated with a generic use of the term in the employment context.

On the other hand, Van Alstyne deems some forms of "affirmative action" acceptable because they do not encourage or require discrimination and are "in keeping with our mutual commitment to equal protection under the law." *Id.* at 180. One of Van Alstyne's categories of acceptable affirmative action would cover the ADA's accommodations rule for actually disabled individuals. *See id.* at 182. That category includes actions taken to avoid "*gratuitous* discrimination." *Id.* According to Van Alstyne, gratuitous discrimination is "the unintended consequence of unexamined practices or habits that create unnecessary headwinds or hardships," when the practice or habit "may, in fact, be quite unnecessary." *Id.* Van Alstyne characterizes "avoid[ing] *gratuitous* discrimination" as a form of "affirmative action" because it requires positive steps: it requires an employer to "reduce gratuitous differential treatment of persons not necessary to distinguish in the manner one's customary practice did distinguish them." *Id.* "One acts affirmatively by being sensitive to this possibility," says Van Alstyne, "and by acting affirmatively to avoid it." *Id.*

Van Alstyne's use of the term "affirmative action" to describe "avoid[ing] *gratuitous* discrimination" is consistent with the concept of "active nondiscrimination" that is used in this Article. *Id.* As Van Alstyne explains, avoiding such discrimination is "wholly consistent with a common resolve to make no disadvantaging use"—and no advantaging use—of any person's membership in a particular category. *Id.* While such action "is conscious of those whom it will benefit, and conscientious of those with whom they are then treated identically," it is undertaken "without indexing or allocating by the quotas ... of racism," *id.* at 183–84, and its ultimate goal "is the removal of gratuitous barriers to each person's opportunity to be treated the same as others," *id.* at 182.

260. Karlan & Rutherglen, *supra* note 47, at 4 (drawing distinctions between the ADA's reasonable accommodations rule and traditional forms of antidiscrimination protection, but concluding that the distinctions do not show "that disabled individuals are somehow receiving unwarranted benefit or even an unfair advantage over other groups that have experienced exclusion from full economic participation").

261. *See id.* at 25 ("[The ADA's] goals presuppose a comparison with individuals who are not disabled: to the extent possible, the disabled should be given the same opportunities as those who are not disabled.").

are available to the average similarly situated employee without a disability."[262] As explained above, for some types of actual disabilities, accommodations are needed simply to achieve this same level of opportunity—"no more and no less."[263] In contrast, for plaintiffs with perceived disabilities, the traditional forms of operational accommodations indeed do more.

Unlike employees with actual disabilities, those with perceived disabilities possess no substantially limiting impairments to distinguish them from other nondisabled employees. The only statutorily relevant difference between perceived disability plaintiffs and other nondisabled individuals is an employer's misperception[264]—"but for" an employer's mistaken belief, perceived disability plaintiffs would not be covered by the ADA at all.[265] Just like targets of racial and other forms of invidious discrimination, a perceived disability plaintiff faces unequal opportunity because the employer improperly treats employees differently when they are "fundamentally the same."[266] Perceived disability discrimination therefore fits a sameness model of antidiscrimination. Achieving equal opportunity for perceived disability plaintiffs should require only that the employer treat them the same as other nondisabled employees.[267]

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262. 29 C.F.R. pt. 1630 app. § 1630.9; *see* S. REP. NO. 101-116, at 35 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (describing reasonable accommodations as part of the ADA's equal opportunity goal, which "means an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities"); *see also* 42 U.S.C. § 12101(a)(8), (9) (describing the ADA's goal of equal employment opportunity); 29 C.F.R. pt. 1630 app. Background (same); *id.* pt. 1630 app. § 1630.1(a) (describing the ADA as an "anti-discrimination" statute, which "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given").

263. Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995); *see also* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 199, 207–08 (3d Cir. 1997) (explaining how reasonable accommodations serve to equalize opportunity for individuals with actual disabilities), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc).

264. *See Deane*, 7 AD Cases (BNA) at 208 ("[T]hat which renders [a perceived disability plaintiff] disabled is not the individual's impairment, if impairment there be, but the employer's unfounded stereotypes, fear or simple misperception that the impairment is serious enough to be disabling."); *see also Deane*, 142 F.3d at 148 n.12 (explaining the employer's argument that a " 'regarded as' plaintiff's only disability is the employer's irrational response to her illusory condition").

265. *See Deane*, 7 AD Cases (BNA) at 207.

266. Karlan & Rutherglen, *supra* note 47, at 10.

267. *See, e.g.*, Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) (stating that it would be "bizarre" if an employer's subjective misperception made a nondisabled employee "entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy"), *cert. denied*, 120 S. Ct. 794 (2000); *see also* Karlan & Rutherglen, *supra* note 47, at 10 (arguing that a sameness model "would condemn decisions made on the basis of myths, fears, and stereotypes associated with disabilities

Unlike some people with actual disabilities, perceived disability plaintiffs do not need to be treated "differently" in order to achieve equality with the nondisabled. Whereas the operational bias toward the nondisabled majority requires "active nondiscrimination" to equalize the playing field for those with actual disabilities, perceived disability plaintiffs—who are really a part of the nondisabled majority—are among those who typically benefit from the conventional workplace design. The heart of the disability rights movement, which was the driving force behind the ADA, was focused in large part on the basic goals of independence, self-sufficiency, mainstreaming, and integration for those who had been excluded systematically from participating in society.[268] Those fundamental concerns, which were the impetus behind the reasonable accommodations rule, are implicated rarely for those with perceived disabilities, whose nondisabling impairments are the type frequently possessed by the correctly perceived nondisabled majority workforce. Therefore, there is no justification for using a "difference model" of antidiscrimination for perceived disability claims.

Without an equality-based justification for using a difference model, applying the accommodations rule to perceived disability claimants gives them a "windfall."[269] Granting perceived disability plaintiffs the full range of traditional, operational accommodations advantages them over other nondisabled workers because perceived disability plaintiffs are, objectively, already similarly situated with

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that assume that individuals with physical or mental impairments are not equally capable of doing a particular job," such as an employer's "refus[al] to hire an employee with a disfiguring cosmetic condition because he, other workers, or customers might be upset" (internal quotation marks and footnotes omitted)); Cooper, *supra* note 181, at 1427–28 (arguing that, when "social bias" is the cause of disability-based discrimination, a simple antidiscrimination mandate should eliminate the harm without the need for reasonable accommodations).

268. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 52, 144 (1993); *see also* S. REP. NO. 101-116, at 10 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (describing the ADA's "critical goal" of "allow[ing] individuals with disabilities to be part of the economic mainstream of our society"); 135 CONG. REC. 19,892 (1989) (statement of Sen. Biden) (emphasizing the goals of participation, integration, independence, self-determination, and self-sufficiency).

269. *Deane*, 7 AD Cases (BNA) at 208; *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (opining in dicta that "it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability, when other impaired but not disabled people are not entitled to accommodation"); *Deane*, 142 F.3d at 148 n.12 (noting in dicta the "considerable force" of the employer's argument that accommodations 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, for admittedly non-disabling conditions").

members of the nondisabled majority. Traditional accommodations also advantage perceived disability plaintiffs over those with actual disabilities, who are only accommodated for disabling impairments that the nondisabled majority does not possess. In both instances, accommodating perceived disabilities is "unfair" because entitlement to a legal right (and a redistribution of social goods) is tied to irrelevant individual characteristics. Whatever physical or mental characteristics that may prompt a perceived disability plaintiff to seek accommodations are "irrelevant" because they do not differentiate materially between perceived disability plaintiffs and other nondisabled individuals and because they are not the cause of the inequality that the ADA is trying to combat. In other words, granting traditional accommodations to perceived disability plaintiffs creates an advantage by using a difference model of antidiscrimination when a sameness model would suffice.

Of course, many perceived disability plaintiffs do possess physical or mental impairments that, although nondisabling, are nonetheless quite real,[270] and those perceived disability plaintiffs certainly could benefit from workplace accommodations. However, accommodating a nondisabling impairment—even if the nondisabling impairment triggered the employer's misperception—will unfairly advantage a plaintiff with a perceived disability claim.[271] Nondisabled individuals often may possess physical or mental impairments as well, and, at least under current law, they are not entitled to invoke the ADA's right to accommodation.[272] Similarly, those with actual disabilities are only entitled to accommodation for their actually disabling conditions; they are then "on [their] own to deal with any non-disabling impairments just as would any similarly impaired person without a disability."[273] As the Supreme Court recently explained when deciding another issue,

> [b]y its terms, the ADA allows employers to prefer some

270. *See supra* notes 29–38 and accompanying text.

271. *See Deane*, 7 AD Cases (BNA) at 208.

272. *See id.*; *see also* 29 C.F.R. pt. 1630 app. § 1630.2(j) (1999) ("Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities."). Of course, legislators could decide to require accommodation of all nondisabling impairments, as well as all disabling ones. Thus far, that step has not been taken. Legislators have been concerned primarily with protecting individuals whose general ability to obtain employment is decreased significantly due to prejudice, and a particular employer's misperception "will seldom limit an individual's general ability to secure employment elsewhere." Moberly, *supra* note 6, at 363–64.

273. *Deane*, 7 AD Cases (BNA) at 208.

> physical attributes over others and to establish physical criteria.... [A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.[274]

Thus, providing equal opportunity to perceived disability plaintiffs demands that the traditional forms of accommodation not apply to any nondisabling impairments, even if those nondisabling impairments were the source of the employer's erroneous beliefs.[275] Otherwise, a perceived disability plaintiff would obtain an "undeserved windfall" by gaining a right to accommodations "solely by virtue of the employer's misperception[,] where others with the same impairment would have no such right."[276]

In fact, granting traditional accommodations to perceived disability plaintiffs would make it more advantageous for a nondisabled individual to be misperceived than to be perceived correctly. Applying the reasonable accommodations rule would entitle our hypothetical Employee *B* (the misperceived but nondisabled worker with mild carpal tunnel syndrome) to a redesigned gurney or an assistant to help lift patients—a task that Employee *B* could otherwise be fired for failing to perform. In contrast, our hypothetical Employee *C* (the correctly perceived, nondisabled worker with a knee injury) would not be entitled to a redesigned gurney or an assistant to help lift patients and could be fired for not performing that task. Employee *C* would be better off if the employer acted on stereotypes, fears, and myths, because those misperceptions would entitle Employee *C* to receive the workplace modifications needed to perform the job.[277] This perverse incentive

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274. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2150 (1999). Although the language from *Sutton* is helpful, it does not answer the question raised in this Article. The Court did not decide whether or not the reasonable accommodations portion of the "qualified individual" test applies to perceived disabilities because the plaintiff failed to show that the employer perceived her as disabled in the first place. *See id.*

275. *See Deane*, 7 AD Cases (BNA) at 208.

276. *Id.*; *see* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999).

277. *Cf.* Weber v. Strippit, Inc., 186 F.3d 907, 915–17 (8th Cir. 1999) (using a similar hypothetical to demonstrate why "[i]mposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results"), *cert. denied*, 120 S. Ct. 794 (2000). One article has argued that not applying the reasonable accommodations rule to perceived disabilities could actually harm employers. *See* Major Amy M. Frisk & Major Charles B. Hernicz, *Obesity As a Disability:*

further illustrates the advantaging effect of granting traditional accommodations to those with perceived disability claims.

Denying traditional accommodations to perceived disability claims arguably is consistent not only with the specific Supreme Court language quoted above, but also with the general concepts underlying most contemporary theories of antidiscrimination law. Contemporary antidiscrimination theories have been dominated by a range of centrist positions, which Mark Kelman and Gillian Lester have described along a spectrum from right to mainstream to liberal.[278] The dominant mainstream centrist theory defines discrimination narrowly around the concept of market rationalism.[279] Under mainstream centrist theory, the law should ensure only that employees receive their correct marginal product in a perfected, impersonal market.[280] Mainstream centrists believe that the employer is free to make decisions based on the plaintiff's value as a productive asset and to decide how to define productivity.[281] Thus, mainstream centrists should agree that the only market irrationality that needs to be corrected for plaintiffs with perceived disabilities is the effect of the employer's misperceptions, which prevent perceived disability plaintiffs from receiving their objectively correct marginal product. If a perceived disability plaintiff remains a less productive asset than another nondisabled employee even after the misperceptions are corrected, a mainstream centrist presumably would not consider it

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An Actual or Perceived Problem?, ARMY LAW., May 1996, at 3, 18. Frisk and Hernicz begin by noting correctly that, with perceived disabilities, "there is no actual disability to accommodate." *Id.* The authors argue, however, that employers will be worse off if courts interpret the accommodations rule as inapplicable to perceived disability claims because "the defendant employer is deprived of any opportunity to escape liability through accommodation or showing of undue hardship." *Id.* Frisk and Hernicz contend that, if courts do not apply the reasonable accommodations rule to perceived disability claims, the ADA would "create[] a strict liability situation for employers who regard employees as limited in their ability to perform." *Id.* The flaw in this argument is that, *without* the duty to accommodate, the plaintiff would be required to demonstrate the ability to perform the job functions *without* an accommodation in order to state a prima facie case. Thus, there would be no need for the employer to defend itself by accommodating the employee or proving that accommodation is unduly burdensome: the plaintiff will have failed to state a prima facie case if the plaintiff needs an accommodation to perform.

278. MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 200 (1997).

279. *See id.* at 200, 202–04.

280. *See id.*

281. *See id.* at 202–05 (explaining that mainstream centrism would require an employer to treat a member of a protected group "as a factor of production paid her marginal product," "but [that] measures of job performance remain defined by the employer").

"discriminatory" to act upon that ground.[282]

Right centrists place even more stock in the self-correcting power of markets and even less stock in the government's ability to identify and fix market failures, than do mainstream centrists.[283] Because right centrists contend that the law should be used even more narrowly to address only truly intentional discrimination,[284] right centrists also should agree that the ADA should not grant perceived disability plaintiffs the right to workplace accommodations.

