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**Reasonable Accommodation for Employees with Perceived Disabilities:
An Alternative Approach Based on Relationship**

Wilson G. Barmeyer*

I. INTRODUCTION

Does the Americans with Disabilities Act (the ADA) require “reasonable accommodation” for employees who are “regarded as” disabled, or is reasonable accommodation only required for employees who are “actually disabled?” There is a growing debate over whether and to what extent employees with “perceived disabilities” should be entitled to the same reasonable accommodation rights as employees with “actual disabilities.” Of the ten circuits that have considered the issue, four have held that employees with perceived disabilities are entitled to reasonable accommodation;¹ four have held otherwise;² and two have considered the issue but declined to address it.³ Legal scholarship on the issue is also equally divided.⁴

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¹ D’Angelo v. Conagra Foods Inc., 422 F.3d 1220, 1240 (11th Cir. 2005); Kelly v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep’t., 380 F.3d 751, 774 (3d Cir. 2004); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996).

² Kaplan v. City of Nev. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

³ Cigan v. Chippewa Falls Sch. Dist., 388 F.3d 331, 336 (7th Cir. 2004); Cameron v. Cmty. Aid for Retarded Children, Inc., 335 F.3d 60, 64 (2nd Cir. 2003).

⁴ Compare Timothy J. McFarlin, Comment, *If They Ask for a Stool...Recognizing Reasonable Accommodation for Employees “Regarded As” Disabled*, 49 ST. LOUIS U. L.J. 927, 929, 965 (2005) (advocating accommodation based on plain language, legislative history, and the interactive process requirement), with Padmaja Chivukula, *Is Ignorance Bliss? A Pennsylvania Employer’s Obligation to Provide Reasonable Accommodation to Employees It Regards as “Disabled” After Buskirk v. Apollo Metals*, 41 DUQ. L. REV. 541, 544 (2003) (opposing accommodation rights based on legislative intent and “common sense”); Allen Dudley, Comment, *Rights to Reasonable Accommodation Under the Americans with Disabilities Act for “Regarded As” Disabled Individuals*, 7 GEO. MASON L. REV. 389, 391 (1999) (arguing against accommodation, “because entitling persons merely ‘regarded as’ disabled to accommodation leads to an absurd result”). Some scholars have argued for alternatives to the “all-or-nothing” positions. See Michael D. Moberly, *Letting Katz Out of the Bag: The Employer’s Duty to Accommodate*

The circuit courts that have considered the issue have generally taken “all-or-nothing” approaches by laying down clear rules either for or against accommodation.⁵ Courts that follow an “all approach” provide the full range of statutory protections to an employee with a perceived disability, including the right to reasonable accommodation.⁶ These courts have reasoned that an all approach is consistent with the plain language and statutory purpose of the ADA.⁷ Other circuits have taken a “nothing approach,” which denies a cause of action to a regarded as disabled plaintiff who seeks reasonable accommodation in the workplace.⁸ These courts have argued that providing reasonable accommodation for perceived disabilities would give these employees an unfair advantage over similarly situated individuals and lead to “bizarre results” that are contrary to the equal opportunity goals of the ADA.⁹

This Paper argues that both categorical approaches are incorrect, because neither approach fully reflects the equal opportunity goals of the ADA.¹⁰ The “regarded as” prong of the ADA covers individuals facing a variety of impairments and stereotypes,¹¹ and the need for and right to accommodation will depend on the specific facts of a given case. What is needed is not a categorical rule for or against accommodation, but an interpretation of the ADA that is faithful to

Perceived Disabilities, 30 ARIZ. ST. L.J. 603, 610 (1998)(arguing that employer should be required to accommodate employees with actual impairments who are erroneously perceived to be disabled, but not employees who are regarded as disabled but have no impairment); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 906-907 (2000)(arguing that “the accommodations question is better framed as a remedies issue”).

⁵ See *supra* notes 1-2 (listing cases); Travis, *supra* note 4, at 906-07 (describing approaches as “all-or-nothing”).

⁶ See *D’Angelo*, 422 F.3d at 1235-36; *Williams*, 380 F.3d at 775-76.

⁷ See *Williams*, 380 F.3d at 774 (pointing to plain language and legislative history).

⁸ See *supra* note 2 (creating categorical rule against accommodation).

⁹ See *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999)(citing “bizarre results”).

¹⁰ See C.F.R. pt. 1630, app. § 1630.9 (setting forth equal opportunity goals); Travis, *supra* note 4, at 906-907 (rejecting categorical approaches).

¹¹ The EEOC has delineated three subcategories within the “regarded as” prong of the definition of disability. See *infra* note 25 and accompanying text.

the statutory language and purpose and gives courts flexibility to require or deny accommodation based on a factual inquiry.¹²

This Paper explores the rationales behind the all-or-nothing approaches and concludes that the circuit split on this issue is largely superficial, based more on factual differences between the cases coming before the circuits than on legal disagreement about the ADA. The circuits disagree because they have different conceptualizations of the paradigmatic regarded as disabled plaintiff. Those in the “nothing” camp envision an employee who is adversely affected only by a misperception.¹³ To them, remedying the misperception will provide the employee with equal opportunity, and therefore, entitling that employee to reasonable accommodation would be something extra that the ADA does not require.¹⁴ In contrast, those in the “all” camp envision an employee who has been adversely affected by discrimination in such a way that reasonable accommodation is necessary to provide that employee with equal opportunity.¹⁵ In this way, both positions strive for equal opportunity, but the different fact situations that have come before the circuits have resulted in divergent legal rules.

This Paper seeks to reconcile this circuit split by offering a legal interpretation of the ADA that reaches an appropriate result without laying down a categorical rule. This theory encourages courts to focus on the relationship between the accommodation and the specific disability. An employee with a perceived disability should only be entitled to accommodation where there is a casual connection between employer’s misperception and the denial of the accommodation. That is, an employee will only have a right to an accommodation that was denied because of the misperception that gave rise to his statutory disability. This alternative

¹² See Travis, *supra* note 4, at 907 (also advocating for alternative approach).

