

## Accommodating Perceived Disabilities

By Michael Starr and Megumi Sakae\*

Fifteen years after passage of the Americans with Disabilities Act (ADA), it is common knowledge that employers are required to make reasonable accommodations to the actual mental and physical limitations of their employees with disabilities (provided, of course, that they can, if provided the accommodation, perform their essential job functions). Less well known is that the ADA also protects people who are “regarded as” or perceived to be disabled. Must the employer, in such a case, accommodate the work-related limitations it perceives the employee to have but which do not actually exist? Is an employee who has an actual medical impairment that is not so limiting as to be a disability as defined by the ADA, entitled to a reasonable accommodation merely because her employer mistakenly believes she is? Courts are split on how to resolve the conundrums that naturally arise when trying to apply the concept of “reasonable accommodation” to employees who are perceived to be disabled but who would not otherwise fit the statutory definition of disability.

### Protecting the ‘regarded as’ disabled

Under the ADA, the term “disability” means, first and foremost, having a physical or mental impairment that substantially limits one or more of the major life activities, but it also means being “regarded as” having such an impairment. Typically, an employee is “regarded as” disabled if she suffers some medical impairment (say, for example, a mental illness) and is mistakenly perceived by her employer as being substantially limited by it or if she is erroneously perceived to have a substantially limiting impairment (say, for example, symptomatic AIDS) that she does not actually have. See *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999).

By broadening the scope of ADA protection, Congress intended to remove attitudinal barriers to equal employment opportunity in the workplace faced by those who are not disabled or who never were disabled, but are perceived as such to their detriment by their employers. Consequently, if an individual is fired from his job because his employer erroneously believes that he has a disabling condition that he does not have or denies him a promotion because the employer accurately believes him to have a medical condition that the employer falsely believes is substantially limiting, there is a clearly identifiable adverse employment action. The individual has been discriminated against because of his perceived disability, and the ADA violation raises no conceptual difficulty.

But if the person “regarded as” disabled requests an accommodation so that she can continue to work but in some different role or capacity, it might well be asked why the employer should be required to comply. After all, others with equally severe impairments but no misperception as to how their condition affected their suitability for the job, would have no ADA right to an accommodation.

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### **The fear of 'windfall'**

In *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir.) cert. denied, 540 U.S. 1049 (2003), for example, Frederick Kaplan, a peace officer for the City of North Las Vegas suffered a hand injury and was misdiagnosed with rheumatoid arthritis. During his rehabilitation, he was reassigned to a civilian light-duty position. After his rehabilitation, his doctor gave him a full duty release with the exception of gun handling. Sometime later, Kaplan's supervisor asked him to try to qualify at the pistol range for firearm handling (that would, presumably, lead to a regular assignment). But Kaplan refused, citing a department rule that prohibited employees from qualifying on the pistol range unless they were fully released by a doctor. Just six days later, Kaplan was examined by one of the City's doctors, who concluded that his hand injury (which prevented him from holding or shooting a gun or grasping and detaining suspects) rendered him unable to perform the essential functions of his job and, incorrectly believing Kaplan to be suffering from rheumatoid arthritis, that this incapacity was permanent. Based on this medical assessment, Kaplan was terminated from his employment. Soon after that, however, Kaplan qualified at a private pistol range and, two years later, fully recovered from his hand injury. When the City refused reinstatement to his old job, Kaplan sued.

A conundrum is created here by the inaccurate diagnosis of rheumatoid arthritis: If the diagnosis was correct, Kaplan had an ADA-protected disability, but the employment termination was likely lawful because Kaplan would never regain use of his hand sufficient to perform his essential job responsibilities as a peace officer. If the diagnosis was wrong, Kaplan could benefit from an accommodation (say, for example, a leave of absence or continued light-duty assignment) that would have permitted him, in time, to perform his job, but he would not actually have an ADA-protected disability because, generally speaking, temporary conditions are not "substantially limiting" under the ADA.

Refusing to be limited by "a formalistic reading of the ADA," which makes no distinction between actual and perceived disabilities in its discussion of "reasonable accommodation," the Ninth Circuit rejected the idea of providing reasonable accommodation to employees "regarded as" disabled because it would lead to the "perverse and troubling" consequence that impaired employees "would be better off" under the ADA if their employer erroneously treats them as disabled. It also observed that affording reasonable accommodation to "regarded as" employees would "do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage employers to see their employees' talents clearly; instead it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability." *Kaplan*, 323 F.3d at 1232.