Liberal centrists, on the other hand, take a more distributive view of discrimination law, which allows some employees to demand more than rational market treatment and to have employment decisions made on the basis of gross, rather than net, output.[285] In taking such a position, however, liberal centrists need a justification for choosing proper redistribution recipients. Liberal centrists have a tendency to fall back on rather traditional, conservative notions of moral-based recipient selection: they tend to justify the use of gross output measures whenever net costs systematically fall on a particularly deserving social group.[286] Because nondisabled individuals who are incorrectly perceived as disabled are not, as a group, systematically affected by a workplace designed around the dominant, nondisabled majority (to which perceived disability plaintiffs actually belong), even some liberal centrists might agree that the antidiscrimination justification for using gross output measures does not apply. Presumably, the market will take care of perceived disability plaintiffs like our hypothetical Employee *B*.

Thus far, this analysis has demonstrated that antidiscrimination theory cannot justify treating those with perceived disabilities differently from other nondisabled individuals when deciding who should be entitled to traditional forms of workplace accommodation.

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282. Because mainstream centrists at least acknowledge that market irrationality may be found in majority "customs," as well as in prejudice, there is some possibility that the theory could support granting perceived disability plaintiffs accommodations to change aspects of the work environment that are discriminatory in impact, if not intent. *See id.* at 204–05. In practice, however, members of this centrist camp have only advanced this position to challenge purportedly neutral entrance or credential requirements, not to challenge performance criteria. *See id.* at 205. Because mainstream centrists leave measures of job performance up to the employer and do not analyze organizational decisions to see if they put protected group members at a disadvantage, *see id.*, mainstream centrists might agree that individuals with perceived disabilities are not entitled to workplace accommodations.

283. *See id.* at 202–03.

284. *See id.*

285. *See id.* at 206–07.

286. *See id.* at 207.

Because the ADA currently denies nondisabled individuals a right to accommodation, the ADA cannot be interpreted to grant that right to individuals with perceived disability claims. Beyond that doctrinal question, however, there still lies a normative one: whether the law *should* grant nondisabled individuals a right to accommodations, thereby requiring that the same right be granted to individuals with perceived disability claims. One could argue that the ADA simply got it wrong and that *all* individuals should be entitled to reasonable workplace accommodations for impairments, whether disabling or not, whenever the impairment creates a functional limitation on the job. In other words, one could agree that antidiscrimination theory requires perceived disability plaintiffs to be treated the same as other nondisabled individuals for purposes of determining entitlement to accommodations (that is, our hypothetical Employee *B* should be treated like our hypothetical Employee *C*), but one also could argue that Congress should have drafted the ADA to provide both groups the right to accommodations, just like individuals with actually disabling conditions (that is, both Employees *B* and *C* should be accommodated, just like Employee *A*).

While there may be moral, philosophical, political, social, economic, or other reasons for such a normative stance, that position cannot be defended on contemporary antidiscrimination grounds. As David Wasserman has explained, recognizing that the disadvantages from various physical or mental impairments are mediated by the work environment "does not, by itself, give claims for reconstruction greater urgency than (other) claims for the redistribution of resources," such as claims by individuals with poor education or obsolete skills.[287] Group-based antidiscrimination norms provide one basis for placing workplace accommodation ahead of other redistributive claims. Group-based antidiscrimination theory posits that the inequality in workplace design arises not just from "the vagaries of the market or the political process," but because of prejudice.[288] The arbitrary design of the workplace around the unstated, able-bodied norm has its source in pervasive attitudes of contempt, disrespect, and devaluation of those with actual disabilities, which gives accommodation claims for those with actual disabilities greater moral urgency than claims for eliminating distributive inequalities from other sources, such as "greed, insularity, or

287. Wasserman, *supra* note 13, at 175.
288. *Id.*

oversight."[289]

The ADA uses this antidiscrimination theory to support the right to reasonable accommodations—in other words, to justify prioritizing that form of redistribution over others. Antidiscrimination theory cannot, however, provide the moral urgency necessary to prioritize workplace accommodations of nondisabled individuals (whether correctly or incorrectly perceived) over other forms of redistribution. Although the conventional workplace may create some functional limitations for nondisabling impairments, the inequalities in design are not an expression of disrespect, neglect, or devaluation, because nondisabling impairments are traits possessed by many of the members of the dominant group around which the workplace is constructed. The unequal distribution of goods among nondisabled individuals that may result in the conventional workplace lacks the stigmatizing aspect that would allow antidiscrimination norms to justify prioritizing their redistributive claims over others. Thus, contemporary antidiscrimination norms cannot, on their own, justify extending the ADA's traditional accommodations to the nondisabled majority workforce.

Nor can antidiscrimination theories justify a doctrinal outcome that treats perceived disability plaintiffs differently from other nondisabled individuals for purposes of receiving such accommodations, which is the primary focus of this Article. When addressing questions of statutory construction, "[the] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."[290] With the ADA, Congress sought to serve equal opportunity, which is not promoted by granting perceived disability plaintiffs the full array of operational workplace accommodations. On the other hand, it is difficult to ignore the single statutory definition of a "qualified individual" or to completely divorce the "accommodations" language from the "regarded as" prong. While the broader statutory context argues against granting traditional forms of accommodation for perceived disability claims, Part IV discusses how a more appropriate conception of "accommodation" could, and should, apply.

289. *Id.*

290. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979).

III. DOES THE ADA UNFAIRLY ADVANTAGE PERCEIVED DISABILITY PLAINTIFFS BY REQUIRING THEM TO PERFORM ONLY THE "ESSENTIAL FUNCTIONS" OF A JOB?

The ADA's "essential functions" limit also should not apply identically to actual and perceived disability claims. Although virtually all courts have reached the opposite conclusion based on the statute's purportedly "plain language," Section A demonstrates that the answer is far from "plain" by using a contextual reading of the statute, the EEOC guidelines, and the legislative history. Section B bolsters the view that the essential functions limit should not apply to perceived disabilities by again comparing perceived disability discrimination to employment discrimination under Title VII, which requires employees to be qualified for all legitimately selected job functions. Section C then explains why the same risk of unfair advantage that results from applying the reasonable accommodations rule to perceived disability claims also results from applying the essential functions limit.

A. Lessons from the Statutory Text, Agency Guidelines, and Legislative Intent

Nearly all courts have given perceived disability plaintiffs the benefit of the essential functions limit, which allows plaintiffs to be "qualified" even if they cannot perform marginal job tasks.[291] As with the reasonable accommodations rule, courts have taken this "all" approach by mechanically applying the ADA's single definition of a "qualified individual with a disability" identically to both perceived and actual disability claims.[292] An individual is "qualified" under the ADA if, with or without reasonable accommodation, the individual "can perform the essential functions of the employment position that such individual holds or desires."[293] By applying this single definition to perceived disability claims, courts conclude that perceived disability plaintiffs need not perform marginal job tasks either to state an ADA claim or to be eligible for all available statutory remedies.[294] Even courts that have expressed doubts about applying the

291. *See supra* notes 63–87, 116–17, 125 and accompanying text.

292. *See supra* notes 63–87, 116–17, 125, 127 and accompanying text.

293. 42 U.S.C. § 12111(8) (1994). The ADA's general antidiscrimination rule says that "[n]o covered entity shall discriminate against a qualified individual with a disability" regarding the terms, conditions, and privileges of employment, *id.* § 12112(a), and the statute defines individuals with disabilities to include those with substantially limiting impairments that are either actual or perceived, *id.* § 12102(2)(A), (C).

294. *See supra* notes 63–87, 116–17, 125 and accompanying text.

accommodations rule to perceived disability claims have applied the essential functions limit without reservation by deeming the statutory language to be plain and unambiguous.[295] This interpretation has been accepted by virtually all courts that have addressed the issue, and it has gone virtually unchallenged by employers defending perceived disability claims.[296]

Once again, however, a broader look at the statute uncovers ambiguities that should prompt courts to look to other interpretational sources.[297] The definition of a qualified individual—one who can perform the essential functions of the job with or without reasonable accommodation—itself contains statutorily defined terms. The ADA defines a "reasonable accommodation" to include, among other things, "job restructuring."[298] Congress viewed job restructuring as the obligation to eliminate nonessential job functions by redelegating or exchanging a disabled employee's job assignments.[299] The EEOC regulations clarify that job restructuring means "reallocating or redistributing nonessential, marginal job functions" for an individual with a disability who is unable to perform a nonessential job task.[300] The EEOC's technical assistance manual further elaborates: "Job restructuring or job modification is a form of reasonable accommodation which enables many qualified individuals with disabilities to perform jobs effectively. Job restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a job."[301] Thus, these sources indicate that allowing a disabled employee to be deemed "qualified" without performing the marginal job functions *is itself a form of*

295. *See, e.g.*, Deane v. Pocono Med. Ctr., 142 F.3d 138, 140, 146–47, 148 n.12 (3d Cir. 1998) (en banc) (applying the essential functions limit to perceived disability claims while declining to decide the "more difficult" reasonable accommodations issue); Keck v. New York State Office of Alcoholism & Substance Abuse Servs., 10 F. Supp. 2d 194, 198 (N.D.N.Y. 1998) (same); *see also supra* note 125 (citing Rehabilitation Act cases that reached the same conclusion).

296. *See supra* notes 63–87, 116–17, 125 and accompanying text. Even in the *Deane* case, where the original panel decision held that the essential functions limit does not apply and that a perceived disability plaintiff must perform all job functions, the employer refused to support that position before the en banc court. *See Deane*, 142 F.3d at 140, 146.

297. *See supra* note 135.

298. 42 U.S.C. § 12111(9)(B); *see* 29 C.F.R. § 1630.2(o)(2)(ii) (1999).

299. *See* H.R. REP. NO. 101-485, pt. 2, at 62 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 303, 344 ; S. REP. NO. 101-116, at 31 (1989) (Sup. Docs. No. Y 1.1/5:101-116).

300. 29 C.F.R. pt. 1630 app. § 1630.2(o) (citing H.R. REP. NO. 101-485, pt. 2, at 62, 1990 U.S.C.C.A.N. at 344–45; S. REP. NO. 101-116, at 31).

301. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.10(2), at III-21.

accommodation.[302] In other words, the essential functions limit is really just one specific application of the reasonable accommodations right. Requiring an employee with a disability to perform only the essential job functions, while restructuring the job to eliminate functions that are only marginal, is one way to create a reasonable accommodation for the disability.

Because the essential functions limit is itself an accommodation, a plaintiff should be entitled to that right only if the plaintiff is entitled to be reasonably accommodated. The applicability of the essential functions limit thereby collapses into the analysis of whether or not the right to reasonable accommodations applies. Because the analysis in Part II concluded that perceived disability plaintiffs are not entitled to traditional forms of operational accommodation, that analysis should also answer the essential functions question. In syllogistic form: perceived disability plaintiffs do not have the right to traditional forms of accommodation; allowing an employee to perform only the essential job functions is a traditional form of accommodation; therefore, perceived disability plaintiffs do not have a right to the ADA's essential functions limit.

The vacated *Deane* panel decision reached this conclusion not only as a matter of statutory interpretation, but also as a matter of common sense.[303] The "common sense notion" anchoring the court was very basic: "[*A*]*ny* employee, disabled or otherwise, must be able to perform all the requisite functions of a given job unless the individual is entitled to accommodation by operation of the ADA or a similar remedial statute."[304] Moving from common sense to statutory construction, the court determined that job restructuring—"i.e., excusing the performance of nonessential functions or reassigning them to other employees"—was "a statutorily defined

302. *See* 42 U.S.C. § 12111(9)(B); Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 206 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc); 29 C.F.R. § 1630.2(o)(2)(ii); *id.* pt. 1630 app. § 1630.2(o); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.10(2), at III-21 to -22; *see also* Robert B. Fitzpatrick, *Reasonable Accommodation and Undue Hardship Under the ADA: Selected Issues*, CA30 ALI-ABA 103, 112 (1995), *available in* WL, ALI-ABA database (listing "eliminating or reassigning the non-essential aspects of a job that are incompatible with a worker's disability" as an example of reasonable accommodation); Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1008 (1997) (explaining that one of the "more common accommodations that may be required" is "restructuring a job by reallocating or redistributing marginal, nonessential functions of the job").

303. *Deane*, 7 AD Cases (BNA) at 206.

304. *Id.*

form of accommodation."[305] Because an employer may require nondisabled individuals to perform marginal job tasks, "an employee who is excused from performing marginal tasks *is* being accommodated."[306] Unlike those with actual disabilities, who may need accommodation to compete on level ground with the nondisabled, the *Deane* panel held that accommodation would give perceived disability plaintiffs an "undeserved windfall."[307] Thus, the court concluded that perceived disability plaintiffs must perform "*all* the functions of the position held or sought."[308]

Despite the *Deane* panel's careful statutory analysis, the dissent found the panel's interpretation "unpersuasive."[309] The en banc court followed the dissenting panel opinion by holding that the "plain language" of the statute required the essential functions rule to apply identically to actual and perceived disability claims.[310] If Congress *really* had wanted the essential functions limit to be viewed as an accommodation, why did it need to define "qualified individual" with reference to *both* terms? If reassigning the marginal job functions was really a form of accommodation, couldn't Congress have defined a "qualified individual" with reference solely to the reasonable accommodations rule? Although this point has merit, the answer appears to be "no."

The reason that Congress needed to use both terms to define a "qualified individual" is that Congress apparently wanted to treat the reassignment of marginal functions not just as a potential accommodation, but as a presumptively reasonable one. If Congress simply had defined "qualified individual" as one who could perform all job duties with or without reasonable accommodations, the Act would have allowed employers to argue that reassigning marginal tasks was not "reasonable" in a particular situation, and courts would have had to analyze that issue on a case-by-case basis.[311] The

305. *Id.* (emphasis omitted); *see id.* at 206 n.17 (citing 42 U.S.C. § 12111(9)(B)).

306. *Id.* at 206.

307. *Id.* at 208.

308. *Id.* at 209 (emphasis added); *see id.* at 208.

309. *Id.* at 211–12 (Becker, J., dissenting).

310. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 146–47 (3d Cir. 1998) (en banc) (adopting the dissenting opinion from the panel decision in *Deane*, 7 AD Cases (BNA) at 211–12 (Becker, J., dissenting)).