¹³ See *id.* at 1000-01 (stating that “those with perceived disabilities do not face any resulting structural or dynamic barriers to equal employment opportunity”).

¹⁴ See *infra* notes 48-51 and accompanying text.

¹⁵ See *infra* note 60-61 and accompanying text (presenting hypothetical from point of view of all approach).

approach relies on the individualized determination required by the ADA and the flexibility inherent in the right to reasonable accommodation. Because there are a variety of fact situations under which an individual can demonstrate a perceived disability, the relationship between that disability and the right to accommodation will depend on specific facts. This gives courts flexibility to require reasonable accommodation only where it is consistent with the purposes of the ADA.

Part II of this Paper presents an overview of the relevant ADA background, statutory definitions, and EEOC regulations necessary to understand the conceptual issues.¹⁶ Parts III and IV continue with a discussion of the arguments that have been raised for and against reasonable accommodation for perceived disabilities, with Part III describing the nothing approach¹⁷ and Part IV summarizing the all approach.¹⁸ Part V concludes by offering a third way. It proposes a relationship approach that meets the level playing field objectives of the ADA without providing an unfair advantage for employees with perceived disabilities.¹⁹

II. RELEVANT PROVISIONS OF THE ADA

The ADA prohibits employers from discriminating against a “qualified individual with a disability” because of that individual’s disability.²⁰ To establish a *prima facie* case of discrimination under the ADA, a plaintiff employee must show (1) that he is disabled within the meaning of the statute, (2) that he is qualified with or without reasonable accommodation, and (3) that he has suffered an adverse employment decision because of his disability.²¹

¹⁶ See *infra* notes 20-42 and accompanying text.

¹⁷ See *infra* notes 43-60 and accompanying text.

¹⁸ See *infra* notes 61-86 and accompanying text.

¹⁹ See *infra* notes 87-120 and accompanying text.

²⁰ 42 U.S.C. § 12111(8)(2000).

²¹ See *e.g.*, *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F.3d 751, 761 (3d Cir. 2004).

A. THE DEFINITION OF DISABILITY

The ADA provides three alternative definitions of disability, and therefore three alternative ways for a plaintiff to show that he is entitled to statutory protection. Under the ADA, “[t]he term ‘disability’ means, with respect to an individual, (A) a physical or mental impairment that substantially limits one or more. . .major life [activities]; (B) a record of such an impairment; or (C) being *regarded as* having such an impairment.”²² The “regarded as” prong was meant to protect individuals who are perceived as disabled, even though they may not be actually disabled within the meaning of subsection (A).²³ With this prong, Congress sought to protect against discrimination based on perceived disabilities, because it recognized that the “accumulated myths and fears about disability and diseases are as handicapping as the physical limitations that flow from actual impairment.”²⁴

The EEOC has provided additional guidance on the meaning of the regarded as prong. The regulations lay out three categories of individuals who are regarded as disabled:

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

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

²² 42 U.S.C.S. § 12102(2)(A)-(C)(2000) (emphasis added).

²³ See H.R. Rep. No. 101-485, *reprinted in* 1990 U.S.C.C.A.N. 445, at 453 (discussing purpose of regarded as disabled prong).

²⁴ *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

[Category 3] – Has [no impairment] but is treated by a covered entity as having a substantially limiting impairment.²⁵

The EEOC Technical Assistance Manual provides an example of each category.²⁶ An example of Category 1 is an employee who has “controlled high blood pressure that is not substantially limiting.”²⁷ This employee would be regarded as disabled if the employer reassigns him to less strenuous work “because of unsubstantiated fears that [he] will suffer a heart attack if he . . . continues to perform strenuous work.”²⁸ Category 2 covers an employee who has a prominent facial scar that does not limit major life activities.²⁹ “If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarded the individual as disabled. . . .”³⁰ Category 3 covers an employee who has no impairment at all but who is fired by his employer because of an unfounded rumor that he has HIV.³¹ For all three categories of perceived disabilities, it is “necessary that a covered entity entertain misperceptions about the individual” for the individual to be disabled under the regarded as prong.³²

B. QUALIFIED INDIVIDUAL AND REASONABLE ACCOMMODATION

To prevail on an ADA claim, the plaintiff must be a “*qualified* individual with a disability.”³³ A qualified individual with a disability is one who, “with or without reasonable accommodation, can perform the essential functions of the employment position that such

²⁵ 29 C.F.R. 1630.2(l).

²⁶ See 29 C.F.R. pt. 1630 app. 1630.2(l) (giving examples).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Sutton v. United Air Lines, 527 U.S. 471, 489 (U.S. 1999)(defining regarded as disabled within a two category framework).

³³ 42 U.S.C. § 12112(a)(2000)(emphasis added).

individual holds or desires.”³⁴ The ADA provides that an employee with a disability is entitled to reasonable accommodation if such accommodation will enable the employee to perform the essential functions of the position.³⁵ Discrimination under the ADA includes “not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability.”³⁶ With the requirement of reasonable accommodation, the ADA goes beyond the protections of Title VII in seeking to level the playing field in the workplace for individuals with disabilities.³⁷

Reasonable accommodation can include modifications to the job application process, modifications to the work environment that enable a qualified individual to perform the essential functions of the job, or modifications that enable the individual with a disability to enjoy equal benefits and privileges enjoyed by other employees.³⁸ Accommodation can include structural changes to the physical work environment which make facilities accessible, or job restructuring such as part time schedules or reassignment to a vacant position.³⁹ In order to determine the appropriate accommodation, the employer should engage in an interactive process with the employee to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”⁴⁰ Reasonable

³⁴ 42 U.S.C. § 12111(8)(2000).

