What is “Because of the Disability” under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine

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Professor Anderson examines the Americans with Disabilities Act’s requirement that discrimination be “because of the disability” of the individual seeking its protection. She focuses on how some courts use this language to impose unwarranted causation standards on reasonable accommodation claims. Title I of the ADA requires employers to accommodate the “known physical or mental limitations” of employees with disabilities; however, a number of courts require the accommodation be linked to narrowly identified aspects of that disability, or in the case of employees only regarded as having a disability, deny accommodations altogether as not necessary “because of the disability.” Professor Anderson concludes that courts use causation requirements to avoid evaluations on the merits of accommodations claims. She argues that courts should review such claims based on whether they are reasonable and not on whether they amount to undeserved windfalls.

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I. INTRODUCTION

The Americans with Disabilities Act (ADA) reasonable accommodation law can be compared to stones that are dropped into a river. The river does not yield to the stones; it flows around them. Similarly, while the ADA attempts to change the treatment of individuals with disabilities under the law, the judiciary continues to approach the legal
questions posed by the Act with a deeply ingrained attachment to principles of formal equality\(^1\) that resists any attempts at modification. Despite rejection by Congress and the Supreme Court of judicially crafted limitations on the right to accommodation in the name of formal equality, the judiciary's underlying values remain the same and simply manifest themselves in other ways.\(^2\)

Perhaps not surprisingly, individuals seeking reasonable accommodation run into resistance from courts that view accommodations as a form of preferential treatment not unlike affirmative action.\(^3\) Prior to the Supreme Court's decision in *US Airways v. Barnett*,\(^4\) several courts of appeals held that accommodation requests were not reasonable when they could be construed as providing preferential treatment to employees with disabilities, such as requests to change an otherwise neutral employment rule.\(^5\) The Supreme Court subsequently rejected this interpretation, finding that in some circumstances it is necessary to provide exceptions to neutral rules to provide equal employment opportunity.\(^6\) That the exception could

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2. Professor Reva Siegel has coined a term for an analogous concept in equal protection law: "preservation-through-transformation," which explains how "status-enforcing state action evolves in form as it is contested." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). For example, as marriage laws evolved away from the subordinate, hierarchical structure whereby the "wife's identity 'merged' into her husband's," courts began to articulate a new "public policy" based view of marriage as an emotional, private relationship, beyond the ordinary reach of the law. *Id.* at 1118. The new view justified courts continuing to deny women recourse to such things as tort liability for domestic violence. *Id.* Similarly, as the Civil Rights Act of 1866 moved to enforce the ban on slavery by investing former slaves with equal power to create contracts, courts interpreted marriage as a social, rather than civil, right, and found social rights not governed by federal law. *Id.* at 1119-20.

3. See, e.g., EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (characterizing a reasonable accommodation claim as "affirmative action with a vengeance").


5. See, e.g., Burns v. Coca-Cola Enter., 222 F.3d 247, 258 (6th Cir. 2000) (quoting Dalton v. Subaru-Isuzu Auto, Inc., 141 F.3d 667, 679 (7th Cir. 1998) for the proposition that "[a]llowing [the plaintiff] to recover despite his failure to abide by [the employer's] non-discriminatory policy requiring him to apply for a transfer to a new position within his restrictions would 'convert a nondiscrimination statute into a mandatory preference statute, a result which would be inconsistent with the nondiscriminatory aims of the ADA'"); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (concluding that the ADA does not "requir[e] affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled"); see also Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of *US Airways v. Barnett* Beyond Seniority Systems, 51 DRAKE L. REV. 1, 12-15 (2002) (discussing lower court rejection prior to *Barnett* of accommodations in cases involving workplace rules of general application).

6. *Barnett*, 535 U.S. at 397-98. *Barnett* involved a plaintiff who sought an exception to a seniority system that had been unilaterally imposed by the employer. *Id.* at 394. The Court held that to prevail on his reasonable accommodation claim, the plaintiff was required to show special circumstances that warranted a deviation from the company's seniority system. *Id.* at 405-06.
be characterized as a preference for the employee with a disability is not relevant to ADA accommodation analysis.\(^7\)

Preferential treatment concerns make it difficult to situate reasonable accommodation within the broader context of civil rights law. Some scholars argue the accommodation mandate is unique from other antidiscrimination principles and urge courts to be sensitive to that uniqueness and not to employ the same old patterns of interpretation.\(^8\) Other commentators argue that there is more overlap than has been recognized between accommodation and other antidiscrimination principles, and accordingly, there is no basis for judicial hostility toward it.\(^9\) While this Article is informed by that debate, it does not delve directly into it. Instead, it turns an eye to yet another way the perceived uneasy fit of reasonable accommodation within antidiscrimination law manifests itself. Specifically, this Article looks at courts’ use of causation standards in ADA accommodation cases.

While the Supreme Court’s ruling in *Barnett* bars explicit rejection of accommodations on preference grounds, courts have found other analytical methods to reflect their anti-preference views. One of these methods is the interpretation of what is discrimination “because of the disability” of the employee. Title I of the ADA makes it unlawful to discriminate “against a qualified individual with a disability because of the disability of such individual . . . .”\(^10\) One form of discrimination “because of” disability is to fail to reasonably accommodate “the known physical or mental limitations of an otherwise qualified individual who can perform the essential functions of the job in question.”\(^11\) By reading “because of” to include various causation elements, courts have raised the bar for plaintiffs seeking reasonable accommodations under the ADA in contravention of the intent of Congress and the Supreme Court.