311. An accommodation is not "reasonable" if it imposes an undue hardship on the employer. *See* 42 U.S.C. § 12112(b)(5)(A). Whether an accommodation imposes an undue hardship is an individualized determination based on several factors, including the nature and cost of the accommodation, the employer's size and financial resources, the impact that the accommodation would have on business operations, and the type of operations involved. *See id.* § 12111(10)(B)(i)–(iv).

legislative history indicates Congress's implicit view that reassigning, substituting, or excusing marginal job tasks should be viewed as a presumptively reasonable accommodation because those tasks do not define the job and because employers could use marginal tasks as an excuse for not hiring highly capable workers with disabilities.[312] It is therefore consistent not only to view the essential functions limit as an accommodation, but also to use *both* the reasonable accommodations right *and* the essential functions limit to define a "qualified individual." Because, as discussed in Part II, perceived disability plaintiffs should not be entitled to the traditional forms of operational workplace accommodation and because excusing performance of nonessential tasks *is* such an accommodation, perceived disability plaintiffs should be required to perform all required job tasks. Whether a particular task is essential or marginal therefore should be irrelevant in a perceived disability case, even though the statute's qualification language only refers explicitly to the essential functions of the job.[313]

If courts interpreted the ADA otherwise, the statute theoretically could create an absurd result.[314] An employer properly may terminate a correctly perceived, nondisabled employee who fails to perform a marginal, but required, job function. For example, ABC

312. *See* H.R. REP. NO. 101-485, pt. 3, at 31–34 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 445, 454–57; *id.*, pt. 2, at 55–57, 1990 U.S.C.C.A.N. at 337–39; S. REP. NO. 101-116, at 25–27 (1989) (Sup. Docs. No. Y 1.1/5:101-116); 136 CONG. REC. 11,451 (1990) (statement of Rep. Fish); *see also* 29 C.F.R. pt. 1630 app. § 1630.2(m) (1999) ("The purpose of this second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position."); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N & U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT HANDBOOK I-37 (1992) (same); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N & CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT, QUESTIONS AND ANSWERS 2 (1992) ("Requiring the ability to perform 'essential' functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions.").

313. *See Deane*, 7 AD Cases (BNA) at 209 n.24. As the vacated *Deane* panel explained,

> when determining whether an individual can, with or without accommodation, perform the essential functions, courts necessarily must look to whether the individual may be excused from the nonessential functions that he or she cannot perform. Indeed, the lynchpin of the ADA is that a disabled individual's qualifications are to be assessed only after he or she is accommodated through job restructuring or otherwise. Where that accommodation is not available, we do not read the ADA as permitting the individual or the court to focus exclusively on the essential functions of the relevant position.

Id. at 206 n.17 (citation omitted).

314. *See id.* at 210; *id.* at 215 (Becker, J., dissenting).

Company could fire our hypothetical Employee *C*, who has the correctly perceived, nondisabling knee injury, because of Employee *C*'s inability to perform the marginal task of restocking supply-room shelves. Let us say that ABC Company also fired our hypothetical Employee *B* because ABC misperceived Employee *B*'s mild carpal tunnel syndrome as a disability. If the essential functions rule applied to Employee *B*'s perceived disability claim, then Employee *B* would be deemed "qualified" to state an ADA claim, despite Employee *B*'s inability to perform the marginal restocking task. Let us say that Employee *B* wins the perceived disability case and is reinstated in the nursing assistant job. After losing the case and reinstating Employee *B*, ABC Company presumably will be disabused of its misperception about Employee *B*'s carpal tunnel syndrome.[315] At that point, ABC Company promptly, and lawfully, could terminate Employee *B* for failing to perform the marginal restocking task, just as it could fire any other correctly perceived, nondisabled worker on that ground.[316] In the end, the employer would get precisely what it wanted—to fire the employee—even though the employer lost the case.[317] And the employee would suffer precisely the fate that the employee was trying to avoid—losing the job—even though the employee won.[318] As this scenario demonstrates, applying the essential functions rule to perceived disability claims would establish a statutory right to a remedy that simply would not last.[319]

That result would be difficult to defend, given the practical intent behind the ADA.[320] Courts are obligated to construe a statute "to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose."[321] The appropriate alternative to applying the essential functions limit identically to actual and perceived disability claims is to interpret the essential

315. *See id.* at 215 (Becker, J., dissenting) (explaining that an employer's misperception of a nondisabled employee as disabled should be corrected when the employee wins a perceived disability case).

316. *See id.* at 210 (describing the lawful conduct that an employer may take after losing a perceived disability case); *id.* at 215 (Becker, J., dissenting) (same).

317. *See id.* at 215 (Becker, J., dissenting) (describing this scenario).

318. *See id.* (Becker, J., dissenting) (describing this scenario).

319. *See id.* at 210 (using this conclusion to hold the essential functions rule inapplicable to perceived disability claims).

320. *See* 42 U.S.C. § 12101(a)(8) (1994) (listing societal participation, independence, and self-sufficiency among the goals of the ADA); *see also* SHAPIRO, *supra* note 268, at 52, 144 (explaining that the fundamental goals behind the underlying disability rights movement included independence, self-sufficiency, mainstreaming, and integration of individuals with disabilities into society).

321. United States v. Schneider, 14 F.3d 876, 880 (3d Cir. 1994).

functions limit as an example of the reasonable accommodations right. Because excusing, substituting, or reassigning the marginal functions is itself an accommodation and because perceived disability plaintiffs should not be entitled to traditional forms of accommodation, the essential functions limit should not apply to perceived disability claims.

B. *Comparing Perceived Disability Claims to Other Types of Actionable Employment Discrimination*

Comparing disability discrimination to other types of employment discrimination also suggests that the essential functions limit should not apply to perceived disability claims. If the essential functions limit is viewed as a form of accommodation, then Part II.B's analysis of the reasonable accommodations rule should apply.[322] As an accommodation, the essential functions limit is part of the ADA's distributive justice component. Accordingly, the essential functions limit should be unavailable to perceived disability plaintiffs who do not face the structural and/or dynamic discrimination that would elevate their redistribution claims over the rest of the nondisabled workforce. Because the ADA protects perceived disability plaintiffs solely because of employers' misperceptions—like Title VII protects against discrimination on the basis of race, sex, and other vocationally irrelevant characteristics—perceived disability plaintiffs should be ineligible for accommodation rights and, therefore, ineligible for the essential functions limit.[323]

To state a case under Title VII, plaintiffs must prove that they are "qualified" for the jobs at issue.[324] Unlike the ADA's definition of a "qualified individual" that limits an employee's required performance to essential job functions, Title VII's provisions apply to "any individual,"[325] placing no limits on which job functions a plaintiff must be qualified to perform. An employer therefore may require a Title VII plaintiff to perform "all" of the employer's designated job requirements, duties, and responsibilities,[326] as long as the selected criteria do not have an impermissible disparate impact and are not a

322. *See supra* notes 176–222 and accompanying text.

323. *Cf. Deane*, 7 AD Cases (BNA) at 206 (holding that an employee who cannot perform a marginal job function is not qualified unless an accommodation right exists because "*any* employee, disabled or otherwise, must be able to perform all the requisite functions of a given job unless the individual is entitled to accommodation").

324. *See* Taylor v. Canteen Corp., 69 F.3d 773, 779 (7th Cir. 1995).

325. 42 U.S.C. § 2000e-2(a)(1) (1994).

326. *See* Pafford v. Herman, 148 F.3d 658, 669 (7th Cir. 1998) (applying Title VII's qualification rule in a failure-to-promote case).

pretext for discriminatory intent. In a termination case, a plaintiff is not "qualified" if the plaintiff has not met any one of the employer's "legitimate performance expectations."[327] The Title VII plaintiff must establish more than just the requisite educational credentials and experience; the plaintiff must demonstrate competent performance on all required job tasks.[328] Accordingly, the distinction between essential and marginal functions is irrelevant in Title VII claims. If the plaintiff is not qualified for "any" reason, the plaintiff may not establish the qualification requirement of a Title VII case.[329] Similarly, courts will allow an employer to defend a Title VII case by citing a plaintiff's failure to perform any legitimate job function as a nondiscriminatory reason for making an employment decision.[330]

Because the ADA shares the same goal as Title VII, the ADA's "essential functions" limit on the definition of a "qualified individual" must be justified as a necessary form of equal opportunity. That justification exists for those with actual disabilities.[331] Unlike the protected categories under Title VII, people with substantially limiting impairments may sometimes face unique employment barriers because of their protected status, with one such barrier being the arbitrary or unnecessary selection, assignment, distribution, or designated method of performing marginal job tasks.[332] In contrast,

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327. *Taylor*, 69 F.3d at 779; *see* Santana v. United States Tsubaki, Inc., 932 F. Supp. 189, 191 (N.D. Ohio 1995); Brady v. DiBiaggio, 794 F. Supp. 663, 668 (W.D. Mich. 1992).

328. *See* Oliver v. Digital Equip. Corp., 846 F.2d 103, 108 (1st Cir. 1988) (focusing on the employer's expectations); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 290 (8th Cir. 1982) (same); Johnson v. Westinghouse Elec. Corp., 752 F. Supp. 1000, 1003 (D. Utah 1990) (same); Bocage v. Litton Sys., Inc., 702 F. Supp. 846, 850 (D. Utah 1988) (same); *see also* Von Zuckerstein v. Argonne Nat'l Lab., 984 F.2d 1467, 1474 (7th Cir. 1993) (requiring detailed evidence of the particular job requirements for a plaintiff to state a prima facie case under Title VII).

329. *Pafford*, 148 F.3d at 669; *see also* Lawson v. Getty Terminals Corp., 866 F. Supp. 793, 801–02 (S.D.N.Y. 1994) (holding that the plaintiff did not meet the qualification test to state a prima facie case because the plaintiff had performed poorly by, among other things, failing to identify a worker who called in sick one day, which the employee characterized as a " 'little mistake[]' " (modification in original)).

330. *See, e.g.*, Richmond v. Board of Regents of the Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992).

331. For an analysis of the equal opportunity justification for providing other forms of accommodation to those with actual disabilities, see *supra* notes 177–87 and accompanying text.

332. As one commentator has explained,

> the essential-functions concept is indeed rooted in the intractable natural basis of the individual's disability. Such a natural ground is never a basis faced in laws against racial bias, and rarely is in other areas of prohibited discrimination. There the protected traits are always (or nearly always) regarded as immaterial to job performance. Only in anti-discrimination law protecting people with disabilities does the protected trait pertain to normal job performance.

perceived disability plaintiffs, like those protected under Title VII, face unequal opportunities not because a protected trait pertains to the socially constructed "normal job performance" but because of an employer's erroneous beliefs about an "immaterial" trait.[333] Although a plaintiff's nondisabling impairment may trigger the erroneous beliefs, any such impairment also may be possessed by other nondisabled employees, who, at least under current law, still are required to perform all designated job functions. Because perceived disability plaintiffs are actually part of the nondisabled majority, an employer's choice of marginal job tasks is not likely systematically to disfavor nondisabled workers who are perceived incorrectly over those who are perceived correctly. Thus, unlike those with actual disabilities, perceived disability plaintiffs should obtain equal opportunity with the rest of the nondisabled workforce without requiring the employer to eliminate or redistribute marginal job tasks, which, although nonessential, nevertheless legitimately may be desired by the employer. Like Title VII's approach, eliminating the employer's erroneous beliefs should be sufficient to equalize opportunity for those with perceived disability claims.

C. Distinguishing Equal Opportunity from Unfair Advantage

If the ADA's essential functions limit is viewed as a form of accommodation, then Part II.C's "unfair advantage" analysis of the reasonable accommodations rule is directly applicable.[334] As a form of accommodation, the essential functions limit is consistent with a "difference model" of antidiscrimination.[335] Accordingly, the essential functions limit needs an equality-based justification for treating some people "differently" in order to end up treating them "the same." Absent such a justification, a "sameness model" should apply, which simply requires employers to treat all employees the same.

An equality-based justification for the essential functions limit

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W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls's Concept of Social Justice*, 22 N.M. L. REV. 295, 351 (1992); *see also* H.R. REP. NO. 101-485, pt. 2, at 55 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (explaining how marginal job tasks can have the "purpose or effect" of discriminating against individuals with actual disabilities); STAFF OF HOUSE COMM. ON EDUC. AND LAB., 101ST CONG., THE AMERICANS WITH DISABILITIES ACT 124 (Comm. Print 1990) (Sup. Docs. No. Y 4.Ed8/1:102-A) (same).

333. *See* Gray, *supra* note 332, at 351.

334. *See supra* notes 224–77 and accompanying text.

335. For an explanation of how accommodations represent a "difference model" of antidiscrimination, see *supra* notes 238–47 and accompanying text.

exists for people with actual disabilities, just as it exists to justify any other form of reasonable accommodation.[336] Because the conventional workplace often is oriented unnecessarily toward the nondisabled, accommodations are needed to eliminate barriers that some individuals with actual disabilities would still face under a "sameness model," which effectively treats the job as immutable. The selection, distribution, and required method of performing marginal job tasks may create such a barrier. For example, our disabled Employee *A* would be excluded from the nursing assistant's job, even if Employee *A* could perform all essential job functions, because the employer unnecessarily assigned that particular position the marginal task of restocking the top shelf and because the employer arbitrarily required the task to be performed by moving one's body up a ladder, rather than by using some type of reaching device. Given that such marginal job functions are not, by definition, "essential" to accomplishing the job, requiring individuals with disabilities to perform particular marginal tasks, or to perform them in a particular manner, can be unnecessarily exclusionary.[337] By requiring redistribution of such marginal tasks, the essential functions limit may be described as "active nondiscrimination"—just like other forms of traditional workplace accommodation—because it requires positive steps to equalize opportunity between employees who have an actual disability and those who do not.[338]

As with the ADA's general accommodations rule, the essential functions limit does not provide preferential treatment just because it treats individuals with actual disabilities differently from the nondisabled. As explained in Part II.C, accommodations for actual disabilities ensure only that the individual's abilities will be recognized; they do not require the employer to lower legitimate performance standards or to prefer employees with disabilities.[339] This assertion, however, may be harder to defend for the essential functions limit than for other forms of traditional accommodation. While other accommodations merely modify the work environment,

336. For a discussion of this analysis for other forms of reasonable accommodations, see *supra* notes 234–60 and accompanying text.