³⁵ The issue is whether the employee is qualified “with or without reasonable accommodation.” *E.g.*, *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F.3d 751, 761 (3d Cir. 2004).

³⁶ 42 U.S.C. § 12112(b)(5)(A)(2000).

³⁷ *See Travis, supra* note 4, at 914 (discussing the seven types of discrimination under the ADA, and noting that all but the reasonable accommodation provision mirror Title VII).

³⁸ 29 C.F.R. § 1630.2(o)(1).

³⁹ 29 C.F.R. § 1630.2(o)(2).

⁴⁰ 29 C.F.R. § 1630.2(o)(3).

accommodation is not required if it imposes undue hardship on the employer.⁴¹ For example, the ADA does not require an employer to “find or create a new job” or create a light duty position.⁴²

III. ARGUMENTS AGAINST ACCOMMODATION: THE “NOTHING” APPROACH

The circuit split over reasonable accommodation results at least partly from a different conceptualization of the potential fact situations that can arise when an employee with a perceived disability requests accommodation. This section begins with a hypothetical that illustrates the paradigm plaintiff from the point of view of the nothing approach and then presents the arguments against requiring accommodation for perceived disabilities.

A. THE PARADIGM PLAINTIFF AS ENVISIONED BY THE “NOTHING” APPROACH

The employer, a supermarket, requires all cashiers to stand.⁴³ Two cashiers, Employee A and Employee B, have back problems that cause discomfort and prevent them from standing for long periods of time, but these impairments are not substantially limiting enough to amount to actual disabilities. The employer fires Employee A because she cannot stand for an entire shift. Employee B’s impairment, however, is incorrectly perceived by the employer as being more severe, thus constituting an actual disability and entitling her to ADA protection. As a result, the employer offers her a stool as accommodation and allows her to continue working as a seated cashier. Even though Employees A and B are objectively similar, requiring reasonable accommodation solely because of the employer’s incorrect misperception gives Employee B an advantage over Employee A.⁴⁴

⁴¹ 42 U.S.C. § 12112(b)(5)(A)(2000).

⁴² See e.g., *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 809 (5th Cir. 1997); *Chairi v. City of League City*, 920 F.2d 311, 318 (5th Cir. 1991).

⁴³ This hypothetical, and the one presented in Part IV, is adapted from a hypothetical described by the Third Circuit in *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F.3d 751, 776 n.19 (3d Cir. 2004).

⁴⁴ See *Travis*, *supra* note 4, at 919-20 (presenting hypothetical of hospital workers that leads to similar results).

B. ARGUMENTS AGAINST ACCOMMODATION

1. *The Title VII Analogy.* “Regarded as” disabled individuals are often compared to victims of race or sex discrimination. According to Judge Richard Posner, “Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.”⁴⁵ Because these individuals are merely regarded as disabled and not actually disabled, reasonable accommodation is not necessary to “level the playing field” for these employees.⁴⁶ Because their impairments are “non-disabling,” they should be entitled to equal treatment, but nothing more, analogous to the rights of plaintiffs who sue for discrimination under Title VII. Opponents of reasonable accommodation for perceived disabilities argue that accommodation is not necessary to achieve the equal opportunity goals of the ADA.⁴⁷

2. *The “Unfair Advantage” Critique.*⁴⁸ The unfair advantage theory reasons that providing accommodation for individuals who are merely regarded as disabled would give them a “windfall” by treating them more favorably than similarly situated individuals.⁴⁹ As the Eighth Circuit stated in *Weber v. Strippit, Inc.*, accommodation would “create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers’ misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees.”⁵⁰ Requiring reasonable accommodation would therefore exceed the ADA’s level playing field goal

⁴⁵ *Vande Zande v. Wisc. Dep’t of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995).

⁴⁶ See Travis, *supra* note 4, at 963.

⁴⁷ See *infra* notes 48-51 and accompanying text.

⁴⁸ See Travis, *supra* note 4, at 901 (referring to this argument as “unfair advantage critique”).

⁴⁹ *Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999).

⁵⁰ *Id.*

and “stack the deck” for perceived disability plaintiffs over other nondisabled individuals and those who are actually disabled.⁵¹

The *Weber* court noted that “imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results.”⁵² First, as discussed, accommodation would create a windfall for regarded as disabled employees.⁵³ Second, such a rule would “do nothing to encourage...employees to educate employers of their capabilities.”⁵⁴ Third, as noted by the Third Circuit in *Deane v. Pocono Medical Center*, after litigation disabuses the employer of the misperception that gave rise to the employee’s regarded as disability, the employee would no longer be disabled under the ADA, and the employer would be free to fire the employee without providing accommodation.⁵⁵ In this situation, a right to accommodation would be “bizarre” because it would provide no lasting remedy.⁵⁶ Under this logic, the ADA should not require physical accommodation for impairments that are not actually disabling.

3. *Gaming the Process*. In *Deane*, the Third Circuit stated that giving a right to reasonable accommodation would “permit healthy employees to, through litigation (or the threat of litigation) demand changes in their work environments under the guise of ‘reasonable accommodations’ for disabilities based upon misperceptions.”⁵⁷ This is not a persuasive rationale for denying accommodation. Such conduct by an employee would be foreclosed by the ADA’s requirement of an interactive process to identify an individual’s limitations and

⁵¹ Travis, *supra* note 4, at 906.

⁵² *Weber*, 186 F.3d at 916.

⁵³ *Id.* (quoting *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 149 n.12 (3d. Cir. 1998)).

⁵⁴ *Id.* at 917.

⁵⁵ *Deane*, 142 F.3d at 148-149 n.12.

⁵⁶ *Id.* See also Dudley, *supra* note 4, at 414-15 (discussing this “odd result”).