At least initially, some courts articulated the prima facie case under the ADA to require proof that the adverse employment action was taken “solely

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7. See id. at 398.
10. 42 U.S.C. § 12112(a) (2000). The Equal Employment Opportunity Commission gives several examples of individuals who fall under the “regarded as” prong of the definition of disability. See EEOC, *A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT 1-2.2(c)* (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL] (suggesting as an example of someone regarded as having a disability an individual with controlled high blood pressure whose employer nonetheless reassigns him to a less strenuous job out of an unsubstantiated fear the individual will have a heart attack).
11. Id. § 12112(b)(5)(A), (B).
because of" the disability, thereby apparently ruling out motivating factor, or mixed-motive, liability.\textsuperscript{12} Other courts have added a narrow causation requirement, denying an accommodation for limitations that are related to the disability at issue but not in and of themselves substantial limitations a major life activity.\textsuperscript{13} In a similar vein, some courts narrowly construe the impairment at issue to preclude accommodation claims for the full spectrum of the limitations caused by the disability.\textsuperscript{14}

Then there are the courts that deny accommodations to individuals who are perceived to have a disability as opposed to having an actual disability. The ADA specifically protects individuals whom employers perceive, or regard, as having a physical or mental impairment that substantially limits a major life activity.\textsuperscript{15} In some cases, although the individual may not have an impairment that is physically or mentally restrictive enough to prove an actual disability, that impairment may nonetheless present a significant hurdle to the individual’s ability to obtain equal opportunity in the workplace.\textsuperscript{16} About half of the circuit courts that have considered this issue have held that employers have no obligation to accommodate these “regarded as” individuals, because the refusal to accommodate what is only perceived as a disability is not discrimination “because of” the individual’s disability.\textsuperscript{17}

In each of these instances, courts do not deny the accommodation based on an argument that it would provide some sort of preference for the individual at hand. Instead, courts deciding there is no duty to accommodate “regarded as” disabled individuals, for instance, justify their decisions by comparing those individuals to individuals with similar impairments who are not covered under the ADA (because they are not regarded as substantially limited by their impairment). They express concern that it is a “windfall” to an individual not “in genuine need of accommodation to perform to their potential.”\textsuperscript{18} This analysis is anti-preference analysis proceeding under a different guise.

Courts’ analogies to other antidiscrimination laws further undermine the goal of providing reasonable accommodation under the ADA. Other antidiscrimination laws contain a “because of” requirement similar to that in the ADA. Under Title VII of the Civil Rights Act of 1964, for example, it

\begin{itemize}
\item \textsuperscript{12} See infra Part II.B.
\item \textsuperscript{13} See infra Part III.A.1.
\item \textsuperscript{14} See infra Part III.A.2-3. This spectrum includes minimum wage and maximum hour protection, occupational health and safety protection, antidiscrimination, family and medical leave, unemployment insurance, compensation for work-related injuries, collective bargaining rights, and retirement security.
\item \textsuperscript{15} 42 U.S.C. § 12102(2).
\item \textsuperscript{17} See infra Part III.B.
\item \textsuperscript{18} See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).
\end{itemize}
is unlawful for an employer to discriminate “because of [an] individual’s race, color, religion, sex, or national origin.” It is not unusual for plaintiffs to lose an antidiscrimination case because they have failed to prove their employer took an action “because of” a protected characteristic. These cases turn on whether the plaintiff has proven that the employer in fact used the protected characteristic as a factor in the decision or whether the employer had a legitimate, non-discriminatory reason for its actions. Courts are applying the “because of” causation standard in a somewhat different way in accommodation cases to find that the way the characteristic was used in the employment decision was not what the ADA intended to cover in the first place.

This matters because it allows courts to transform a statute that calls for individualized inquiries into one that operates on per se rules. This in turn allows courts to avoid evaluation of the actual burden posed by the accommodation, where the pertinent inquiry is not causation but rather efficacy and cost. For example, in a “regarded as” disability case, instead of ruling per se that the employee is not entitled to accommodations, courts would have to evaluate how burdensome the request is to the employer if the accommodation is otherwise reasonable. In many—if not most—cases, the burden is not likely to be considerable. That courts deny accommodation requests even when the burden on the employer is not