The idea that employees "regarded as" disabled have ADA-protected rights that employees not so regarded do not, seems not to be "perverse," or, as another court put it, "bizarre," *Weber v. Strippit, Inc.*, 186 F.3d 907, 916 (8th Cir. 1999), but rather the natural consequence of the policy choice Congress made when it extended ADA protection to those "regarded as" disabled. And, while talk of a "windfall" to those who "perpetuate[] . . . misperceptions" may apply to Kaplan (who seemed to have been gaming the system to remain on light duty for as long as possible until he realized that his job was in jeopardy), it is far from clear that this would be true of all those with merely perceived disabilities.

### **Protecting workers from myths, fears and stereotypes**

A markedly different approach was taken recently in *Williams v. Philadelphia Housing Authority Police Dep't*, 380 F.3d 751 (3d Cir. 2004), where the Third Circuit Court of Appeals ruled that an employer was required to accommodate an employee with a perceived mental disability. Edward Williams, a police officer for the Philadelphia Housing Authority, was suspended after he threatened his superior officer. When the Housing Authority later learned that Williams talked of "smoking people, going postal, and having the means to do it," it ordered Williams to be examined by its psychologist, who diagnosed Williams with "major depression" and recommended that he not carry a weapon for at least three months, but cleared him for working in either an administrative or clerical capacity. As an accommodation,

Williams requested two transfers – either to the training unit or to the radio room – neither of which required the use of a firearm. But the Authority denied both requests because it wrongly perceived Williams as being restricted from any access to firearms and even being around others carrying firearms when, in fact, he was only restricted from carrying a firearm. Without a temporary assignment, Williams exhausted his available leave time, and his employment was terminated on that ground.

Because Williams had been terminated for exhausting his leave, not for his perceived disability, his only ADA claim could have been for failure to offer the accommodation of temporary reassignment. Williams further claimed that the Authority's perception that he could not carry firearms (which was accurate) when combined with its perception that he could not have access to firearms or around those who carried them (which was erroneous) meant that he was regarded as "substantially limited" in the major life activity of work, since someone with the limitations Williams was perceived to have would be excluded from virtually all law enforcement positions. Thus, the issue in the case was whether Williams would have that ADA-protected right to a reasonable accommodation if it was only the mistakenly-perceived additional restriction – no access to firearms or those who carried them – that rendered him disabled within the meaning of the ADA. The Third Circuit said he would.

In making its decision, the court relied heavily on the legislative history of the ADA. The "regarded as" prong of the definition of "disability" was adopted, the court explained, because "the reaction of others" to individuals with medical impairments that were not themselves substantially limiting could "prove just as disabling" as an actual disability, and it served to protect individuals who suffered adverse employment actions due to "the myths, fears and stereotypes associated with disabilities." 380 F.3d at 774 (quoting Congressional report). The court also emphasized that "but for [the employer's] erroneous perception that Williams was unable to be around firearms because of his mental impairment, Williams would have been eligible for" a reassignment that would have obviated his discharge. *Id.*

The court rejected the argument that if Williams is entitled to reassignment by virtue of his merely perceived disability, he receives a "windfall" as compared to a similarly situated co-worker who, not being "regarded as" disabled, has no ADA accommodation right. The court reasoned that since Williams was denied a reassignment "solely based on [his employer's] erroneous perception," he was, in fact, worse off than an employee who is not perceived as having that additional limitation and, consequently, receives the transfer. As the court put it, "[t]he employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid." *Id.* at 775. Restoring Williams to where he would have been but for his employer's misperception, is not a windfall.

### **Protecting the victims of misperception**

Those courts that would afford reasonable accommodation to those "regarded as" disabled seem more in keeping with the ADA, and not just formalistically so. If a worker with medically-controlled depression or cancer in remission is erroneously perceived to be unable to handle the stress of her regular job or if the worker with medically-controlled epilepsy is mistakenly perceived to be a risk to himself and co-workers, then obligating the employer whose misperception causes the employment disruption to make a reasonable accommodation – such as job restructuring, position reassignment, or an extended leave of absence – protects the affected employee from ungrounded "fears, myths and stereotypes," as Congress intended.

In most cases, if the perceived limitation was truly mistaken, the employee, though having a medical impairment, would be qualified for the position, and a question of reasonable accommodation would never arise. It would rather be a straightforward case of disparate treatment against a qualified person with a (perceived) disability. But there are the unusual cases, like Williams, where the individual was truly limited with respect to his current job, but could benefit from an accommodation that was denied due to a

misperception as to the precise scope of the impairment-caused limitations. It would be ironic to say in such cases that the displaced worker would have to prove the accuracy of the employer's misperception ("yes, it's true, people with depression really cannot handle stress") to qualify for an ADA-required accommodation. As long as courts do not equate a perceived inability to perform a particular job with a perceived disability, there is little risk of "windfall" results in those few cases in which a reasonable accommodation would be properly required for someone "regarded as" disabled.

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