⁵⁷ *Deane*, 142 F.3d at 148-149 n.12; *Weber*, 186 F.3d at 917.

appropriate accommodations.⁵⁸ In the interactive process, “both the employer *and the employee* have a duty to assist in the search for appropriate reasonable accommodation and to act in good faith.”⁵⁹ An employee who acted in bad faith, therefore, would no longer have a right to reasonable accommodation.⁶⁰

IV. ARGUMENTS IN FAVOR OF ACCOMMODATION: THE “ALL” APPROACH

The Title VII analogy and the windfall argument are both persuasive arguments against reasonable accommodation for perceived disabilities in the context of a fact situation similar to the hypothetical introduced in Part III. These arguments, however, are inapplicable to other fact situations that can arise under the regarded as prong. This section begins with a hypothetical describing such a situation and then discusses the common arguments in favor of accommodation, including adherence to the statutory language and purpose of the ADA.

A. THE PARADIGM PLAINTIFF AS ENVISIONED BY THE “ALL” APPROACH

Like the earlier hypothetical, the employer is a supermarket that requires all cashiers to stand. Once again, two cashiers, Employee C and Employee D, have back problems that cause discomfort and prevent them from standing for long periods of time, but these impairments are not substantially limiting enough to amount to actual disabilities. Both employees are reliable workers and the employer would like to retain both of them if possible. The employer accurately perceives Employee C’s impairment, and voluntarily chooses to make a simple and low cost accommodation. The employer provides Employee C with a stool to sit on while her line is clear, but still requires her to stand while checking out customers. This accommodation by the

⁵⁸ 29 C.F.R. § 1630.2(o)(3).

⁵⁹ *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F.3d 751, 771 (3d Cir. 2004)(emphasis added).

⁶⁰ See also MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, AND REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 756 (6th ed. 2003)(“An employee who fails to participate in discussions about accommodation may forfeit protection against disability discrimination.”).

employer enables Employee C to succeed in her position, to the benefit of both the employee and the employer. The employer makes this minor accommodation, not because it is required by the ADA, but because the employer has an interest in retaining a reliable employee.

Meanwhile, the supermarket misperceives Employee D's back impairment as one that prevents her from standing for more than a few minutes at a time, and fires her because she cannot stand. In contrast to the hypothetical in Part III, in this situation Employee D is not given an advantage because she is "regarded as" disabled. To the contrary, she is treated less favorably than a coworker with an objectively similar limitation. "The employee whose limitations [were] perceived accurately gets to work, while [the misperceived employee was] sent home unpaid."⁶¹

B. ARGUMENTS IN FAVOR OF ACCOMMODATION

1. The Plain Language of the ADA. A plain language reading of the ADA suggests that all individuals who are disabled within the meaning of the statute are entitled to reasonable accommodation. The statute contains three separate definitions of disability, and the statute's prohibition on discrimination applies equally to all three statutorily defined disabilities.⁶² Both the Eleventh Circuit and the Third Circuit have noted that "[t]he text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not."⁶³ Although Professor Michelle Travis has

⁶¹ *Williams*, 380 F.3d at 775.

⁶² *D'Angelo v. Conagra Foods Inc.*, 422 F.3d 1220, 1235-1236 (11th Cir. 2005).

⁶³ *Id.* at 1236, 1238 ("[C]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."); *Williams*, 380 F.3d at 774 (stating that "the statutory text of the ADA does not in any way 'distinguish between [actually] disabled and 'regarded as' individuals in requiring accommodation.")(quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d. Cir. 1999)).

argued that this reading of the ADA is overly mechanical,⁶⁴ even circuits adopting the nothing approach have acknowledged that the plain language favors accommodation.⁶⁵

2. *Legislative History and Purpose.* The legislative history and purpose of the ADA support the plain language meaning.⁶⁶ Congress, through the regarded as prong, recognized that “discriminatory attitudes and actions can create tangible limitations.”⁶⁷ In the legislative history, Congress adopted the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*,⁶⁸ stating that the “accumulated myths and fears about disability and diseases are as handicapping as the physical limitations that flow from actual impairment.”⁶⁹ By providing protection to individuals with perceived disabilities, Congress sought to eliminate discrimination based on “stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”⁷⁰ Courts in favor of accommodation have viewed this legislative history as evidence of congressional intent to provide the full range of statutory protections to individuals who are regarded as disabled.⁷¹

3. *Supreme Court Precedent.* The Supreme Court’s decision in *Arline* offers precedent for accommodation of individuals with perceived disabilities.⁷² In *Arline*, a school teacher with

⁶⁴ See Travis, *supra* note 4, at 935-36 (arguing that statutory language is “far more ambiguous,” because it “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”).

⁶⁵ See Kaplan v. City of Nev. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003)(noting that “on its face,” ADA “does not differentiate”).

⁶⁶ See Williams, 380 F.3d at 774 (pointing to legislative history in holding that “Congress meant what its text says”).

⁶⁷ McFarlin, *supra* note 4, at 943.

⁶⁸ 480 U.S. 273 (1987).

⁶⁹ H.R. Rep. No. 101-485 (III), 1990 U.S.C.C.A.N. 445, 453 (citing *Arline*).

⁷⁰ 42 U.S.C. 12101(a)(7)(2000).

⁷¹ D’Angelo v. Conagra Foods Inc., 422 F.3d 1220, 1237 (11th Cir. 2005); Williams, 380 F.3d at 774. *But see* Travis, *supra* note 4, at 955-56 (arguing that accommodation that provides unfair advantage is inconsistent with legislative purpose of securing equal opportunity); Dudley, *supra* note 4, at 410 (stating that legislative history does not support this creation of an “overinclusive class”).