20. See, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000) (finding sexually explicit insults and graffiti directed at plaintiff were because of his apparent homosexuality and poor work relationships and not because of his sex, i.e., maleness); see generally L. Camille Hebert, Sexual Harassment as Discrimination “Because of... Sex”: Have We Come Full Circle?, 27 OHIO N.U.L. REV. 439 (2001) (tracing the history of judicial interpretation of “because of... sex” under Title VII).
21. The most recent Title VII case focused on what the plaintiff needed to prove in order to meet the “motivating factor” test, which shifts the burden of proof to the employer to show it would have made the same decision based on some non-discriminatory reason. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).
22. In this sense, it is somewhat akin to the cases that held that Title VII did not cover same-sex harassment because such harassment was never “because of... sex” as intended by the Act. But see Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (implicitly overruling lower court decisions holding that same sex harassment was per se not covered under Title VII).
23. See Albertson’s, Inc. v. Kirkingburg, 527 U.S. 555 (1999) (emphasizing that the ADA requires a case-by-case evaluation in order to determine whether an individual has a disability as defined by the Act).
24. See 42 U.S.C. § 12111(9) (defining “reasonable accommodation” in functional terms); id. § 12111(10) (defining “undue hardship” defense based on “significant difficulty or expense” to employer).
25. See id. § 12112(b)(5) (requiring employer to make reasonable accommodations unless it can show “the accommodation would impose an undue hardship on the operation of the [employer’s] business”).
particularly heavy reflects the entrenched mindset that accommodations amount to inappropriate preferential treatment, or a windfall, to employees.

This narrow approach is not unique to the reasonable accommodation inquiry. The U.S. Supreme Court has adopted an extremely narrow definition of disability, making it difficult for plaintiffs to meet the threshold showing for an ADA claim.27 To some extent, courts' approaches to causation issues reflect the same set of values.

This Article evaluates how courts have used causation to actuate their anti-preference views. In Part II, the Article compares the language of the ADA and other civil rights statutes, particularly Title VII, with regard to causation issues. At least one circuit court requires as part of the ADA prima facie case that discrimination be solely "because of" the disability, contravening the plain language of the statute. This heightens the causation standard, such that more cases will be found not to involve discrimination "because of the disability" of the plaintiff. In Part III, the Article addresses causation issues specifically related to accommodation law. This Part looks at how courts disaggregate the plaintiff's disability into separate elements to find that the requested accommodation does not address the disability itself, especially when that accommodation is not intuitively causally related to that disability. In addition, some courts have adopted a per se rule that individuals only "regarded as" disabled are not entitled to accommodations, because such accommodations would not be "because of the disability." Finally, in Part IV, the Article discusses what role causation should play in an accommodation case and argues that the unduly restrictive view of causation is yet another stumbling block to accomplishing the integrative goals of the ADA.

II.
PROHIBITION OF DISCRIMINATION "BECAUSE OF" A PROTECTED CHARACTERISTIC IN THE ADA AND OTHER ANTIDISCRIMINATION STATUTES

Title I of the ADA, like Title VII and other federal antidiscrimination statutes, prohibits employment discrimination "because of" a covered, or protected, characteristic.28 In the ADA’s case, that characteristic is

27. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (interpreting the definition of disability under the ADA to require that mitigating measures be considered when determining whether an impairment substantially limits a major life activity); see also Chai R. Feldblum, Definition of a Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About it?, 21 BERKELEY J. EMP. & LAB. L. 91 (2000) (analyzing the definition of “disability” and how it has been significantly narrowed through the years).

28. 42 U.S.C. § 12112(a). Similar language is contained in both Title II and Title of the Act. See id. § 12132 (prohibiting discrimination “by reason of such disability” by public entities); id. § 12182 (prohibiting discrimination “on the basis of disability” by places of public accommodation).
disability, whereas under Title VII it is race, color, religion, sex, and national origin. The ADA’s prohibitions on disability discrimination bear some similarity to its precursor, the Rehabilitation Act of 1974. At the same time, the specific prohibitions contained in each statute are somewhat different.

The “because of” language in each of these statutes operates as a form of causation requirement. Different proof models have been developed to determine whether the protected characteristic was the reason behind the adverse action experienced by the plaintiff. Because these statutes are similar in language, yet different in application and scope, some uncertainty exists regarding whether the same standards of proof apply in each statute.

The Eighth Circuit, for example, has articulated the basic prima facie case under Title I of the ADA to require that the plaintiff demonstrate that “he has a disability as defined in the ADA; he was qualified to perform the essential functions of the job at issue, either with or without reasonable accommodation; and that ‘because of’ his disability, he suffered an adverse employment action.” Other courts state the third requirement differently to require proof of “circumstances which give rise to an inference” that the adverse action was “based on” the plaintiff’s disability. Regardless, these courts place an ADA Title I case into the same general framework as a Title VII disparate treatment case, in which the plaintiff must first prove a prima facie case of discrimination and then the burden shifts to the employer to either produce or prove a legitimate, non-discriminatory reason for its actions.

Most courts recognize indirect evidence, or pretext-based, disparate treatment claims under the ADA, which they treat as essentially identical to pretext-based disparate treatment claims brought under Title VII. As more fully explained below, however, there is some dispute regarding whether mixed-motive disparate treatment claims are cognizable under the

29. Id. § 12112(a).
31. Pub. L. No. 93-112 (codified at 29 U.S.C. § 794(a) (2000)). Section 504 provides in pertinent part that “[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the services of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance ...” Id.
32. Burroughs v. City of Springfield, 163 F.3d 505, 507 (8th Cir. 1998).
33. See Bones v. Honeywell Int’l, Inc., 366 F.3d 869, 878 (10th Cir. 2004); see also Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004) (articulating prima facie case with plaintiff having to show in third prong that “she was discriminated against based upon [her] disability”).
34. See, e.g., Hedrick v. Western Reserve Care Sys., 355 F.3d 444, 452-53 (6th Cir. 2004) (outlining plaintiff’s prima facie case under ADA using the proof methods developed under Title VII).
35. The Supreme Court recently endorsed the use of the pretext proof model in ADA cases in Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). Raytheon is discussed more extensively in subsection (C) of this Part, infra.
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Alternatively, there are disparate impact claims, which are also available under Title VII and some courts have recognized under the ADA, pointing to language in the Act that appears to create an impact-based standard. Alternatively, there are disparate impact claims, which are also available under Title VII and some courts have recognized under the ADA, pointing to language in the Act that appears to create an impact-based standard.37