337. For a definition of "essential functions," see H.R. REP. NO. 101-485, pt. 3, at 33, 1990 U.S.C.C.A.N. at 455–56; *supra* notes 42–46 and accompanying text.

338. *See* Conway, *supra* note 16, at 961 ("The essential function limitation is consistent with the congressional mandate to provide equal opportunity to the disabled."). For a discussion of how the term "affirmative action" may be used correctly to describe what this Article refers to as "active nondiscrimination," see the description of Van Alstyne's work, *supra* note 259.

339. *See supra* notes 226–29, 243, 247, 253 and accompanying text.

equipment, or methods to allow disabled individuals to perform a task in an unconventional way, the essential functions limit also allows disabled individuals to *avoid* performing tasks that the employer could require nondisabled individuals in that position to perform. Nevertheless, the essential functions limit is "an important nondiscrimination requirement," not a way to give those with disabilities a competitive edge.[340]

The essential functions limit is consistent with a nondiscrimination theory for those with actual disabilities because basing employment decisions on marginal job functions can facilitate discrimination in two ways. For individuals with actual disabilities, focusing on marginal job functions may not only have the "effect" of discriminating against the disabled by creating additional, arbitrary barriers, but often it may have a discriminatory "purpose" as well.[341] Because of employers' historic prejudice against people with actual disabilities, Congress recognized that a more complete qualification test would create a significant risk that employers would use marginal job functions to disguise illegitimate motives for failing to hire or retain highly capable disabled employees.[342] From this perspective, Congress intended the essential functions limit to be "protective" of people with actual disabilities by ensuring that discrimination could not be accomplished through the arbitrary distribution of marginal tasks.[343] The essential functions limit assures a legitimate fit between

340. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.3(2), at II-12; *see* H.R. REP. NO. 101-485, pt. 3, at 33, 1990 U.S.C.C.A.N. at 455–56 (explaining the purpose of the essential functions rule).

341. *See* H.R. REP. NO. 101-485, pt. 2, at 55–56, 71, 1990 U.S.C.C.A.N. at 337–38; STAFF OF HOUSE COMM. ON EDUC. AND LAB., *supra* note 332, at 124.

342. *See* H.R. REP. NO. 101-485, pt. 2, at 71, 1990 U.S.C.C.A.N. at 353–54 (emphasizing the desire to keep employers from using marginal job tasks for the "purpose" of excluding individuals with disabilities); *id.* at 55, 1990 U.S.C.C.A.N. at 337 (explaining the purpose of the essential functions rule); STAFF OF HOUSE COMM. ON EDUC. AND LAB., *supra* note 332, at 124, 135 (describing how the essential functions limit prevents employers from using marginal job tasks with the "purpose" of excluding disabled individuals); EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.3(2), at II-12 (explaining that the ADA's focus only on essential job functions "is an important nondiscrimination requirement" for the "[m]any people with disabilities who can perform essential job functions [but who] are denied employment because they cannot do things that are only marginal to the job"); *see also* 136 CONG. REC. 10,901–02 (1990) (statement of Rep. McCollum) (arguing during floor debate that the ADA protects employees from employers "attempting to shape the essential functions of the job to exclude" disabled individuals).

343. *See* H.R. REP. NO. 101-485, pt. 2, at 71, 1990 U.S.C.C.A.N. at 353–54 (explaining the purpose behind the essential functions limit); *id.* at 55, 1990 U.S.C.C.A.N. at 337 (same); STAFF OF HOUSE COMM. ON EDUC. AND LAB., *supra* note 332, at 124, 135 (same). *But see* Gray, *supra* note 332, at 307 (noting this "protective" purpose, but

job criteria and relevant ability and works together with the broader accommodations rule "to eliminate the current pervasive bias against employing persons with disabilities."[344] Accordingly, individuals with actual disabilities who receive the "accommodation" provided by the essential functions limit are not advantaged over nondisabled employees. Those with actual disabilities are just recipients of an appropriately difference-based form of equal opportunity law.

While the essential functions limit thus helps "level the playing field" for individuals with actual disabilities, the same is not true for those whose disabilities only are perceived. Because perceived disability plaintiffs possess no substantially limiting impairments that materially distinguish them from other nondisabled individuals, any unequal opportunity results from the employer incorrectly treating similar employees differently, not from incorrectly treating different employees the same. Accordingly, for perceived disability plaintiffs, a sameness model should suffice.

Under a sameness model, a perceived disability plaintiff should be held to the same qualification standards as all other nondisabled individuals, which means an employer could require performance on all legitimately selected essential *or marginal* job tasks.[345] While a perceived disability plaintiff may have a nondisabling impairment that impacts performance of marginal job functions, any such impairment is not the cause of the plaintiff's unequal opportunity.[346] Nor does a nondisabling impairment objectively distinguish the perceived disability plaintiff from other nondisabled employees, who may

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arguing that the essential functions rule also ends up having an exclusionary effect).

344. H.R. REP. NO. 101-485, pt. 2, at 71, 1990 U.S.C.C.A.N. at 353; *see* STAFF OF HOUSE COMM. ON EDUC. AND LAB., *supra* note 332, at 124, 135.

345. Under this interpretation, a plaintiff with an otherwise nondisabling impairment who is denied a job for failure to perform marginal job functions may still be protected if there are enough employers who require the same marginal job functions for a particular class of jobs or a broad range of jobs in various classes. *See* 29 C.F.R. § 1630.2(j)(3)(i) (1999). The plaintiff could argue that the otherwise nondisabling impairment substantially limits the major life activity of "working," thus enabling the plaintiff to bring an actual disability claim instead of a perceived disability claim. *See id.* In that situation, the marginal job tasks would have the purpose or effect of discriminating on the basis of a disability, and the essential functions rule appropriately would serve the ADA's equal opportunity objective. Nevertheless, because employers are likely to have much greater variability in their selection of marginal job tasks than in their selection of essential ones, this scenario probably would be rare. *See* Moberly, *supra* note 6, at 363–64. Typically, perceived disability plaintiffs are likely to have a much greater opportunity than actual disability plaintiffs for economic exit by finding similar employment with another employer. *See id.* That fact further supports the view that the essential functions limit is needed only to obtain equal opportunity for those with actual disability claims.

346. *See supra* notes 29–38, 270–76 and accompanying text.

possess similar types of nondisabling conditions.[347] Thus, perceived disability plaintiffs should not need to have marginal job tasks substituted, redistributed, or excused in order to receive opportunities equal to "the average similarly situated employee without a disability," which is all that the ADA seeks to accomplish.[348] Instead, applying the essential functions limit would provide a "windfall" to those with perceived disability claims.

Because a sameness model of antidiscrimination would suffice for those with perceived disabilities, granting them the essential functions limit, like other traditional accommodations, would make it more advantageous for nondisabled workers to be misperceived than to be perceived correctly. For example, applying the essential functions limit to our hypothetical Employee *B* (the misperceived but nondisabled worker with carpal tunnel syndrome) would require ABC Company to tolerate Employee *B*'s inability to perform the marginal shelf-stocking function by exchanging that task with another employee's marginal job task, by reassigning the task, or by excusing performance of the task altogether. In contrast, ABC Company could fire our hypothetical Employee *C* (the correctly perceived, nondisabled worker with a knee injury) for not performing the required shelf-stocking task, even though the task is not essential to the job. Employee *C* would be better off if ABC Company misperceived Employee *C*'s knee injury as disabling because the misperception would prevent the Company from basing employment decisions on the ability to perform marginal job functions. To avoid this unintended result, and to be consistent with the ADA's equal opportunity objective, courts should not apply the essential functions limit to perceived disability claims.

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347. *See supra* notes 29–38, 270–76 and accompanying text.

348. *See* 29 C.F.R. pt. 1630 app. § 1630.9; *id.* pt. 1630 app. § 1630.1(a) (describing the ADA as an "anti-discrimination" statute, which "requires that individuals with disabilities be given the same consideration for employment that individuals without disabilities are given"); *see also* 42 U.S.C. § 12101(a)(8), (9) (1994) (describing the ADA's equal opportunity goal); 29 C.F.R. pt. 1630 app. Background (same).

Of course, the theoretical risk of unfair advantage from applying the essential functions limit to perceived disability claims will only be a reality for employers who actually base employment decisions at least in part on the performance of marginal job tasks. If courts interpret the ADA to prevent an employer from taking action against perceived disability plaintiffs because of their inability to perform marginal job functions, but the employer never takes such action against other nondisabled individuals, then perceived disability plaintiffs have gained no practical "advantage."

IV. RECOMMENDATIONS

To this point, this Article has argued only that courts should not apply the ADA's reasonable accommodations and essential functions rules identically to actual and perceived disability claims. By granting perceived disability plaintiffs a cause of action and the full array of statutory remedies under the same circumstances as actual disability plaintiffs—the "all" approach—courts exceed the ADA's equal opportunity objective and advantage those with perceived disabilities. This Part analyzes what should be done as a result of that conclusion.

Section A first translates the theoretical advantage of the "all" approach into practical terms by assessing whether the problem is big enough to warrant a response at all. Section B then analyzes the only response that has been suggested to date. That response—the "nothing" approach—would eliminate the ADA's reasonable accommodations and essential functions rules from perceived disability claims altogether, leaving perceived disability plaintiffs like our hypothetical Employee *B* with no cause of action and, therefore, no remedy at all. While eliminating the reasonable accommodations and essential functions rules from the perceived disability context would solve the advantage problem of the majority's "all" approach, Section B explains how the "nothing" approach misses the target in the other direction, falling short of the ADA's level playing field goal. Section C then proposes a middle-ground alternative that would produce the broadest scope for the perceived disability prong consistent with the ADA's equal opportunity goal.

A. The Size of the "Unfair Advantage" Problem

As explained in Part I.B, the vast majority of courts have applied the reasonable accommodations and essential functions rules identically to actual and perceived disability claims. Given the ambiguity of the statutory language, the ease with which most courts have applied the qualification language mechanically to perceived disabilities, and the administrative convenience and other benefits that may result from identical treatment of all ADA claims, is there enough of an issue for courts to change course? Is the risk of advantage from the majority's "all" approach significant enough for courts to rethink the meaning of the qualification tests for perceived disability claims? This Section attempts to answer these practical questions before moving on to analyze potential alternatives.

The number of cases in which perceived disability plaintiffs would receive an advantage if a court applied the traditional

qualification standards is only a subset of all perceived disability claims. The risk of advantage only exists in those perceived disability cases in which the plaintiff needs a reasonable accommodation (which may include redistributing the marginal job functions) in order to do the job. Perceived disability plaintiffs who can perform all job functions without accommodation will not receive a "windfall" over other nondisabled individuals because those plaintiffs will be deemed "qualified" without accommodation. Unfortunately, data for the relevant subset of perceived disability claims is not available and instead must be estimated from general records of perceived disability litigation.

Historically, the number of reported cases involving perceived disabilities has been small.[349] Until the mid-1990s, there were so few perceived disability cases under either the ADA or the Rehabilitation Act that one court described perceived disability case law as "hen's-teeth rare."[350] During the first half of the decade, allegations of perceived disabilities were still considered "pathbreaking" claims that required courts to enter "new frontiers" and "journey into the terra incognita."[351] By the mid-1990s, perceived disability claims started to increase,[352] but the small number of recorded cases still provided a

349. *See* Vande Walle, *supra* note 127, at 902 (citing Cook v. Rhode Island, 10 F.3d 17, 22 (1st Cir. 1993)).

350. *Cook*, 10 F.3d at 22.

351. *Id.* at 20, 22, 26.

352. For a partial list and a discussion of the large number of recent perceived disability cases, which is in stark contrast to the first half of the 1990s, see *supra* notes 63–126 and accompanying text. One reason for the increase was a significant First Circuit decision in late 1993, which "issued a number of rulings favorable to a plaintiff who proceeds with a perceived disability claim." Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 58 (1994) (describing *Cook*). The *Cook* case held, among other things, that the immutability and voluntariness of a nondisabling condition do not bar a perceived disability claim. *Cook*, 10 F.3d at 23–24. The court's ruling spawned a series of articles and increased the number of perceived disability claims. *See* Frisk & Hernicz, *supra* note 277, at 19 (arguing that *Cook* may have been a catalyst for increasing perceived disability claims); Charles T. Passaglia, *Appearance Discrimination: The Evidence of the Weight*, 23 COLO. LAW. 841, 842 (1994) ("*Cook* certainly provides support, and perhaps momentum, for the often-nebulous 'perceived disability' claims brought under the ADA."); Jennifer Shoup, Note, *Title I: Protecting the Obese Worker?*, 29 IND. L. REV. 207, 220 (1995) ("*Cook* affirmed a finding of employment discrimination based upon perceived disability. As the *Cook* court pointed out, such claims have, in the past, been rare. However, it seems a legitimate concern that, in the wake of *Cook*, such claims will become more prevalent."). *But see* Shoup, *supra*, at 220 ("*Cook* offers some reassurance, however, by indicating that a perceived disability claim, at least insofar as obesity is concerned, is relatively narrow.").

fairly minor contribution to disability-based discrimination law.[353] Not until well into the decade did perceived disability cases begin to make any significant impression on the legal landscape.[354]

Since the mid-1990s, however, the number of perceived disability cases has increased,[355] and there are several reasons to predict that the trend will continue. Courts are beginning to clarify and narrow the scope of the actual disability prong.[356] This trend is exemplified by the Supreme Court's recent decision in *Sutton v. United Air Lines, Inc.*[357] In *Sutton*, the Supreme Court overturned the broad interpretation of the ADA's actual disability prong previously reached by the majority of circuit courts, and the Court greatly restricted the potential class of individuals with actual disabilities.[358] Despite EEOC regulations to the contrary, the *Sutton* Court held that actual disability status should be based on an employee's functioning *with* the use of any corrective measures that the employee uses to reduce the impact of the impairment.[359] Accordingly, many high-functioning individuals with impairments may no longer rely on the ADA's actual disability prong. As courts continue to circumscribe the reach of the actual disability prong in this and other ways, creative plaintiffs lawyers are and will be turning more frequently to the perceived disability prong as an alternative, often pleading a perceived disability as a fall-back position in the same complaint with an actual disability claim.[360] In addition, at the same time that courts are paring back the scope of the actual disability prong, they may be demonstrating a willingness to expand the protected class of

353. *See* Greenberg v. New York State, 919 F. Supp. 637, 641 (E.D.N.Y. 1996) (observing that "few" perceived disability cases had been litigated); Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469, 1474 (E.D. Va. 1994) ("Case law on the perceived disability component of the Rehabilitation Act [is] scant. . . .").