⁷² *Arline*, 480 U.S. at 288-89. *See also* McFarlin, *supra* note 4, at 959 (explaining precedent argument for accommodation).

tuberculosis was fired because of fears of contagiousness.⁷³ The Supreme Court held she was entitled to protection under the “record of” disability prong.⁷⁴ In dicta, the Court also discussed the regarded as prong and remanded for a determination not only of whether she was contagious, but also “whether the school board could have reasonably accommodated her.”⁷⁵ While this is not controlling precedent of the Court, the decision lends precedential value to the position that accommodation should be available for perceived disabilities.

4. *The “Mischief Rule.”* The mischief rule focuses on the employer’s conduct. To the extent that the ADA is designed to punish and deter discrimination, an employer who fails to reasonably accommodate an individual who it regards as disabled is just as culpable as the employer who fails to accommodate an individual who is actually disabled.⁷⁶ The employer’s discriminatory intent is equally invidious, because at the time of the adverse employment action, the employer has no basis for distinguishing between an actual disability and a perceived disability.⁷⁷ Denying accommodation for perceived disabilities would therefore conflict with the ADA’s deterrence rationale.⁷⁸

Employer culpability for discrimination on the basis of perceived disabilities relates to the ADA’s requirement of an interactive process. The ADA requires that an employer engage in an interactive process with an employee to identify that individual’s precise limitations.⁷⁹ This places a duty of good faith on the employer not to have misperceptions about an employee’s impairment.⁸⁰ If an employer has misperceptions about an employee because of a failure to

⁷³ *Arline*, 480 U.S. at 276.

⁷⁴ *Id.* at 285-86.

⁷⁵ *Id.* at 288-89.

⁷⁶ See Travis, *supra* note 4, at 994 (focusing on employer conduct).

⁷⁷ *Id.*

⁷⁸ See Moberly, *supra* note 4, at 640 (elaborating on deterrence goals of the ADA).

⁷⁹ 29 C.F.R. 1630.2(o)(3).

⁸⁰ *Williams v. Phila. Hous. Auth. Police Dep’t.*, 380 F.3d 751, 771 (3d Cir. 2004)(describing employer’s duty of good faith).

engage in an interactive process, then that employer is culpable of the stereotyping that the ADA was designed to prevent.⁸¹ If the employer engages in the interactive process and learns that an employee is not actually disabled, then accommodation is not be required.⁸² This reasoning lends further support to the arguments in favor of accommodation when an employer regards an employee as disabled because of a failure to engage in the interactive process.

5. *Regarded as individuals are not “similarly situated.”* In *D’Angelo v. Conagra Foods Inc.*, the Eleventh Circuit responded to the windfall proposition by arguing that regarded as plaintiffs are not “similarly situated” with employees with objectively similar impairments.⁸³ First, regarded as plaintiffs are not “impaired but non-disabled;” instead they are “disabled within the meaning of the statute.”⁸⁴ Second, an employee who is impaired *and* regarded as disabled is not similarly situated with an employee who is merely impaired, because the “‘regarded as’ disabled employee is subject to the stigma of the disabling and discriminatory attitudes of others.”⁸⁵ For example, in the hypothetical above, “[t]he employee whose limitations are perceived accurately gets to work, while [the plaintiff] is sent home unpaid.”⁸⁶

This argument reinforces the importance of the interactive process. An effective interactive process will remedy misperceptions. Without misperceptions, employees with similar impairments will be accurately perceived, and will in fact be “similarly situated,” not only in terms of their physical impairments, but also in terms of the treatment they should receive from their employer.

⁸¹ See McFarlin, *supra* note 4, at 964 (explaining employer culpability).

⁸² In this situation, the employee would not be disabled within the meaning of the statute.

⁸³ 422 F.3d 1220, 1239(11th Cir. 2005). See also *Williams*, 380 F.3d at 775-776 (offering similar rejection of windfall theory); McFarlin, *supra* note 4, at 975-76 (explaining that such employees are often not similarly situated).

⁸⁴ *D’Angelo*, 422 F.3d at 1239.

⁸⁵ *Id.* (quoting *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002)).

⁸⁶ *D’Angelo*, 422 F.3d at 1239; *Williams*, 380 F.3d at 775.

V. A RELATIONSHIP THEORY OF ACCOMMODATION FOR PERCEIVED DISABILITIES

Both categorical approaches fail to appreciate the full range of factual situations that can arise under the regarded as disabled prong of the ADA. Accommodation should be recognized to the extent necessary to give regarded as individuals equal opportunity to succeed,⁸⁷ but accommodation should not be imposed on an employer when it would give an unfair advantage to the regarded as plaintiff.

Neither categorical approach reaches the appropriate result in both of the introductory hypotheticals in Parts III and IV. In the first hypothetical, the regarded as disabled plaintiff should not be entitled to reasonable accommodation, because it would result in an unfair advantage for that employee over a similarly situated individual. In contrast, the regarded as disabled plaintiff in the second hypothetical should be entitled to reasonable accommodation, because accommodation is necessary to remedy the discriminatory effects of the employer's misperception. What is needed is a flexible theory that allows courts to require reasonable accommodations when necessary to provide equal opportunity and deny accommodation that would result in an unfair advantage or a windfall.⁸⁸

For a flexible approach, courts should focus on the relationship between the disability and the accommodation. For all disabilities, the reasonable accommodation obligation only applies

⁸⁷ See McFarlin, *supra* note 4, at 976 (arguing in favor of accommodation).