Finally, there are reasonable accommodation claims. Courts have recognized that a plaintiff who establishes her employer refused a reasonable accommodation has proven discrimination “because of” her disability under the ADA. Title VII also includes the accommodation doctrine within its definition of religion. That doctrine, however, does not play the central role it does in disability discrimination law.

Title VII, with its emphasis on principles of formal equality, has been characterized as operating on the sameness model, whereas the ADA, to the extent it requires reasonable accommodation, operates on a difference model. The sameness model requires the employer to treat similarly situated individuals equally. A qualification standard, for example, must apply to all employees, or it cannot apply to any of them. Only in the context of religious discrimination, and then only if the differential treatment imposes at most a de minimis burden, can the employer apply its

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36. See note 65 infra and accompanying text.
38. See, e.g., Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 (2d Cir. 2000) (finding that plaintiff who shows that he has a disability, that his employer had notice of that disability, and that he could perform the essential functions of the job with reasonable accommodation, establishes discrimination “because of” his disability if the employer refuses to make a reasonable accommodation).
39. See 42 U.S.C. § 2000e(j) (2000) (defining “religion” to “include[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates 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”).
40. Carlos A. Ball, Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act, 55 ALA. L. REV. 951, 954 (2004) (discussing the “sameness” model of equality); Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 DUKE L.J. 1, 10-11 (1996) (describing reasonable accommodation as “clearly rest[ing] on a difference model of discrimination since it requires employers to treat some individuals . . . differently than other individuals”). There has been recent scholarship questioning this distinction. See Samuel R. Bagenstos, “Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 VA. L. REV. 825, 830 (2003) (proposing that accommodation and antidiscrimination are normatively not distinct); Jolls, supra note 9, at 645 (asserting that “antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories”).
41. Issacharoff & Nelson, supra note 8, at 307, 315 (noting Title VII’s premise that similarly-situated persons be treated similarly).
42. See Karlan & Rutherglen, supra note 40, at 3-4 (noting employer can impose a requirement such as the ability to lift heavy cartons in a warehouse, even if it disproportionately excludes more women than men from warehouse positions, as long as it is job-related; the employer is not required to accommodate female workers who cannot lift heavy items).
43. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (reasoning that accommodation of an employee’s religion is not reasonable if it imposes more than a de minimis burden on the employer, which includes the cost of the accommodation).
rules differentially among otherwise similarly situated employees with regard to a characteristic protected by Title VII.

By contrast, the difference model recognizes that providing equal employment opportunity sometimes requires differential treatment.\textsuperscript{44} Reasonable accommodation requires the employer adapt its workplace and workplace rules to the particular circumstances presented by an individual employee with a disability.\textsuperscript{45} While some argue that Title VII actually reflects both the difference model and the sameness model,\textsuperscript{46} the ADA embraces the difference model at its core. At the same time, parts of Title I of the ADA reflect familiar Title VII concepts such as the "because of" requirement.\textsuperscript{47}

Not surprisingly, then, concepts from Title VII's disparate treatment model have crept into the analysis of ADA reasonable accommodation claims, creating doctrinal difficulties.\textsuperscript{48} For example, Title VII theory affects the allocation of burdens of proof between the parties to prove either reasonableness of the accommodation or undue hardship to the employer under the ADA.\textsuperscript{49} Some courts initially approached the allocation of burdens of proof under the ADA the same way they did under the Title VII pretext model, although the ADA explicitly allocates a burden of proof to the employer and the Title VII pretext model does not.\textsuperscript{50}

Under Title VII, it is increasingly apparent that courts are narrowing the types of claims that can survive summary judgment.\textsuperscript{51} Even in disparate impact claims, which are not supposed to be about motive, courts have imposed proof burdens that in effect equate the practices at issue to those in which some type of hostile motive must have been at play.\textsuperscript{52} When courts

\textsuperscript{44} See Karlan & Rutherglen, supra note 40, at 2-4 (outlining ways the ADA may require differential treatment of individual employees with disabilities); Issacharoff & Nelson, supra note 8, at 338 (noting that the ADA, "unlike the normal operation of anti-discrimination laws, . . . does not begin with the presumption that but for some forbidden discrimination, there would be no disparity in the treatment of statutorily protected groups").

\textsuperscript{45} See Karlan & Rutherglen, supra note 40, at 2-4 (describing situations where employer may be required to modify job requirements in order to accommodate an employee with a disability).

\textsuperscript{46} See, e.g., Jolls, supra note 9, at 651-66 (suggesting that Title VII contains a number of accommodation concepts, in disparate impact theory in particular).

\textsuperscript{47} See infra Part II.B.