354. *See* Frisk & Hernicz, *supra* note 277, at 13, 19 & nn.131–32.

355. *See id.* at 19 (noting that perceived disability claims are becoming more common, both before the EEOC and in federal courts); *see also supra* note 352 (discussing the increase in perceived disability claims resulting from the *Cook* decision).

356. *See* Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 328 (1997) (arguing that "the failure of the ADA to provide comprehensive protection against discrimination can be attributed to judicial narrowing of its provisions"); Locke, *supra* note 226, at 108 (arguing that courts have raised the standards that disability discrimination claimants must meet).

357. 119 S. Ct. 2139, 2146–49 (1999).

358. *Id.*

359. *Id.* (declining to follow 29 C.F.R. pt. 1630 app. § 1630.2(h) (1999)).

360. *See* Vande Walle, *supra* note 127, at 917 ("A common scenario in perceived disability cases involves plaintiffs alleging in the alternative that they are actually disabled or that their employer regarded them as disabled.").

perceived disabilities, which could further increase litigation under the "regarded as" prong.[361] The complicated nature of perceived disability claims makes it likely that more cases will be needed to clarify and articulate the parameters of the "regarded as" prong than for the more straightforward portions of the Act.[362]

While the number of perceived disability cases clearly is rising, it is harder to determine what percentage of those cases involve plaintiffs who require accommodation and therefore present the risk of advantage. There is some evidence that this relevant subset of perceived disability cases is substantial. For all types of disability discrimination claims, the failure to provide reasonable accommodation is the second largest form of alleged discrimination, only behind claims of discriminatory discharge.[363] The percentage of all disability claims that allege a failure to accommodate is between 25% and 28%.[364]

Of course, it is possible that this percentage may be less when looking only at perceived disability cases in which the plaintiff, by definition, lacks an actually disabling impairment.[365] But plaintiffs in two of the regulations' three categories of perceived disabilities do possess some type of physical or mental impairment that may impact job performance, even if the impairment is not substantially limiting.[366] Nearly all of the reported cases fall into those two categories.[367] In fact, nondisabled individuals are most likely to suffer

361. *See* Dudley, *supra* note 63, at 391 (arguing that there is a "judicial tendency to expand the protected class of 'regarded as' individuals under the ADA beyond those originally intended by Congress").

362. *See* Wilson v. Georgia-Pacific Corp., 4 F. Supp. 2d 1164, 1171–72 n.7 (N.D. Ga. 1998).

363. *See* Shoup, *supra* note 352, at 228 & n.141 (citing William Flannery, *Rights Act Generates Few Suits*, ST. LOUIS POST DISPATCH, April 6, 1994, at 8, *available in* 1994 WL 8153215).

364. *See* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 369 & n.114 (1997) (citing a 28% figure); Sheil, *supra* note 58, at 332 n.79 (placing the number at 25% for complaints filed with the EEOC between July 26, 1992, and June 30, 1994).

365. *See* Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir. 1998) (speculating in dicta that accommodation claims may occur less often in perceived disability cases than in actual disability cases); Vande Walle, *supra* note 127, at 918–19 (arguing that "issues of reasonable accommodation seldom arise in 'regarded as' cases, and when they do, they are often secondary to issues of class membership").

366. *See supra* notes 63–87 and accompanying text.

367. *See* Vande Walle, *supra* note 127, at 904 ("[T]he completely unimpaired plaintiffs hypothesized by [the third category in] the regulations do not appear with any frequency in the fact patterns found in appellate court decisions." (footnote omitted)); *id.* at 911 n.112 (describing perceived disability cases with "a completely unimpaired plaintiff" as "rare"). A review of the perceived disability cases cited in *supra* notes 63–126 and

from prejudiced attitudes or misperceptions when they exhibit some visible and limiting impairment that affects job performance in some way.[368] Individuals with nondisabling impairments that are "somehow limiting" are the most likely to be misperceived as disabled and thus the most likely to bring perceived disability claims.[369] Therefore, the percentage of perceived disability cases involving accommodation claims may be just as large as the percentage for all disability claims combined.

Given the predicted increase in perceived disability claims and the substantial portion of those claims that may involve accommodation requests, the number of cases presenting the "unfair advantage" issue is probably significant enough to warrant careful examination. On the other hand, some may argue that even if the risk of a "windfall" exists in these cases, the windfall is too small to be consequential. Numerous studies show that the cost, if any, for most accommodations is surprisingly small.[370] That cost may be even smaller for perceived disability cases "because the impairments involved are not, by definition, disabling" and, therefore, the accommodations are likely to be more minor.[371]

But the employer's financial outlay for accommodating perceived disabilities is not the only cost involved. Determining the scope of the "unfair advantage" issue also requires analysis of the perceived scope of the problem and the costs of those perceptions. While the windfall to accommodated plaintiffs with perceived

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accompanying text supports this conclusion because virtually all involve a perceived disability plaintiff with some type of nondisabling physical or mental impairment.

368. *See* Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 213 (3d Cir. 1997) (Becker, J., dissenting), *majority opinion rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc).

369. *Id.* (Becker, J., dissenting); *see also* Vande Walle, *supra* note 127, at 904–10 (explaining that many reported perceived disability cases involve plaintiffs with some type of impairment and that these plaintiffs have the strongest case when, among other things, the condition has impacted performance by necessitating time off or by disrupting the workplace).

370. *See, e.g.*, RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION: CASES AND MATERIALS 86 (1995) (citing a study by Sears, Roebuck and Company finding that "the average cost per reasonable accommodation for employees with disabilities was $121.42 and that 301 of 432 (69%) of accommodations required no cost at all" from 1978 to 1992); Cooper, *supra* note 181, at 1448–49 & n.149 (citing a 1982 study by the U.S. Department of Labor finding that "51% of the accommodations imposed no cost, and 30% cost less than $500 per worker"); Murphy, *supra* note 12, at 1633 & nn.167–68 (summarizing studies that "have consistently found that job accommodations are generally not expensive"); Sheil, *supra* note 58, at 330 n.59 (summarizing evidence that most accommodations "will impose little or no financial burden"); Shoup, *supra* note 352, at 228 (citing evidence that 70% of necessary accommodations cost employers less than $100).

371. Vande Walle, *supra* note 127, at 922.

disabilities may be small in value, the perception of unfairness by other nondisabled employees (and possibly by employees with actual disabilities) may have real economic effects. Business success is tied in part to employee morale.[372] A decrease in employee morale can involve decreases in employee enthusiasm, confidence, and loyalty, which in turn can increase coworker friction, tardiness, absenteeism, and employee turnover rates.[373] Although one might suspect that working hours or pay would impact employee morale the most, morale is actually affected more by a sense of "fairness of treatment" than by any tangible elements of the job.[374] The most significant cause of decreased employee morale is the "perception of injustice" that results from perceived discrepancies between the rewards and punishments of oneself and others.[375]

Seeing an individual with a perceived disability receive an accommodation may create this "perception of injustice" in similarly situated nondisabled coworkers, particularly if the coworkers do not share the employer's misperception about the individual's impairment. While there is some evidence that accommodating truly disabled workers may not decrease and actually may increase employee morale,[376] accommodating individuals with only perceived disabilities may have the opposite effect. To the extent that coworkers view the accommodation as preferential treatment, their expectations of fairness are disrupted, decreasing their morale.[377] Unlike the employer, coworkers may regard a perceived disability plaintiff accurately as nondisabled, and the coworkers actually may share the same type of nondisabling impairments themselves. Even without any direct impact on the coworkers' jobs, morale may decrease as coworkers see other employees receiving

372. *See* Key, *supra* note 302, at 1007–08.

373. *See id.* at 1007.

374. *Id.* at 1006 (describing a Sears, Roebuck and Company study of more than 36,000 employees).

375. *Id.* at 1006–07 (discussing a Theodore Caplow study); *see id.* at 1033–34 ("[A] perception that a co-worker is receiving preferential treatment can lead to legitimate feelings of unfairness and injustice.").

376. *See* S. REP. NO. 101-116, at 28–29 (1989) (Sup. Doc. No. Y 1.1/5:101-116) (citing a study of 1452 physically impaired employees of the E.I. du Pont de Nemours and Company finding that coworkers "did not resent necessary accommodations made for employees with [actual] disabilities"); Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 611–12 nn.258–59 (1994) (citing evidence that accommodations do not decrease coworker morale and that coworkers often volunteer to assist employees with actual disabilities).

377. *See* Key, *supra* note 302, at 1009.

accommodations that the coworkers rationally view as a windfall.[378]

This decrease in coworker morale is exacerbated when the accommodation has a direct impact on the coworkers' jobs.[379] For example, if an employer accommodates an employee with a perceived disability by redistributing that employee's marginal job functions to a coworker, the coworker is likely to resent the accommodation because of the increased workload, particularly if the redistributed tasks are undesirable.[380] When actual disabilities are involved, coworker morale decreases the most when the disability is nonobvious and the coworker does not know (or believe) that it exists.[381] The same result is possible when the disability is only perceived by the employer, as coworkers will not necessarily share the employer's view or understand the reason for the redistribution decision.

While the economic impact from decreased employee morale may be real, it nevertheless may be inappropriate to consider when interpreting the scope of the ADA. To the extent that coworkers' sentiments flow from the same stereotypes, prejudice, myths, and misconceptions that the ADA is trying to eliminate in employers, those sentiments should not be weighed into the employment equation.[382] Nevertheless, while the ADA does not permit employers to consider those "illegitimate" causes of decreased morale, some forms of decreased morale may be "legitimate" if they are caused by actual impositions on the coworkers' expectations and rights.[383] The ADA does not require accommodations that impose an "undue hardship," a determination that is based in part on the difficulty that the accommodation creates, given the number of employees and the functions of the employer's work force.[384] An accommodation may

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378. *See id.* at 1009–10.

379. *See id.* at 1010.

380. *See id.* at 1010–11; *see also* Murphy, *supra* note 12, at 1632 (noting that coworkers may feel that accommodations requiring reassignment of "unpleasant or undesirable" marginal job functions are unfair).

381. *See* James G. Frierson, *An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality*, 43 LAB. L.J. 308, 308, 310 (1992).

382. *See* 29 C.F.R. pt. 1630 app. § 1630.15(d) (1999) ("[T]he employer would not be able to show undue hardship if the disruption to its employees were the result of those employees fears or prejudices toward the individual's disability and not the result of the provision of the accommodation.").

383. *See* Key, *supra* note 302 at 1030–41 (arguing that some causes of lowered employee morale should be considered in assessing whether an accommodation imposes an undue hardship on an employer).

384. *See* 42 U.S.C. § 12111(10)(B)(1994); 29 C.F.R. § 1630.2(p); *id.* pt. 1630 app. § 1630.15(d); Murphy, *supra* note 12, at 1632.

pose an undue hardship if it is "unduly disruptive" to other employees, and an accommodation will be deemed "unduly disruptive" only if it actually impacts other employees' ability to perform their jobs.[385] Because the ADA permits coworker impact to play this narrow role in determining undue hardship, coworker impact should play the same role in assessing the scope of the problem created by accommodating perceived disabilities. When decreased coworker morale stems from actual impositions on the coworker's job and the coworker does not share the employer's misperception about the status of the accommodated employee, the economic results legitimately may be viewed as a cost.

In addition to the immediate economic effects caused by decreased employee morale, advantaging perceived disability plaintiffs also may have broader, long-term effects. Employees who view themselves as similarly situated to perceived disability plaintiffs may begin to readjust their expectations and start demanding accommodations whether they are covered by the ADA or not.[386] If courts interpret the ADA to provide reasonable accommodations to perceived disability plaintiffs, such interpretation may "permit healthy employees to, through litigation (or the threat of litigation), demand changes in their work environments under the guise of 'reasonable accommodations' for disabilities based on misperceptions."[387] To the extent that nondisabled individuals begin to expect what "regarded as" plaintiffs are receiving and those expectations are not met, there may be a backlash against the ADA's accommodation requirements more generally.[388] Such a response could undermine the critical support for the ADA by rekindling initial views of the statute as an affirmative action and preferential treatment provision, rather than as an equal opportunity law.[389] Because the ADA obligates employers to implement active nondiscrimination measures that do have costs attached, "support for

385. 29 C.F.R. pt. 1630 app. § 1630.15(d).

386. *See* Deborah A. Calloway, *Dealing with Diversity: Changing Theories of Discrimination*, 10 ST. JOHN'S J. LEGAL COMMENT. 481, 494 (1995).

387. Deane v. Pocono Med. Ctr. 142 F.3d 138, 149 n.12 (3d Cir. 1998) (en banc) (describing the employer's argument against accommodating perceived disabilities and noting in dicta that the argument has "considerable force").

388. *See* Calloway, *supra* note 386, at 494; *see also* Vande Walle, *supra* note 127, at 931 (arguing that "[i]ncluding persons regarded as disabled in the protected class under the ADA subverts its distributive justice rationale," which is the basis of the duty to reasonably accommodate).

389. *See* Blanck & Marti, *supra* note 364, at 346 (describing critics' initial opposition to the ADA because they viewed the statute as "a preferential treatment initiative").

the statute is crucial to its continued viability."[390]

Thus, the impact of the advantage problem may be greater than what is indicated simply by assessing the number of perceived disability cases involving accommodation claims. The potential direct and indirect costs that may result from applying the ADA's qualification standards identically to perceived disability claims appear to be non-trivial. Accordingly, the final Sections of this Article will suggest alternative ways to interpret the reasonable accommodations and essential functions rules for perceived disability claims.