⁸⁸ Two recent law review articles also offer alternative approaches, neither of which is fully satisfactory. Professor Michelle Travis suggests that the issue of reasonable accommodation for perceived disabilities should be considered at the remedies stage of the inquiry. See Travis, *supra* note 4, at 999-1010 (offering this as a "middle-ground proposal"). This approach is flexible and leads to a result that offers equal opportunity without unfair advantage. However, by moving the accommodation issue to the remedy stage, it unnecessarily alters established jurisprudence under the ADA, which considers accommodation at the liability stage. Michael Moberly also offers an alternative approach in his student note. See Moberly, *supra* note 4, at 610. His approach, which relies on the EEOC categories, would deny accommodation to individuals with a Category 2 or 3 perceived disability, but require accommodation for individuals with a Category 1 perceived disability. *Id.* This theory is unsatisfactory because it is no less categorical than the all-or-nothing approaches. In addition, not all perceived disabilities will fit neatly into one of the three categories. See *infra* note 93.

to accommodations that are related to a person's disability.⁸⁹ Accommodation must be appropriate to the individual situation in order to be effective.⁹⁰ Because every disability is different and places different barriers on the individual, any accommodation must be directly related to helping the individual overcome his or her specific disability.⁹¹ For example, a reader might be a reasonable accommodation for a blind employee, but would never be a reasonable accommodation for an employee in a wheelchair. This "relationship principle" should be applied to accommodation for perceived disabilities.

When an individual is regarded as disabled, the person's disability includes, by definition, the misperception or discriminatory attitude of the employer. Under a relationship principle, the reasonable accommodation must relate to this erroneous or discriminatory perception of the plaintiff's condition, just as the accommodation for the individual who is actually disabled must relate to the impairment that substantially limits a major life activity. For example, in the case of a plaintiff who has an impairment that is substantially limiting only because of the attitude of others, the accommodation must relate to removing the barriers put in place by these discriminatory attitudes. This requires courts to take a flexible approach to the reasonable accommodation process.⁹²

The remainder of this section applies the relationship principle to the EEOC's three subcategories within the regarded as disabled prong and demonstrates the flexibility of the

⁸⁹ Under the ADA, discrimination includes "not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12111(b)(5)(A)(2000). Implicit in this language is the requirement that the accommodation relate to the specific physical or mental limitation. *Accord* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002)(explaining that the word "accommodation" conveys the need for "effectiveness" in removing the barrier of the limitation).

⁹⁰ See *Barnett*, 535 U.S. at 400.

⁹¹ See *Vande Zande v. Wisc. Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995)("An unrelated, inefficacious change would not be an accommodation of the disability at all).

⁹² See *Travis*, *supra* note 4, at 999 (arguing for more flexibility in accommodations).

relationship approach. The categories are discussed in reverse order due to increasing analytical complexity.⁹³

A. CATEGORY 3: WOULD ACCOMMODATION EVER BE REASONABLE?

An individual with a Category 3 perceived disability “[has no impairment] but is treated by a covered entity as having a substantially limiting impairment.”⁹⁴ The EEOC example is an employee who is fired because of an unfounded rumor that he has HIV.⁹⁵

For this individual, the employer’s misperception constitutes the entire disability. Simply removing the misperception would almost always be sufficient to provide this individual with equal opportunity. Here, the analogy to Title VII is the strongest. The employee has a right to be treated equally and should be considered equal, similar to a victim of race or sex discrimination. Just as race is not a legitimate consideration in an employment decision, neither is an erroneous perception of an impairment that does not exist.

Because simply removing the misperception would probably provide this individual with equal opportunity, it is unlikely that this individual would ever be entitled to additional accommodation. Physical accommodation would never be required, because the disability does not include an element of physical impairment. Physical accommodation would therefore not directly relate to this specific disability. But, in a rare case, a Category 3 individual may be entitled to accommodations that eliminate discriminatory social barriers in the work environment. If there were lingering discriminatory effects of the employer’s misperception that were not corrected merely by removing that misperception, then the individual might be entitled

⁹³ Because not all perceived disabilities will fit neatly into one of the categories, a rigid adherence to the categories would be artificial. See ROBERT L. BURGENDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 154 (1995)(stating that the categories can “overcomplicate” the issues). The categories are, however, helpful for this analysis because each category presents a different conceptual issue.

⁹⁴ 29 C.F.R. 1630.2(l)(1).

⁹⁵ *Id.*

to an accommodation that would remove barriers caused by such effects. For example, if coworkers ostracized the employee because of an unfounded rumor of HIV, and if the employer's misperception had a role in furthering that rumor, then a reasonable accommodation might include an effort by the employer to correct the misperception of coworkers. This type of social accommodation would have a direct relationship to the misperception that was the cause of the disability in the first place.

B. CATEGORY 2: ACCOMMODATION IN RESPONSE TO DISCRIMINATORY ATTITUDES

An individual with a Category 2 perceived disability “[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.”⁹⁶ For this individual, by definition, the disability is solely the stereotyping that results from the perceptions of others.

Under a relationship principle, any accommodation would therefore have to relate to overcoming this stereotype. Like a Category 3 employee, such an individual would not be entitled to a physical accommodation, because a physical accommodation would not be related to the stereotype that is the cause of the disability. A Category 2 plaintiff, however, may also be entitled to accommodations that eliminate discriminatory social barriers in the work environment.⁹⁷ Such accommodation could include additional education or sensitivity training for supervisors or coworkers.⁹⁸

⁹⁶ 29 C.F.R. 1630.2(l)(3).

⁹⁷ See Travis, *supra* note 4, at 999 (making similar argument in favor of social accommodation to overcome limitations caused by attitudes of others).

⁹⁸ *Id.* This type of social accommodation in response to discriminatory attitudes is related to a potential hostile work environment claim under the ADA. The ADA does not specifically provide for hostile work environment claim, but lower courts have “either assumed or expressly acknowledged that [such as claim] may be brought under the ADA.” ZIMMER ET AL., *supra* note 60, at 806. See also, e.g., Shaver v. Independent Stave Co., 350 F.3d 716, 719 (8th Cir. 2003); Flowers v. S. Reg'l Physician Serv. Inc., 247 F.3d 229, 232-33 (5th Cir. 2001).