\textsuperscript{48} See generally S. Elizabeth Wilbom Malloy, Something Borrowed, Something Blue: Why Disability Law Claims Are Different, 33 CONN. L. REV. 603 (2001) (noting problems courts have had with borrowing Title VII proof models for ADA cases).

\textsuperscript{49} See id. at 641-50.

\textsuperscript{50} See id.


\textsuperscript{52} See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (suggesting that employers cannot be held liable in disparate impact claims on less evidence than required to prove intentional
bring the same narrow perspective to ADA claims, they are much more likely to see certain accommodation claims as raising the specter of a windfall to the plaintiff.

This section first briefly outlines the basic Title VII proof models. Next, it looks at several questions these proof models raise when applied to the ADA. The Article compares the language of the two statutes, along with that of the Rehabilitation Act of 1974, the ADA's precursor, to demonstrate that the ADA does not take the narrow "sole causation" approach of the Rehabilitation Act, but rather allows "motivating factor" causation, similar to Title VII. As a result, ADA claims can proceed on either indirect or direct proof disparate treatment models, and motivating causation (as opposed to sole causation) is sufficient. This section further addresses the Supreme Court's recent ruling in Raytheon Co. v. Hernandez, which disallowed a disparate treatment challenge to the application of neutral employer rules. Raytheon reflects the Court's tendency to transfer Title VII concepts of causation to ADA claims, at least those brought under disparate treatment theory, despite some unique circumstances presented by disability cases.

A. Proving Discrimination "Because of" a Protected Characteristic under Title VII's Proof Models

Two main proof models apply under Title VII: disparate treatment and disparate impact.

Within disparate treatment law, there are two variations: pretext and mixed motive. Cases proceeding on a disparate treatment theory require proof of motive. Cases proceeding on a disparate impact theory do not; however, courts' reasoning in these cases suggests they believe the proof model effectively rules out every reason for employers' actions except improper motive. These proof models—and what "because of" means under each—are discussed below.
1. Disparate Treatment

Title VII prohibits intentional discrimination because of race, color, religion, sex or national origin. Disparate treatment claims arise when an employer intentionally treats two employees differently because of one of these protected characteristics. For example, an employer treats employees differently because of sex if the employer has a policy that only men may handle certain workplace tasks, like operating heavy machinery. Both subcategories of disparate treatment claims, pretext and mixed motive, ultimately require proof of intent to act “because of” the protected characteristic.

Under the pretext model, also called the indirect evidence or McDonnell Douglas model, the plaintiff must first demonstrate a prima facie case of discrimination. This prima facie case is not considered onerous. Once the plaintiff meets it, the burden shifts to the defendant employer to produce a legitimate, non-discriminatory reason for its actions. After the defendant employer produces its legitimate, nondiscriminatory reason, the plaintiff must prove that the asserted reason is pretext for intentional discrimination based on a protected characteristic. The plaintiff can do this “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Throughout this proof process, the employee always bears the burden of proving an act of intentional discrimination.

57. See Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (describing disparate treatment discrimination as a situation where “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]”).
60. Although the elements vary somewhat with the type of employment action in question (refusal to hire, discharge, etc.), the basic elements of the pretext model prima facie case are: membership in a protected class; qualification for the job in question; some type of adverse employment action, such as refusal to hire or discharge; and some additional evidence that raises an inference of discrimination, such as continuing to seek applications from similarly qualified individuals or a person not in the protected class being chosen for the position instead of a similarly qualified candidate in the protected class. See William R. Corbett, An Allegory of the Cave and the Desert Palace, 41 Hous. L. Rev. 1549, 1555 (2005) (summarizing the elements of the McDonnell Douglas model).
61. Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The employer’s burden in the pretext model is a burden of production only; the employer merely needs to produce a reason that creates a genuine issue of fact for the jury as to the reason it took an adverse employment action against the plaintiff. Id. at 254.
62. Id. at 256.
63. Id.
The alternate disparate treatment proof model is the mixed-motive model. Under this model, rather than the plaintiff having to prove the reason given by the employer is pretextual, the plaintiff from the outset presents sufficient evidence to prove by the preponderance that the employer took the plaintiff’s protected characteristic into account when making the adverse employment decision. In other words, the plaintiff shows that his race, sex, religion, color, national origin, or religion was a motivating factor in the employer’s decision-making process. The employer then has a burden of persuasion, not mere production, that it would have made the same adverse decision even if it had not considered that protected characteristic. As with the pretext model, the emphasis remains on proving intentional causation—that the protected characteristic motivated the employer in taking the adverse action.

The mixed-motive approach was first recognized by the Supreme Court in *Price Waterhouse v. Hopkins* and later endorsed in modified form by Congress in the Civil Rights Act of 1991. Most recently, in *Desert Palace Inc. v. Costa*, the Court rejected the approach adopted by a number of lower courts that required direct evidence of intentional discrimination as part of the plaintiff’s prima facie case in a mixed-motive case. The Court held that the jury should be given instruction to find a plaintiff meets the burden of proof when there is “sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a Title VII protected category] was a motivating factor for any employment practice.”