B. Problems with All-or-Nothing Approaches: Why Eliminating the Reasonable Accommodations Right and the Essential Functions Limit for Perceived Disabilities May Fall Short of the "Level Playing Field" Objective

Very few courts or commentators have responded to the advantage that arises when the traditional test of a "qualified individual" is applied to perceived disability claims.[391] To the extent that they have addressed this issue explicitly, the only real response has been an extreme alternative to the majority's "all" approach. This response—the "nothing" approach—sees no role at all for the reasonable accommodations and essential functions rules in the perceived disability context,[392] leaving plaintiffs like our hypothetical Employee *B* (the misperceived but nondisabled worker with carpal tunnel syndrome) with neither a right nor a remedy. While this "nothing" approach effectively eliminates the risk of unfair advantage for perceived disability claims, it is also an imperfect solution. Completely abandoning the ADA's unique qualification tests for perceived disabilities would greatly reduce the scope of the "regarded as" prong.[393] By excluding perceived disability plaintiffs who have

390. Vande Walle, *supra* note 127, at 937–38.

391. Most courts have assumed that the reasonable accommodations and essential functions rules apply identically to actual and perceived disability claims, without objection, discussion, or analysis. *See supra* notes 63–87 and accompanying text. Commentators often have made the same assumption. *See, e.g.*, Vande Walle, *supra* note 127, at 919 & nn.191–92 (presuming that the reasonable accommodations rule applies to perceived disability claims based on the statutory definition of a qualified individual).

392. This approach is exemplified by the vacated *Deane* panel opinion. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 209 (3d Cir. 1997) (holding that neither the reasonable accommodations right nor the essential functions limit apply to perceived disability claims), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc). Other courts and commentators have taken this "nothing" approach with respect to at least the reasonable accommodations rule. *See supra* notes 88–115, 119–22 and accompanying text.

393. *See Deane*, 7 AD Cases (BNA) at 213 (Becker, J., dissenting).

nondisabling but limiting impairments, the "nothing" approach would end up falling short of the level playing field that the ADA seeks to achieve.

Focusing on the employer's conduct provides the first reason for rejecting the "nothing" approach. The ADA's perceived disability prong exists not to protect individuals because of their physical or mental status, but because the statute "condemns the employer's behavior."[394] When an employer acts with discriminatory animus or bases an employment decision on improper criteria, that act is just as reprehensible whether the disability is real or perceived. Although our hypothetical Employee *B* (the misperceived but nondisabled worker with carpal tunnel syndrome) is objectively similar to the lawfully terminated Employee *C* (the correctly perceived worker with a knee injury), ABC Company's motives for terminating Employee *B* are just as invidious as its motives for terminating Employee *A* (the actually disabled worker with lower body paralysis). In ABC's view, both Employees *A* and *B* are "disabled," and ABC is using that status improperly to make an employment decision.[395]

To the extent that the perceived disability prong's scope is reduced by eliminating the right to accommodations, there will be a greater number of improperly motivated employment decisions that are not legally actionable. Whether an employee could bring a perceived disability claim would depend solely on the employee's abilities. An employee with a nondisabling but somehow limiting impairment would not be protected, "even when her employer treats her as though the impairment is substantially limiting," while an employee with a nondisabling and nonlimiting impairment, "whose employer treats her in yet the same discriminating manner," would be

394. Vande Walle, *supra* note 127, at 899.

395. *See id.* at 933 ("[T]he employer discriminating against the employee [it] believes is disabled is acting in the same way as an employer discriminating against an employee who is truly disabled."); *see also* Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 609 (1997) ("The 'regarded as' prong is *supposed* to be a catch-all for individuals who do not qualify as disabled according to the first and second prongs of the definition of disability, but have nevertheless been subject to an adverse disability-based employment action."); Moberly, *supra* note 63, at 640–41 (explaining that " '[t]he purpose of the act is to prohibit employers from discriminating on the basis of handicap,' " and arguing that " '[i]t would not be consistent with that purpose to relieve employers who so discriminate of liability if, although they acted in a prohibited discriminatory manner, it later turns out that their belief was in fact erroneous' " (footnotes omitted) (quoting Sanchez v. Lagoudakis, 486 N.W.2d 657, 660 n.16 (Mich. 1992), which was construing a state disability discrimination act analogous to the ADA)).

protected.[396] 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.

That does not mean, however, that the perceived disability plaintiff with a limiting impairment should be entitled to the full array of traditional accommodations. Despite the employer's improper motives, Congress did not intend the ADA to cause employers to reduce legitimate performance standards.[397] Yet the fact that the quality of the employer's conduct is the same, even if the perceived disability plaintiff needs an accommodation, suggests that courts should at least consider something short of completely abandoning the ADA's unique qualification standards for individuals like our hypothetical Employee *B*, who would be left without a claim at all. If courts could interpret the qualification standards narrowly enough to be consistent with the level playing field objective, but not so narrowly as to eliminate the rules altogether, the number of perceived disability claims would be greater than under an absolutist "nothing" approach. The greater number of viable perceived disability claims, the fewer number of improperly motivated employment decisions that would go unaddressed.

The second and related reason for rejecting the "nothing" approach is based on the important role that perceived disability protection plays in preventing discrimination against those with actual disabilities. The perceived disability prong "serves as a prophylaxis to deter discrimination against truly disabled persons that employers might otherwise believe would not meet the stringent statutory definition of persons with disabilities."[398] Broad protection of perceived disabilities helps prevent "spillover discrimination" by employers that "might be willing to take a chance that a given individual they think is disabled might not actually be disabled" under the technical terms of the ADA's actual disability prong.[399] Although

396. Dudley, *supra* note 63, at 412–13 (describing this as the "odd" outcome that would result if perceived disability plaintiffs who need accommodations have no form of ADA claim available).

397. *See id.* at 412–13; *see also Deane*, 7 AD Cases (BNA) at 208 (explaining that the ADA is intended only " 'to level the playing field' " between disabled and nondisabled employees (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995)).

398. Vande Walle, *supra* note 127, at 937; *see also id.* (stating that perceived disability protection "also reinforces the aspect of moral condemnation of discrimination against the disabled contained in the statute by requiring that employment actions taken against individuals an employer perceives as disabled should be treated the same whether that individual is truly disabled or not").

399. *Id.* at 933; *see also, e.g.*, Francis v. City of Meriden, 129 F.3d 281, 287 (2d Cir. 1997)

lawmakers generally do not cite this prophylactic benefit as a reason for including perceived disability protection in civil rights statutes,[400] some courts are convinced that a strong prohibition against perceived disability discrimination helps deter discrimination against those with actual disabilities.[401] If the reach of the perceived disability prong is reduced by entirely eliminating the right to accommodations, deterrence against actual disability discrimination would decrease.[402] Thus, even though applying the qualification tests identically to perceived disability claims may advantage some perceived disability plaintiffs, abandoning the tests may fall short of equal opportunity for some whose disabilities are real. Accordingly, to create the greatest deterrence, courts should interpret the ADA to retain as many perceived disability claims as possible, while remaining consistent with the ADA's equal opportunity goal.

Abandoning the ADA's unique qualification tests for perceived disability claims not only may fall short of equal opportunity for some individuals with actual disabilities, but also for some individuals with perceived disabilities, which provides the third reason for rejecting the "nothing" approach. Parts II and III demonstrated that granting the traditional forms of workplace accommodation gives perceived disability plaintiffs a windfall. Conversely, it has been assumed that informing the employer of its misperception would be sufficient to equalize opportunity for all perceived disability plaintiffs because the employer's misperception is the only thing that distinguishes them from the rest of the nondisabled workforce. That assumption is likely to be true for some people with perceived disabilities. If the employer's misperception is the only cause of the employee's unequal opportunity, "the employer need only be dispossessed of its misperception."[403] When the employer's misperception is the sole

("By subjecting to liability employers who discriminate on the mistaken belief that an individual has a disability—for example, an employer who fires an employee based on the erroneous belief that the employee has a heart disease—the [ADA] deter[s] discrimination against those who actually have such disabilities.").

400. *See* Moberly, *supra* note 6, at 365.

401. *See* Moberly, *supra* note 63, at 620 & n.129; *see also, e.g., Francis*, 129 F.3d at 287.

402. *See* Moberly, *supra* note 63, at 640–41 ("[A]n interpretation of the ADA which holds that employers are not required to accommodate perceived disabilities conflicts with the act's deterrent rationale."); *see also* Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (noting that the plaintiff's argument for seeking application of the reasonable accommodations rule to her perceived disability claim was that a "failure to mandate reasonable accommodation for 'regarded as' plaintiffs would undermine the role the ADA plays in ferreting out disability discrimination in employment").

403. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc); *see Deane*, 142 F.3d at 148–49 n.12 (noting in dicta that

source of the plaintiff's inequality and that inequality will disappear once the employer is informed of its mistake, then *any* use of the ADA's accommodations rule would create the advantage discussed in Parts II and III.

For some perceived disability plaintiffs, however, simply informing the employer of its mistaken belief will be insufficient to return the plaintiff to level ground. In some cases, the employer's original misperception may have a lasting impact on the work environment, even after the employer acknowledges the mistake. In reality, "the perception of a disability, socially constructed and reinforced, is difficult to destroy."[404] The employer may continue to have reflexive reactions or misread the employee's conduct.[405] The judgments of other individuals in the workplace, including those who evaluate the employee's performance, may continue to be influenced and colored by the employer's prior beliefs. In addition, some perceived disabilities result not just from the employer's misperceptions, but from the employer's ratification of the misperceptions of others, such as coworkers or customers.[406] The

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after the employer is disabused of its improper perception of the individual's disability, there is no reason to afford the individual any special treatment, but declining to rule on whether perceived disability plaintiffs are entitled to accommodations); *see also* Wagner v. Kester Solder Co., No. 94C6039, 1995 WL 399484, at *9 (N.D. Ill. June 28, 1995) ("The ADA protects those 'regarded as having' a disabling impairment in order to disabuse people of myths . . . ."); *cf.* Alderson v. Postmaster Gen., 598 F. Supp. 49, 54–55 (W.D. Okla. 1984) (holding under the Rehabilitation Act that "[i]f the Plaintiff were capable but the employer perceived him as incapable, the Court would simply order the agency to recognize his capability").

404. *Deane*, 142 F.3d at 148 n.12; *see also* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 2.2(c), at II-10 (noting that " 'society's [. . .] myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairments [sic]' " (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (alterations in original)).

405. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2157 (1999) (Stevens, J., dissenting) ("The ADA . . . seeks to implement this mandate by encouraging employers 'to replace . . . reflexive reactions to actual or perceived handicaps with actions based on [reasoned and] medically sound judgments.' "(quoting *Arline*, 480 U.S. at 285 (alteration in original))).

406. *See* 29 C.F.R. § 1630.2(l)(2) (1999) (describing one type of perceived disability to include individuals who have "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment"); Moberly, *supra* note 63, at 620–21; *see also Arline*, 480 U.S. at 284 n.13 (describing "irrational fears or prejudice" by coworkers that hinder equal employment opportunities); 29 C.F.R. pt. 1630 app. § 1630.2(*l*) (finding that a lack of "acceptance by coworkers" is one of the "common attitudinal barriers that frequently result in employers excluding individuals with disabilities"). For other examples of employment inequality that may result indirectly from the misperceptions of third parties, see Moberly, *supra* note 63, at 621 nn.133–35.

inequality created by those mistaken beliefs—which are supposed to be covered by the "regarded as" prong—is unlikely to disappear just by correcting the employer's views.[407]

Perceived disability plaintiffs in these situations still should be ineligible for the traditional forms of workplace accommodation, including the redistribution of marginal job functions. Because these plaintiffs possess no vocationally relevant traits that systematically were ignored by the unstated norm underlying conventional workplace design, traditional accommodations that adapt workplace operations to the employee's characteristics would still provide a windfall. On the other hand, eliminating the accommodations rule altogether would fall short of equal opportunity: it may take more than a winning lawsuit identifying the employer's misperception to eliminate the negative effects of the mistake. The fact that more may be required to achieve equal opportunity suggests that there is room for the accommodations rule to play a narrow but appropriate role in the perceived disability context. For all of these reasons, Section C proposes an alternative that appropriately lies between the two extremes of the current all-or-nothing approaches to perceived disability claims.

C. *An Alternative to All-or-Nothing Approaches: Restructuring the Reasonable Accommodations Right and the Essential Functions Limit for Perceived Disabilities*

Because the majority's "all" approach to perceived disability claims exceeds the ADA's equal opportunity goal, but the minority's "nothing" approach falls short of that objective, this Section proposes a middle-ground alternative. The all-or-nothing approaches suffer from two main flaws. First, they conceptualize the ADA's accommodations rule only in narrow, operational terms. Granting traditional forms of operational accommodation unfairly advantages perceived disability plaintiffs, but providing no other forms of accommodation leaves those individuals at a disadvantage whenever an employer's misperception has a lingering effect. Second, the all-or-nothing approaches analyze the perceived disability problem solely as a liability issue. Granting perceived disability plaintiffs a cause of action (and, therefore, the full panoply of remedies) gives perceived

407. *See* Moberly, *supra* note 63, at 620–21; *see also* S. REP. NO. 101-116, at 24 (1989) (Sup Docs. No Y 1.1/5:101-116) (stating that the perceived disability prong is intended to prevent employers from making employment decisions based on the negative reactions of others to the protected individual).

disability plaintiffs a windfall, but denying a cause of action (and therefore providing no remedies) leaves perceived disability plaintiffs without recourse for an employer's invidiously motivated act. Thus, to come closer to achieving the ADA's goal of equal employment opportunity for those with perceived disabilities, courts must find an interpretation that addresses each of these fundamental flaws.

First, courts should interpret the ADA's "accommodations" concept in a more flexible manner. Although perceived disability plaintiffs do not need accommodations to eliminate discriminatory barriers in the *operational* work environment, they may need accommodations to eliminate discriminatory barriers in the *perceptual* or *social* work environment.[408] If there is a risk that the employer's prior misperception will continue to color future employment interactions, "accommodation" might require additional education in the workplace.[409] If the employer's misperception stemmed from coworkers' assumptions or prejudices, "accommodation" might require mandatory sensitivity training.[410] If the employer's misperception resulted from customers' erroneous beliefs, "accommodation" might require a creative marketing plan to reduce irrational consumer tastes.[411] In all of these examples, the

408. *See* Moberly, *supra* note 63, at 638 ("[W]here an individual is being denied an employment opportunity because of an erroneous perception, the ADA should require the employer to consider whether a reasonable accommodation could remove that barrier to employment." (footnote omitted)).