C. CATEGORY 1: THE DOUBLE IMPACT OF IMPAIRMENT AND ATTITUDE

1. The Test. An individual with a Category 1 perceived disability “[h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation.”⁹⁹ For this individual, the disability is not merely the misperception. The disability includes both an element of physical or mental impairment and an element of misperception by the employer. Therefore, the appropriate accommodation must relate to *both* the physical or mental element *and* the misperception element of the disability. Under a relationship principle, this individual should not be entitled to a physical accommodation that relates only the physical impairment. But the individual may be entitled to a physical accommodation of the physical impairment to the extent that it is also related to the misperception or discriminatory attitude of the employer.

This relationship approach can be captured by a basic disparate treatment test: the individual should be entitled to the physical accommodation the employer would have provided but for the misperception or discriminatory attitude. There are a variety of ways a plaintiff employee could create such an inference. First, the plaintiff could show the treatment of similarly situated individuals who were not misperceived by the employer. This could include evidence of the employer’s treatment of other employees with impairments that do not rise to the level of actual disabilities. In the alternative, the plaintiff could present evidence of his or her own treatment before the employer’s misperception arose. Second, under a disparate treatment model, the plaintiff could point to the employer’s failure to articulate a legitimate nondiscriminatory reason for denying the accommodation or show that the employer’s proffered reason was pretextual.

⁹⁹ 29 C.F.R. 1630.2(l)(2).

2. *Analysis.* A wide range of impairments and misperceptions can arise under Category 1 of perceived disabilities. Often the employee will have a minor physical impairment and will be qualified without reasonable accommodation.¹⁰⁰ This is the easy case. Physical accommodation for such an individual is not necessary, because the employee can perform the essential functions of the job without it. This employee needs a fair chance, not accommodation, to have equal opportunity for success. Requiring the employer to provide an extra accommodation for such an employee would be a windfall that would lead to an unfair advantage.

Courts and commentators who advocate a “nothing” rule often assume that the regarded as disabled class only includes individuals without serious impairments, referring to them as “merely” or “only” regarded as disabled.”¹⁰¹ This is not always correct. This assumption oversimplifies the potential fact issues that can arise under the regarded as prong.¹⁰² A physical impairment is often practically limiting, imposing serious obstacles to equal opportunity in the workplace, even where the impairment is not substantially limiting enough to be an “actual disability” under the ADA.¹⁰³ The Supreme Court’s decision in *Sutton v. United Air Lines, Inc.*,¹⁰⁴ holding that mitigation should be considered in determining whether an impairment is substantially limiting, may expand this potential class of Category 1 plaintiffs. By considering mitigation, *Sutton* raises the bar for showing an actual disability. This could increase the number

¹⁰⁰ See *supra* notes 27-28 and accompanying text (giving EEOC example of Category 1).

¹⁰¹ See e.g., *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999)(describing plaintiffs as “non-disabled employees who are simply regarded as disabled”); *Dudley*, *supra* note 4, at 415-16 (referring to employees who are “merely ‘regarded as’ disabled,” and stating that there is “not any actual impairment that negatively affects job performance”).

¹⁰² These courts often reach the correct result based on the facts of the cases before them, but their categorical rule does not consider the full range of plaintiffs that may be entitled to protection under the ADA.

¹⁰³ See *D’Angelo v. Conagra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005)(summarized at *infra* notes 109-112 and accompanying text); *Kelly v. Metallics West, Inc.*, 410 F.3d 670 (10th Cir. 2005)(summarized at *infra* notes 114-117 and accompanying text).

¹⁰⁴ 527 U.S. 471, 489 (1999).

of individuals with practically limiting impairments that are more likely to bring claims under the regarded as prong.¹⁰⁵

Courts taking the nothing approach also assume that employers are not willing to provide accommodation to workers unless it is mandated by the ADA. This is, of course, also a false assumption. Many times an employer will provide accommodation to employees because it makes good business sense. The nothing approach assumes that an employee with nondisabling impairments will not be accommodated. These courts then reason that if such an employee was misperceived as disabled, it would be a “windfall” or an “unfair advantage” for that employee to receive any accommodation. More likely, however, many employers are willing to provide simple and costless accommodations as a common employment practice, but are less willing to provide more substantial or costly accommodations unless mandated by the ADA.

In many cases, a Category 1 employee’s impairment will interfere with the employee’s ability to perform the essential functions of the job even though the impairment is not substantially limiting enough to constitute an actual disability. Such an employee may not be qualified for the job without some accommodation for the nondisabling but physically limiting impairment.¹⁰⁶ This is the tougher case. For such a claim, courts should follow a disparate treatment model. The issue is whether the adverse employment action was taken because the employer had a legitimate nondiscriminatory reason for not providing the accommodation, such as the cost of the accommodation, or whether the accommodation was not provided because of a misperception or discriminatory intent.¹⁰⁷ Under this test, the employer would not be required to

¹⁰⁵ See *Kelly*, 410 F.3d at 670 (summarized at *infra* notes 114-117 and accompanying text).

¹⁰⁶ *Id.*

¹⁰⁷ It is important to keep the relationship test separate from the test which defines the perceived disability. The test for a regarded as disability is not whether the defendant has treated the plaintiff adversely because of his or her impairment; instead, the test is whether the defendant regards plaintiff as having an impairment that substantially limits a major life activity. Under the relationship approach to accommodation, the plaintiff would need show that

accommodate such an employee unless the failure to accommodate was because of misperception or discriminatory intent.

3. *Application.* The Tenth and Eleventh Circuits recently held that employees with perceived disabilities are entitled to reasonable accommodation.¹⁰⁸ Under the relationship approach, the outcome in these two cases were appropriate for those specific plaintiffs, even though both courts erred by adopting the overinclusive all approach to accommodation.