Accordingly, regardless of whether the pretext or mixed-motive approach is used, the disparate treatment model results in a finding that the employer intentionally acted “because of” the relevant protected characteristic. If the plaintiff fails to provide sufficient probative evidence

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68. See Desert Palace, 539 U.S. at 101-02 (emphasizing the plaintiff must prove the protected characteristic was a motivating factor in the employer’s decision). The employer can limit damages by proving it would have made the same decision regardless, but the essential finding that it committed intentional discrimination because of the protected characteristic remains. 42 U.S.C. § 2000e-5(g)(2)(B).

69. 490 U.S. 228.


71. 539 U.S. 90.

72. See id. at 95, 101-02. “Direct evidence” was not consistently defined among the lower courts prior to the Supreme Court’s decision in *Desert Palace*, but generally required more than mere circumstantial proof of intentional discrimination. See Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002), aff’d, 539 U.S. 90 (2003) (surveying circuits’ approaches and describing the state of the law on burdens of proof in mixed-motive cases as a “quagmire”).

73. Desert Palace, 539 U.S. at 101.
of unlawful motivation, his claim fails. The plaintiff would not have proven that the protected characteristic caused the defendant to take adverse action against him.

2. **Disparate Impact**

Disparate impact cases do not require proof of motivation.\(^74\) Instead, this theory focuses on rules that are neutral on their face but that have a harsher effect on some individuals "because of" a protected characteristic.\(^75\) Causation appears in disparate impact cases in that the plaintiff must first prove the employer uses an employment practice that causes a disparate impact on a class of individuals with a protected Title VII characteristic.\(^76\) The employer then must prove that the practice is "job related for the position in question and consistent with business necessity . . . ."\(^77\) If the employer meets that standard, the employee has the opportunity to prove that there is an alternative business practice "without a similarly undesirable [effect based on a protected characteristic that] would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"\(^78\)

The disparate impact model has traveled a rocky road with the Supreme Court. In the seminal case *Griggs v. Duke Power Co.*,\(^79\) the Court construed Title VII to reach acts that were "neutral on their face, and even neutral in terms of intent" if the effect of those acts favored one group over another based on a protected characteristic.\(^80\) In a series of decisions culminating with *Wards Cove Packing Co. v. Atonio*,\(^81\) however, the Court considerably constricted the reach of this type of claim. In particular, the Court heightened the proof needed for the plaintiff's prima facie case and lowered the employer's burden to one of production only, to show the

\(^{74}\) See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (noting that the consequences, not simply the motivation, of the employment actions are subject to Title VII's antidiscrimination provisions).

\(^{75}\) *Id.*


\(^{77}\) *Id.*


\(^{79}\) 401 U.S. 424.

\(^{80}\) *Id.* at 430.

\(^{81}\) 490 U.S. 642.
alleged practice was "justified" rather than a "business necessity." The Court expressed concerns about the financial burden on employers to defend against these cases and the potential that employers might be held liable "for a myriad of innocent causes." Indeed, in Watson v. Fort Worth Bank and Trust, decided just shortly before Ward's Cove, the Court emphasized that, in its view, successful disparate impact cases involve practices that are the "functional equivalent to intentional discrimination":

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different from in cases where disparate treatment analysis is used. Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

Although the Civil Rights Act of 1991 reversed some of the narrowing the Court did to disparate impact claims (specific to the plaintiff's prima facie case and the employer's burden), it did not explicitly address the Court's equating of the ultimate legal issues in disparate treatment and disparate impact cases. Some lower courts have treated the Court's language as attributing the employer's actions to hidden motive. The Eleventh Circuit, for example, has reasoned that if an employer adopts a practice that it cannot prove is job related and consistent with business necessity, or if there is an alternative employment practice with a less discriminatory impact that the employer refuses to adopt, the explanation for this must be that the employer has some hidden, invidious purpose. In

82. Id. at 656, 659-61.
83. Id. at 657 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).
85. Id. at 987.
86. The Civil Rights Act of 1991 amended Title VII, but not other statutes that have separate remedial provisions, such as the ADEA. Age discrimination cases are still subject to Ward's Cove's disparate impact proof model. See Smith v. City of Jackson, 544 U.S. 228 (2005).
87. In re Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1321-22 (11th Cir. 1999). This case involved an 11th Amendment challenge to disparate impact claims. The court upheld the claims against the challenge, in large part because it concluded disparate impact claims were congruent to the reach of Article 5 of the Fourteenth Amendment by virtue of their functional equivalence to disparate treatment claims. Id. at 1322. While the Fourteenth Amendment supports claims based upon intentional discrimination only, the fact that the ultimate legal issue in a disparate impact claim leaves standing only purposes that must involve some intent to discriminate satisfied the court that the constitutional standards were met. See id.; see also Washington v. Davis, 426 U.S. 229, 239 (1976) (violation of the Equal Protection Clause of the Fourteenth Amendment requires proof of discriminatory purpose); Personnel Adm'n v. Feeney, 442 U.S. 256, 279 (1979) (requiring proof the decision maker selected a course of action "because of," not merely "in spite of," its affects on a protected class).
other words, this reduces disparate impact claims to another form of pretext analysis.88

B. The Reflection of Title VII's "Because of" Language in the ADA's Employment Discrimination Prohibitions

To determine the role "because of" plays under the ADA, the basic statutory prohibitions of Title I of the Act must be compared to those of both Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. All three statutes share some language, and Congress had the language of the latter two statutes in mind when drafting the ADA.89 At the same time, the ADA addresses specific contexts that neither Title VII nor the Rehabilitation Act address. The ADA is most like Title VII in that it allows both direct and indirect proof of discrimination and there is no requirement that the plaintiff prove disability was the sole cause of the employer's adverse actions.