409. *See id.* at 637–38; *see also* Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 172 (4th Cir. 1997) (en banc) ("Our analysis of [the perceived disability claim] focuses on the reactions and perceptions of the relevant decisionmakers working with [the employee]."), *overruled on other grounds by* Bragdon v. Abbott, 524 U.S. 624 (1998); Blanck & Marti, *supra* note 364, at 368 ("Studies show the central role of education in recognizing and eliminating employment discrimination facing qualified people with disabilities.").

410. *See* Moberly, *supra* note 63, at 637–38; *see, e.g.*, Kent v. Derwinski, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (discussing sensitivity training as a form of accommodation for a perceived disability caused by coworkers' misperceptions); *see also* S. REP. NO. 93-1297, at 50 (1974) (Sup. Docs. No. Y 1.1/5:93-1297), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400 (explaining that the "regarded as" definition was added to the Rehabilitation Act in part because "the American people are simply unfamiliar with and insensitive to" the difficulties imposed on individuals with various impairments); Dudley, *supra* note 63, at 417 ("For those individuals merely 'regarded as' disabled, the only true reasonable accommodation that Congress foresaw is tolerance and understanding . . . .").

411. *See* Moberly, *supra* note 63, at 637–38; *see also* Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) ("The focus is on the impairment's effect upon the attitudes of others."); Byrne v. Board of Educ., Sch. of W. Allis-W. Milwaukee, 979 F.2d 560, 567 (7th Cir. 1992) (stating that the perceived disability prong "focuses on the effect that the physical or mental condition has on others"); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (noting that Title VII was, "to a large extent," intended to overcome customer prejudices); Moberly, *supra* note 63, at 638 n.271 (discussing

proposed "accommodation" would not advantage a perceived disability plaintiff. Unlike traditional forms of operational accommodation—which allocate resources based on the effects of nondisabling impairments that are not the source of the plaintiff's unequal opportunity—these workplace changes only eliminate inequality caused by the perceived disability itself.

Both the statute and the EEOC guidelines allow for such an interpretation, which avoids the advantage of traditional, operational accommodations, but provides nontraditional accommodations to truly eliminate the inequality caused by an employer's mistaken belief. The statute prohibits discrimination "because of the disability,"[412] and the EEOC deems plaintiffs qualified even if, "because of the disability," they need a reasonable accommodation.[413] For perceived disability plaintiffs, inequality that results "because of the disability" is caused by the employer's misperception, which is the source of the statutory protection. The "because of" language *does* preclude a perceived disability plaintiff from seeking operational accommodations to eliminate the impact of an employee's nondisabling impairment. Those types of limitations are not "because of the disability," which resides in the employer's mind.

In contrast, the "because of" language does *not* preclude a perceived disability plaintiff from eliminating the impact of the employer's erroneous beliefs. The accommodations rule was designed broadly "to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities" as the nondisabled workforce.[414] Determining "the precise barrier to the employment opportunity," says the EEOC, "will make it possible to determine the accommodation(s) that could alleviate or remove that barrier."[415] There are many different kinds of barriers to equal opportunity.[416] Perceived disability plaintiffs are

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McDonald's Corporation's "McJobs" program, which helped alter customer perceptions and increase the number of disabled employees).

Of course, there may be limits to what an employer can do with respect to third parties. *Compare* Mitchell v. Crowell, 966 F. Supp. 1071, 1079–80 n.9 (N.D. Ala. 1996) (suggesting in dicta that it often will be "practically impossible for an employer to accommodate an individual who is disabled based upon the perceptions of others"), *with* Moberly, *supra* note 63, at 638 (arguing that "Congress appears to have contemplated such employer efforts at public persuasion under many federal employment discrimination laws").

412. 42 U.S.C. § 12112(a) (1994).

413. 29 C.F.R. pt. 1630 app. § 1630.9 (1999).

414. *Id.* pt. 1630 app. Background.

415. *Id.* pt. 1630 app. § 1630.9.

416. *See* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 3, § 3.2, at III-2.

prevented from achieving equal opportunity "only by barriers in other people's minds."[417] Because the accommodations rule includes "*any* change in the work environment" that eliminates barriers to equal opportunity,[418] there is no reason that the rule should not include changes to social and perceptual barriers as well as operational ones. In fact, "erroneous perceptions and stereotypes appear to be the employment barriers with which the drafters of the ADA were most directly concerned."[419]

As long as the accommodations only eliminate the barriers created by the misperceptions "in other people's minds," rather than eliminating barriers created by irrelevant internal characteristics, they will not exceed the ADA's equal opportunity goal for perceived disability claims. To the contrary, accommodations of the perceptual or social work environment would advance that goal by allowing perceived disability plaintiffs to achieve the position in which they would have been absent the mistaken beliefs.[420] Without allowing this

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417. *Id.*; *see also* Steven J. Rollins, Comment, *Perceived Handicap Under the Wisconsin Fair Employment Act*, 1988 WIS. L. REV. 639, 646 ("[T]he concept of perceived handicap requires a shift in focus from the individual's condition to the [particular] employer's perception, attitude and state of mind." (footnote omitted)).

418. 29 C.F.R. pt. 1630 app. § 1630.2(o) (emphasis added).

419. Moberly, *supra* note 63, at 619–20 n.122; *see id.* at 637–38 (arguing that "the primary barriers to equal employment opportunities are often stereotypical assumptions" and that the ADA should require the employer to consider unconventional accommodations to eliminate those barriers through training, education, and public persuasion).

420. Interpreting "accommodations" in the perceived disability context to have some meaningful substance (albeit very narrow substance) is not necessarily inconsistent with the analogy between perceived disability claims and claims under Title VII. As Moberly explains,

> the *Deane* court indicated that race discrimination and perceived disability discrimination should be treated similarly because the type of discrimination faced by those who are perceived to be disabled ... closely resembles discrimination on the basis of race. It then proceeded to cite, as support for its conclusion that there is no duty to accommodate perceived disabilities, its understanding that Title VII's prohibition of race discrimination does not include any form of accommodation.
>
> However, the *Deane* court's characterization of Title VII is correct only in the most formal sense. As the ADA regulations reflect, the employer's duty to accommodate is a means by which barriers to the equal employment opportunity of an individual with a disability are removed.... Even without an express accommodation provision, Title VII similarly requires employers to remove all artificial, arbitrary, and unnecessary racial barriers to employment, including those premised upon false stereotypes and misperceptions.

Id. at 639 (quotation marks and footnotes omitted); *see id.* at 638 ("Congress appears to have contemplated ... employer efforts at public persuasion under many federal employment discrimination laws, and not merely those (like the ADA) that contain express accommodation requirements." (footnote omitted)); *see also, e.g.*, Police Officers

narrow role for education-related accommodations, some perceived disability plaintiffs would be unable to achieve a level workplace playing field.[421] Thus, even though the "unfair advantage" critique requires courts to stop applying the traditional, operational forms of accommodation to perceived disability claims, it does not necessarily require courts to abandon the accommodations rule altogether. Abandoning the ADA's unique qualification test for perceived disability claims ignores its role in punishing improperly motivated employment decisions, in deterring discrimination against those with actual disabilities, and in fully eliminating the barriers created by the employer's misperception.

The second flaw in both the "all" and the "nothing" approaches is addressing the perceived disability issue solely as a question of liability. By recognizing a claim and simply assuming that all remedies will attach, the "all" approach exceeds the level playing field goal; but by denying a claim and thereby providing no remedies, the "nothing" approach leaves some individuals below level ground. One way to avoid the risk of unfair advantage, but also to avoid falling short of equal opportunity, is to make an analytic distinction between the "wrongdoing" and the "harm" in cases of perceived disability. Specifically, courts could apply the traditional requirements of the "qualified individual" test at the *liability* stage of perceived disability claims, but not at the *remedy* stage. In other words, courts could allow perceived disability plaintiffs to state a discrimination claim if they can, "with or without reasonable accommodation, perform the essential functions of the job," using the standard, operational conception of those terms. Perceived disability plaintiffs who need traditional forms of accommodation, however, including the redistribution of marginal job tasks, would have limited

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for Equal Rights v. City of Columbus, 644 F. Supp. 393, 430 (S.D. Ohio 1985) (dismissing the plaintiffs' claim that an employer's "no beard policy" disparately impacted blacks, who are more likely to have a skin condition called PFB that prevents shaving, because the employer "made adequate efforts to accommodate" by redrafting the policy to exempt PFB-sufferers).

421. Under this interpretation, the essential functions limit would continue to play no role in perceived disability cases. As explained in Part III.A, the essential functions limit is really a form of traditional accommodation in which the employer substitutes, redistributes, or excuses the performance of marginal job functions. *See supra* notes 298–313 and accompanying text. That type of accommodation is what this Article characterizes as an operational workplace accommodation, because its goal is to eliminate the impact of the employee's disabling condition in an arbitrarily designed workplace. Thus, accommodating a perceived disability would not include the benefit of the essential functions limit, which would continue to create the "unfair advantage" problem discussed in Parts II and III.

remedies, being ineligible for reinstatement, hiring, promotion, and front pay.

Using the traditional qualification rules at the liability stage makes intuitive sense: because the employer was acting on the belief that the employee was actually disabled, the employer's "wrongdoing" should be judged according to the legal standards for actual disability claims.[422] This would avoid leaving our hypothetical Employee *B* without recourse, which is the result under the minority's "nothing" approach. On the other hand, perceived disability plaintiffs who need traditional accommodations to perform required job functions do not suffer a compensable "harm" from losing a job for which they would have been ineligible if they were perceived correctly. In order to obtain remedies related to the specific job in question—reinstatement, hiring, promotion, and front pay—the perceived disability plaintiff must be able to do the job with only the perceptual and social forms of accommodation described above. If the plaintiff requires traditional forms of operational accommodation, then forcing the employer to hire the plaintiff or to pay for the failure to do so would create the advantage problem of the "all" approach, which is inconsistent with the purpose of the ADA.

The proposed middle-ground alternative should provide the best of both worlds. Perceived disability plaintiffs who require traditional accommodations would be allowed to state a discrimination claim—thereby advancing the ADA's purpose to punish and deter—but would be ineligible for any remedies that would exceed the ADA's limited goal of equal opportunity. This approach would allow the greatest number of perceived disability claims possible without creating the risk of advantaging perceived disability plaintiffs over other nondisabled workers or workers who are truly disabled.

By distinguishing between the liability and remedy stages, this proposal is somewhat analogous to the after-acquired evidence

422. *See* Sanchez v. Lagoudakis, 486 N.W.2d 657, 660 (Mich. 1992) (noting, in the context of construing a state discrimination statute analogous to the ADA, that the proper focus in perceived disability cases is "the employer's conduct—the employer's belief or intent—and not the employee's condition"); Chandler v. Schlumberger, Inc., 542 N.W.2d 310, 314 (Mich. Ct. App. 1995) (explaining, in the context of construing a state discrimination statute analogous to the ADA, that perceived disability claims are needed to help "prevent discrimination—a process of thinking and conduct by the employer—based on handicap"), *aff'd*, 572 N.W.2d 210 (Mich. 1998); Vande Walle, *supra* note 127, at 918 ("It is the employer's perception of the impairment that controls the operation of the perceived disability test.").

rule.[423] The after-acquired evidence rule applies when an employer improperly makes an employment decision based on the employee's protected status, but the employer later discovers a proper reason that could have supported the decision.[424] The Supreme Court has held that after-acquired evidence does not bar the plaintiff from bringing a discrimination claim, but only limits the available remedies.[425] The Court reached that conclusion by acknowledging that federal employment discrimination statutes serve two distinct purposes: (1) to deter and condemn improper bias in employment decisionmaking; and (2) to compensate individuals for the resulting harm.[426]

Even when after-acquired evidence makes the employee ineligible for the job in question, the Court recognized that the first purpose of federal employment laws is still advanced by allowing the plaintiff to state a discrimination claim.[427] In an after-acquired evidence case, the employer uses an improper basis for making its employment decision. Even if the employer would have had a proper basis for the decision if the employer had accurate information at the time, that fact does not negate the "wrongness" of the employer's conduct.[428] Accordingly, in order to deter and condemn the employer's behavior, the Supreme Court has allowed plaintiffs to state a discrimination claim, even when after-acquired evidence makes them ineligible to retain the job.[429]

On the other hand, the Court also has recognized that after-acquired evidence must be considered at the remedy stage to ensure that the second purpose of federal employment laws remains solely compensatory in nature.[430] The Court acknowledged that federal employment discrimination statutes are not intended to be general workplace regulations.[431] While federal employment statutes prohibit discriminatory conduct, they do not "constrain employers from exercising significant other prerogatives and discretions in the course

423. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 355–56 (1995) (describing the after-acquired evidence rule).

424. *See id.* (deciding an after-acquired evidence issue in a claim under the Age Discrimination in Employment Act).

425. *See id.* at 356–62.

426. *See id.* at 357–58.

427. *See id.*

428. *See id.* at 356–62.

429. *See id.*

430. *See id.*

431. *See id.* at 361.

of the hiring, promoting, and discharging of their employees."[432] Even though discrimination statutes "eliminate[] certain bases for distinguishing among employees," they should "otherwise preserv[e] employers' freedom of choice."[433] The Supreme Court has held that this "freedom of choice" would be infringed if the full range of remedies were permitted in an after-acquired evidence case, because the employer would end up paying an employee for a position that the employee was not legitimately eligible to retain.[434]

The proposed middle-ground approach to the ADA's "regarded as" prong would act much like an after-acquired evidence rule for perceived disability plaintiffs who need traditional accommodations. By allowing such an individual to state a discrimination claim, this proposal would serve the ADA's purpose to punish and deter by imposing liability for an employer's bad act. An employer who believes that an employee is disabled and who refuses to accommodate the employee is acting with an improper motive, regardless of the fact that an accurate perception would have provided a proper motive for the act. Allowing perceived disability plaintiffs to state ADA claims, even if they need traditional accommodations to perform the jobs, would condemn the employers' use of improper employment criteria and maximize the deterrent effect of the "regarded as" prong. Just as in the after-acquired evidence context, the employee's inability to perform job functions would have provided a proper basis for the job decision if the employer had perceived the employee accurately as nondisabled. Like after-acquired evidence, however, that fact does not negate the employer's wrongdoing. Therefore, the perceived disability plaintiff who needs traditional accommodations should be allowed to state a discrimination claim.