In *D'Angelo v. Conagra Foods, Inc.*, the plaintiff employee was diagnosed with vertigo prior to accepting her job at a seafood processing plant.¹⁰⁹ She never filled her prescription because her symptoms subsided. At work, she experienced dizziness when she was assigned to monitor a moving conveyor belt. She told her supervisor, who assigned her to other jobs on the production line where she was near the moving belt but not required to stare directly at it. Despite her impairment, she was able to perform almost all of the jobs on the line, because only a few of the jobs involved monitoring moving belts. She continued to work and was promoted twice in three years.¹¹⁰

She was then transferred to a new division, and her new supervisor assigned her to monitor the “box-former belt.”¹¹¹ Again, she experienced symptoms of vertigo, and she told her new supervisor about the dizziness. The supervisor asked her for medical documentation of her condition, and she brought a copy of her unused prescription and a doctor’s note that said she should not look at moving belts. Without engaging in an interactive process with the plaintiff,

he was regarded as disabled *and* that he was denied physical accommodation because of the defendant’s attitude towards this perceived disability.

¹⁰⁸ *D'Angelo*, 422 F.3d at 1240; *Kelly*, 410 F.3d at 676.

¹⁰⁹ *D'Angelo*, 422 F.3d at 1222-24.

¹¹⁰ *Id.* at 1222.

¹¹¹ *Id.* at 1223.

the employer misinterpreted the doctor's note to mean that she could not be around any moving equipment at all. Then, they fired her because they had no such positions.¹¹²

Under the relationship approach, this plaintiff employee should be entitled to the same accommodation she would have received but for the misperception of the employer. The misperception arose three years after she began working for the defendant; therefore, she has evidence that the employer would have accommodated her impairment had she not been misperceived. The ADA should entitle her to this level of accommodation in order to provide her with equal opportunity.

This interpretation is consistent with general antidiscrimination law. Under Title VII and the ADA, a benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.¹¹³ Without the misperception in the *D'Angelo* case, the employer would not have been required to accommodate her vertigo. But once the employer makes a common practice of offering an accommodation for a minor physical impairment, the employer is not entitled to deny that accommodation to another employee because of a characteristic that is protected by statute, in this case a misperception of the employee's impairment.

In *Kelly v. Metallics West, Inc.*,¹¹⁴ the plaintiff employee worked as a receptionist for the defendant employer. After four years of work, she had a pulmonary embolism that required her to miss two weeks of work. After her hospitalization, she had trouble breathing, and her doctor advised that she needed to use supplemental oxygen while at work. The employer would not

¹¹² *Id.* at 1223-24.

¹¹³ *See Hishon v. King & Spalding*, 467 U.S. 69, 75-76 (1984)(applying Title VII to incidents of the employment relationship); 29 C.F.R. 1630.4(f)(discussing discrimination in benefits under ADA).

¹¹⁴ 410 F.3d 670 (10th Cir. 2005).

allow her to bring the oxygen into the workplace, and she was fired when she was unable to return without it.¹¹⁵ The District Court held that she was not actually disabled, because her breathing impairment could be mitigated by the use of portable oxygen.¹¹⁶ The Tenth Circuit held that she was entitled to the reasonable accommodation of being allowed to bring her own oxygen to work.¹¹⁷

Under a relationship approach, this plaintiff would only be entitled to the accommodation that she would have received but for the discriminatory attitude of her employer. This would depend on whether the employer could articulate a nondiscriminatory reason for denying accommodation, and whether the employee could show that the articulated reason was pretextual. The facts in the opinion are insufficient to make this determination, but they strongly favor the employee. The employer would have no cost justification for denying the accommodation, because the employee was merely requesting permission to supply her own oxygen. The employer's stated reason for her dismissal in a termination letter was paternalistic concern for the employee's own health.¹¹⁸ Even though this type of direct threat defense, based on risk to the employee's own health, can be cognizable under the ADA, legislative history advises that such a defense is likely pretextual.¹¹⁹

Although the Tenth Circuit in *Kelly* adopted the categorical all approach for accommodation of perceived disabilities, the reasoning in the opinion mirrors the relationship approach advanced by this Paper. The court stated,

“[A]n employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities

¹¹⁵ *Id.* at 672-73.

¹¹⁶ *Id.* at 673.

¹¹⁷ *Id.* at 676.

¹¹⁸ *Id.* at 673.

¹¹⁹ *See Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 n.5 (2002)(citing legislative history).

must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.”¹²⁰

Following this logic and the relationship approach, an employer can deny physical accommodations for perceived disabilities for a legitimate nondiscriminatory reason, such as cost. However, an employer cannot deny physical accommodation solely because of stereotypic assumptions, prejudice, or a misperception of the employee’s impairment.

V. CONCLUSION

In considering whether individuals with perceived disabilities are entitled to reasonable accommodation, the circuit courts have split over two categorical approaches. Courts in favor of accommodation have held that accommodation is consistent with the plain language and congressional purpose of the ADA. Other courts have denied accommodation because of concerns that it will result in an unfair advantage over similarly situated individuals. Both of these categorical approaches fail to reach the appropriate results for the full range of fact situations that can arise under the regarded as disabled prong of the ADA.

Courts should adopt a more flexible approach that focuses on the relationship between the accommodation and the specific regarded as disability. Where the perceived impairment involves the attitudes of others, reasonable accommodation should relate to overcoming the barriers imposed by the effects of the stereotype. Where the perceived disability includes both an element of physical impairment and an element of misperception or stereotype, then the reasonable accommodation should have a direct relationship to both the physical and social

¹²⁰ *Kelly*, 410 F.3d at 676.

elements that comprise the disability. Under this relationship approach, social accommodations should be required to overcome social barriers in the workplace, and physical accommodation should be required where such accommodation was only denied because of misperception or discriminatory attitude. This alternative approach is the most faithful to the legislative purpose of the ADA, because it gives courts the flexibility to award accommodation that provides equal employment opportunity and deny accommodation that results in an unfair advantage.