Title I of the ADA prohibits discrimination

against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.90

The statute then fleshes out this general prohibition in several subsections defining "discrimination." Among the acts prohibited are:

- "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [that individual's] disability",91

- "utilizing standards, criteria, or methods of administration

88. Professor George Rutherglen has argued that disparate impact theory actually operates to uncover business practices that can be a pretext for discrimination. See George Rutherglen, Disparate Impact under Title VII: An Objective Theory of Discrimination, 73 VA. L. REV. 1297 (1987). In articulating what he calls a "systematic approach" to evaluating the employer's business justification defense, Professor Rutherglen suggests that "[t]aken together, the plaintiff's evidence of adverse impact and the defendant's evidence of business justification must reveal a significant risk that the disputed employment practice could be used as a pretext for discrimination." Id. at 1320. "The frequent correspondence of findings of adverse impact and lack of business justification reveals the fundamental connection between these issues in proving, or disproving, pretextual discrimination." Id. at 1323.


91. Id. § 12112(b)(1).
... that have the effect of discrimination on the basis of disability"; 92

- "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, unless [the employer] can demonstrate that the accommodation would impose undue hardship on the operation of the [employer's] business"; 93

- "using qualifications standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test or other selection criteria ... is shown to be job-related for the position in question and is consistent with business necessity." 94

By comparison, Title VII's general prohibition on discrimination is contained in three subsections. The statute makes it unlawful to

- "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of" one of Title VII's protected characteristics; 95

- "limit, segregate, or classify [the employer's] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" a protected characteristic"; 96

- "[Use] a particular employment practice that causes a disparate impact on the basis of [a protected characteristic when] the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 97

92. Id. § 12112(b)(3).
93. Id. § 12112(b)(5)(A).
94. Id. § 12112(b)(6).
96. Id. § 2000e-2(2).
97. Id. § 2000e-2(k)(1)(A).
In some respects, the language of the ADA varies from that of Title VII. For one, there is no similar generalized provision for reasonable accommodation under Title VII, although it does contain a specific accommodation mandate for religion. In addition, whereas the Supreme Court in Griggs read disparate impact claims into Title VII's general prohibitions, the ADA delineates them specifically in the language prohibiting qualification standards that “screen out or tend to screen out” an individual or individuals with a disability. The ADA incorporates specific defenses that are unique to disability, such as undue hardship. Beyond that, however, there are basic similarities between the statutes.

One of these similarities is that the employer’s actions be “because of” the protected characteristic. As noted above, the Supreme Court recognized in Price Waterhouse v. Hopkins that in Title VII disparate treatment cases, “because of” causation can be proven even when another motive for the action has also been shown. The plaintiff need only prove that the unlawful reason was a motivating factor in the decision—i.e., that it played a role in the decision at the time the decision was made. Price Waterhouse rejected the argument that Title VII required a narrow kind of but-for causation in disparate treatment cases, namely sole causation, that would single out a particular motive as the reason for the employer’s

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98. Title VII contains a limited duty to reasonably accommodate religious practices. See id. § 2000e(j) (defining “religion” to require employer show undue hardship in having to accommodate employee or prospective employee’s religious observance or practice). This religious accommodation requirement was added to the statute almost a decade after Title VII’s original passage. Equal Employment Opportunity Act of 1972, Pub. L. 92-261 § 2(7), 86 Stat. 104 (1972).


100. See Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (stating that “[b]oth disparate-treatment and disparate-impact claims are cognizable under the ADA,” citing 42 U.S.C. § 12112(b) which prohibits using qualification standards that “screen out or tend to screen out” individuals with disabilities); see also Kelly Cahill Timmons, Accommodating Misconduct Under the Americans with Disabilities Act, 57 FLA. L. REV. 187, 200-03 (2005) (comparing disparate impact claims under Title VII to disparate impact claims under the ADA).

101. See 42 U.S.C. § 12111(b)(5)(A) (2000) (limiting duty of reasonable accommodation when employer “demonstrate[s] that the accommodation would impose an undue hardship on the operation of the business” of the employer); id. § 12111(10) (defining undue hardship); see also 29 C.F.R.§ 1630.2(p) (2004).

102. See Malloy, supra note 48, at 619-20 (noting the substantial similarity between the ADA and Title VII, with the exception of the reasonable accommodation provisions); Karlen & Rutherglen, supra note 40, at 5 (noting the fundamental prohibition against discrimination based on disability in the ADA flows from corresponding prohibitions in Title VII).

103. See supra notes 65-73 and accompanying text.

104. 490 U.S. 228 (1989).

105. Id. at 240-41.

106. Id. at 250.
action. As the Court pointed out, Congress specifically rejected an amendment to Title VII that would have required proof that an action was solely because of a protected characteristic. Consequently, to state a claim under Title VII, a plaintiff need only show that the protected characteristic was one motivating factor in the employer’s decision.