On the other hand, once the employer is informed that the perceived disability plaintiff is really nondisabled, the plaintiff's need for traditional accommodations becomes a legitimate basis for an employment decision, just like after-acquired evidence. Once ABC Company is disabused of its misperception about our hypothetical Employee *B* (the misperceived but nondisabled employee with carpal tunnel syndrome), Employee *B* becomes similar to our hypothetical Employee *C* (the correctly perceived, nondisabled employee with a knee injury), who lawfully may be terminated for failing to perform

432. *Id.*
433. *Id.* (internal quotation marks and citation omitted).
434. *See id.* at 361.

any required job tasks. Although Employee *B* should be entitled to the perceptual and social forms of accommodation needed to level the playing field with respect to Employee *C*, Employee *B* already has achieved level ground without receiving any operational accommodations. In the after-acquired evidence context, the Supreme Court correctly recognized that reinstatement of such an unqualified employee would be "pointless" because, once the employer is aware of the proper grounds for termination, the employer "will terminate, in any event and upon lawful grounds."[435] Just as in the after-acquired evidence context, forcing the employer to employ an individual who needs traditional accommodations once the employer correctly perceives the individual as nondisabled would infringe on the employer's freedom to set legitimate workplace standards.[436] Therefore, forward-looking remedies requiring hiring, reinstatement, promotion, or front pay should be unavailable for perceived disability plaintiffs who need traditional accommodations, just as they are unavailable in an after-acquired evidence case.[437]

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435. *Id.* at 362. The vacated *Deane* panel decided not to apply the reasonable accommodations rule to perceived disability claims for this very reason. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 210–11 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998) (en banc). The *Deane* panel noted the "absurd" result that would occur if an employer, who finally was disabused of its misperception after losing a lawsuit, then could terminate the plaintiff lawfully for the inability to perform all required job tasks. *See id.* Where the *Deane* panel went wrong was in using this "absurd" result as a reason for eliminating an otherwise valid claim of discrimination, rather than as a reason merely for limiting the plaintiff's remedies.

436. *See McKennon*, 513 U.S. at 361; *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (1994) (incorporated by reference into the ADA at 42 U.S.C. § 12117(a) (1994)) (stating that when a plaintiff proves employment discrimination and the employer proves that it would have taken the same action even without the impermissible motivating factor, "the court ... may grant declaratory relief, injunctive relief ... and attorney's fees and costs ... and ... shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [back pay]").

437. *See McKennon*, 513 U.S. at 361–62. Perceived disability plaintiffs who need traditional accommodations also may face a limit on back pay awards. In the after-acquired evidence context, the Supreme Court has held that limited back pay usually is appropriate. *See id.* at 362. Because the employer lawfully could terminate the employment once the employer discovers the after-acquired evidence (which often occurs midway through the lawsuit), back pay typically ends at the point of discovery in order to avoid "undue infringement upon the employer's rights and prerogatives." *Id.* On the other hand, some back pay is necessary to "give proper recognition" to the fact that the employer's original employment decision was discriminatory. *Id.* Accordingly, the Supreme Court has directed lower courts to begin the back pay calculation "from the date of the unlawful discharge to the date the new information was discovered" and then to modify that amount for any "extraordinary equitable circumstances that affect the legitimate interests of either party." *Id.* In the perceived disability context, the analogous cut-off would be the point at which the employer discovers that its perceptions are wrong, that the employee is really nondisabled, and that the employee's need for accommodation

Although the after-acquired evidence rule usually applies when the employer discovers employee misconduct (such as falsifying information on a resumé), this fact does not distinguish the after-acquired evidence analysis materially from the ADA context. The Supreme Court explained that after-acquired evidence limits the employee's remedies not as a way to "punish" the employee or because of the employee's "moral worth."[438] Rather, after-acquired evidence limits an employee's remedies in order to "take due account of the lawful prerogatives of the employer in the usual course of its business."[439] That rationale applies equally to the ADA's perceived disability context, in which an employer has the "lawful prerogative" to terminate an employee who needs traditional accommodations once the employer correctly recognizes that the employee does not have an actual disability.

Under this middle-ground approach to the ADA's "regarded as" prong, perceived disability plaintiffs who require traditional accommodations still would be eligible for some types of remedies. As long as the remedy does not require the employer to employ a plaintiff who needs traditional accommodations (or to pay for not employing such a plaintiff), the remedy would not go beyond the ADA's equal opportunity goal. Thus, a perceived disability plaintiff who needs traditional accommodations may still seek injunctive relief, which may advance the statutory purposes by "instructing employers to comply with federal law," by "subjecting employers to the contempt power of the federal courts for future violations," and by "reducing the chilling effect of employers' alleged discrimination."[440] The plaintiff also may be compensated for other harms flowing from the employer's disparate treatment[441] and may be

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therefore is a valid ground for termination (perhaps at the time of judgment). That cut-off point is difficult to determine and likely would require case-by-case judicial inquiry, just like in an after-acquired evidence case.

438. *Id.* at 361 (internal quotation marks omitted).

439. *Id.*

440. Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (citing EEOC v. Goodyear Aerospace, 813 F.2d 1539, 1544 (9th Cir. 1987)). Although the en banc Third Circuit declined to decide whether or not the reasonable accommodations rule should apply to perceived disability claims, the court pondered the possibility that eliminating the rule might have an impact only at the remedy stage. *See id.*; *see also* Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) (stating in dicta that, "even if" the perceived disability plaintiff was not entitled to reasonable accommodations, "he may well be entitled to other forms of relief, such as injunctive relief and damages, as well as attorney's fees").

441. *See* Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996) ("Unlawful discrimination under the ADA includes both discriminatory [treatment] and the failure to provide reasonable accommodation."); HADLEY, *supra* note 167, at 1007

eligible for punitive damages and reasonable attorneys' fees and costs.[442] Even if there are no compensable damages, an award of nominal damages may vindicate the plaintiff's rights and advance the "national policies respecting nondiscrimination in the work force."[443]

This middle-ground approach to "regarded as" claims is not only the most consistent with the ADA's goal of equal opportunity, but also is consistent with the statutory language. Restricting the traditional difference-based elements of the "qualified individual" test to the liability phase should appease those who view the statute's "qualified individual" test as unambiguously applying to both actual and perceived disability claims.[444] Under that "plain language" view, the single definition of a "qualified individual" means that perceived disability plaintiffs must be able to state ADA claims even if they need traditional accommodations, which this proposal would allow.

At the same time, plain language proponents should not take issue with limiting the available remedies for perceived disability plaintiffs who need more than the perceptual and social forms of accommodation described above. The ADA incorporates the remedies from Title VII, as amended by the Civil Rights Act of 1991.[445] Under Title VII, as amended, courts may order limited

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(suggesting that perceived disability claims under the Rehabilitation Act "do not raise true issues of reasonable accommodation" and that such claims "properly are analyzed as disparate treatment cases"); Moberly, *supra* note 63, at 631 & n.215 (noting that "courts have indicated[] [that] the failure to accommodate an employee's disability, and treating the employee differently because of that disability, are separate and distinct forms of discrimination").

The EEOC has distinguished between reasonable accommodations claims and disparate treatment claims under the Rehabilitation Act. *See, e.g.*, Howard v. Widnall, No. 01931905, 1994 WL 747979, at *5 (EEOC May 12, 1994). In *Howard*, a plumber with a back injury was limited in his ability to lift, bend, twist, and turn his spine and hips. *See id.* at *5, *9 n.1. The plumber brought a perceived disability claim against the Air Force, arguing that the Air Force discriminated against him by failing to accommodate his limitations and by intentionally assigning him duties that exacerbated his condition. *See id.* at *5–6 The EEOC held that "an individual who is merely regarded as having a disability ... does not require reasonable accommodation" and therefore dismissed the accommodation claim. *Id.* at *5. However, the EEOC upheld the disparate treatment claim. *See id.*; *see also* Coleman v. Keebler Co., 997 F. Supp. 1102, 1119 (N.D. Ind. 1998) ("[L]ogic dictates that if the evidence supports a regarded as theory of disability, the case must then proceed under a disparate treatment, not a reasonable accommodation, theory.").

442. *See Deane*, 142 F.3d at 148 n.12.

443. *McKennon*, 513 U.S. at 358–59; *see also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980) ("It is of little solace to a person denied employment to know that the employer's view of his or her condition is erroneous. To such a person the perception of the employer is as important as reality.").

444. *See supra* notes 63–87, 127, 291–96 and accompanying text.

445. *See* 42 U.S.C. § 12117(a) (1994).

compensatory and punitive damages,[446] reasonable attorneys' fees and costs,[447] an injunction against the unlawful employment practice, and "such affirmative action *as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief *as the court deems appropriate*."[448]

This provision requires courts to determine when equitable remedies are "appropriate." Based on the analysis in Parts II and III, reinstatement, hiring, promotion, and front pay are not "appropriate" for perceived disability plaintiffs who need traditional accommodations, including the redistribution of marginal job tasks. Courts should deny these remedies because granting more than the perceptual and social forms of accommodations would go beyond the ADA's level playing field objective. This conclusion fits with the plain language of the statute because it is linked to the determination of "appropriateness" that the statute explicitly requires at the remedy stage.

Those who find the ADA's language to be more ambiguous may support the proposed approach as well. The ambiguity arises because the statute prohibits discrimination "because of the disability," which arguably limits the employer's accommodation duty only to limitations that are caused by the disability itself.[449] When looking at perceived disabilities objectively, the only performance limits that are caused by the disability are those that flow from the employer's mistaken beliefs, thereby precluding traditional forms of accommodation that modify the operational work environment. The proposed approach accounts for this interpretation at the remedy stage. Under the proposed approach, plaintiffs may only obtain job-related remedies, such as reinstatement or promotion, if they can perform the job solely with accommodations to the perceptual or social work environment, such as workplace training or education. In other words, they may obtain such remedies only if they can perform the job with accommodations that eliminate barriers *caused by* the perceived disability. At the liability stage, in contrast, the causal link should be judged from the employer's subjective point of view. At the time the employer makes the employment decision, the employer believes that performance limits are caused by an actual disability, making the failure to provide traditional accommodations an

446. *See id.* § 1981a(a)(2), (b).
447. *See id.* § 2000e-5(k).
448. *Id.* § 2000e-5(g)(1) (emphasis added).
449. *Id.* § 12112(a); *see supra* notes 128–33 and accompanying text.

actionable wrong. Thus, the middle-ground proposal for the "regarded as" prong is one way to remain more consistent with both the letter and the spirit of the ADA.

CONCLUSION

The conclusions reached in this Article ultimately may provide additional ammunition for those, like myself, who believe that the ADA should embrace a broader conception of equality than it does: "[T]hat we must do more than formal equality requires to structure jobs and tasks so as to give people, impaired or not, a fair or adequate opportunity to display talent and competence."[450] Unfortunately, the ADA's current goals are far less lofty in stature.

Within the confines of the ADA's current goals, the ADA's "regarded as" prong forces courts to draw the line between Congress's competing desires. On one hand, Congress wanted the ADA to provide broad protection for perceived disabilities, recognizing that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."[451] On the other hand, Congress wanted the ADA to infringe upon an employer's freedom as narrowly as possible, leaving an employer's "prerogatives and discretions" intact.[452] The line between these competing desires is marked by the goal of equal employment opportunity, which the ADA conceptualizes only in terms of formal equality and equal access to compete. "Congress intended not to erect impenetrable spheres of protection around the disabled, but hoped merely 'to level the playing field' " between those who do and do not have

450. Wasserman, *supra* note 13, at 274.

451. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (interpreting the congressional intent behind the Rehabilitation Act's "regarded as" prong, which later was adopted by the ADA); *see* H.R. REP. NO. 101-485, pt. 3, at 29–30 (1990) (Sup. Docs. No. Y 1.1/8:101-485), *reprinted in* 1990 U.S.C.C.A.N. 445, 452–54 (quoting *Arline*, 480 U.S. at 284); *id.*, pt. 2, at 53, 1990 U.S.C.C.A.N. at 335–36 (same); S. REP. NO. 101-116, at 23–24 (1989) (Sup. Docs. No. Y 1.1/5:101-116) (same).

452. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995) (describing the congressional intent behind federal antidiscrimination laws generally); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2142 (1999) (same); H.R. REP. NO. 101-485, pt. 2, at 55–57, 1990 U.S.C.C.A.N. at 337–38 (emphasizing that the ADA does not undermine an employer's freedom to select the most qualified applicants); S. REP. NO. 101-116, at 26–27 (same); 136 CONG. REC. 11,460 (1990) (statement of Rep. Owens) (same); 136 CONG. REC. 10,839 (1990) (statement of Rep. Gordon) (emphasizing the need to balance business concerns and costs); 29 C.F.R. pt. 1630 app. Background (1999) (interpreting the congressional intent to allow employers to retain the same performance standards).

disabilities.[453]

Applying the reasonable accommodations and essential functions rules identically to actual and perceived disability claims overshoots this narrow conception of equal opportunity. That approach advantages perceived disability plaintiffs over other nondisabled workers and workers with actual disabilities by reallocating resources based on irrelevant individual differences that are not the source of the plaintiffs' protected status. But abandoning the reasonable accommodations and essential functions rules altogether would have the opposite effect. Eliminating the rules from perceived disability claims would undershoot the ADA's equal opportunity target by ignoring improperly motivated employment decisions, decreasing deterrence of actual disability discrimination, and leaving perceived disability plaintiffs on their own to face the long-term effects of an employer's mistaken beliefs. This Article's proposed approach should come closer to hitting the ADA's intended mark. Allowing perceived disability plaintiffs to state discrimination claims, even if they need traditional accommodations, would maximize the ADA's effectiveness, while limiting their remedies would allow the workplace playing field to remain on level ground.

453. Deane v. Pocono Med. Ctr., 7 AD Cases (BNA) 198, 208 (3d Cir. 1997) (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995)), *rev'd on other grounds*, 142 F.3d 138 (3d Cir. 1998) (en banc).