By contrast, Section 504 of the Rehabilitation Act of 1973 requires sole causation. Under that statute, the plaintiff has to prove that he was excluded from the program or activity of an entity receiving federal funding “solely by reason of his or her disability.” As a result, the lower courts have overwhelmingly found that there is no Title VII mixed-motive liability under the Rehabilitation Act.
The ADA plainly does not require discrimination be solely because of disability.\footnote{See 42 U.S.C. § 12112(a) (2000); cf. 42 U.S.C. § 12132 (prohibiting exclusion of qualified individuals with a disability from participation in or the benefits of public services, programs, or activities, without the requirement such exclusion be “solely” because of disability).} Although some courts initially imported Rehabilitation Act standards into the ADA,\footnote{Cases from the Seventh and Ninth Circuits initially inserted a “solely” requirement into disparate treatment claims under the ADA. See Despares v. Milwaukee County, 63 F.3d 635, 636 (7th Cir. 1995) (denying plaintiff’s claim because if found “compulsion (for sole cause) . . . necessary to” prove the employer’s adverse action was because of the employee’s disability); Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999) (requiring plaintiff’s prima facie show an adverse action “solely because of’ disability).} most courts have now concluded that the ADA allows for liability upon proof of motivating cause.\footnote{See, e.g., Head v. Glacier Nw., Inc., 413 F.3d 1053, 1064 (9th Cir. 2005) (noting that seven circuits, not including the Ninth, have held that causation under the ADA does not require a showing of sole cause); Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) (reasoning that “elimination of the word ‘solely’ from the causation provision of the ADA suggests forcefully that Congress intended the statute to reach beyond the Rehabilitation Act to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action”); \textit{see also} Seam Park, Comment, \textit{Curing Causation: Justifying a “Motivating-Factor” Standard under the ADA}, 32 FLA. ST. U. L. REV. 257, 263-66 (2004) (surveying circuits that reject a “solely because of’ standard).} The primary exception is the Sixth Circuit.\footnote{The position of the Fifth Circuit on this issue is not entirely clear. In a footnote, that court acknowledged a prior decision in which a final element of plaintiff’s prima facie case was stated as requiring proof of an employment decision taken “solely because of the disability,” but then apparently construed the authority that case relied upon to mean an action “taken because of [the plaintiff’s] disability” and not literally “solely because of.” See Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1050 n.2 (5th Cir. 1998) (citing Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996) and Rizzo v. Children’s World Learning Ctrs., Inc., 84 F.3d 758 (5th Cir. 1996)).} The Sixth Circuit uses in ADA cases the same distinction between \textit{McDonnell Douglas} pretext, or indirect evidence, cases and \textit{Price Waterhouse} mixed-motive, or direct evidence, cases, that the Supreme Court rejected under Title VII in \textit{Desert Palace}, and requires proof of sole causation in so-called direct evidence cases.\footnote{See Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 454 (6th Cir. 2004); \textit{see also supra} notes 71-73 and accompanying text discussing \textit{Desert Palace}. In \textit{Hedrick}, the Sixth Circuit upheld a prior ruling in that circuit that ADA plaintiffs are required to show sole causation in direct evidence cases. \textit{Hedrick}, 355 F.3d at 454 (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) and Walsh v. United Parcel Serv., 210 F.3d 718 (6th Cir 2000)). The court indicated it could overrule its prior decisions only if there was an intervening Supreme Court decision or an en banc decision of the entire circuit. \textit{Id.} Rehearing en banc was denied in the case. \textit{See id.} at 444 (rehearing en banc denied Mar 4, 2004). The Sixth Circuit nowhere in \textit{Hedrick} acknowledges that the Supreme Court in \textit{Desert Palace} rejected the notion that Title VII’s mixed-motive proof model requires direct evidence. It simply cites its pre-\textit{Desert Palace} cases that set out the prima facie case. \textit{See id. at} 452-53 (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996) and Kline v. Tenn. Valley Auth., 128 F.3d 337 (6th Cir. 1997)).} Most courts properly recognize that Congress deliberately left the word solely out of the ADA\footnote{The House Committee Report on Title II of the ADA at one point states that while that Title was based in large part on the Rehabilitation Act, “solely” was deliberately eliminated from the general prohibition on disability discrimination because “a literal reliance on that phrase . . . leads to absurd results.” H.R. REP. No. 101-485, pt. 2, at 85 (1990), \textit{reprinted in} 1990 U.S.C.C.A.N. 303, 368. For} and conclude that there is no sole-cause requirement under the
ADA. In fact, after the Supreme Court's decision in *Desert Palace* rejecting a direct-evidence threshold to prove a mixed-motive claim under Title VII, some courts similarly adjusted the prima facie case under the ADA so that plaintiffs "need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a 'motivating factor' for the employment action, even though the defendant's legitimate reason may also be true or have played some role."  

In other cases, importing familiar proof models into the ADA has led courts to view reflexively certain ADA claims from a Title VII-like perspective that does not consider the unique issues disability raises. The next section addresses one recent example of this, the Supreme Court's decision in *Raytheon Co. v. Hernandez*.  

C. *Raytheon and the Limits of the Application of Title VII "Because of" Causation Standards to ADA Cases*  

The Supreme Court's recent decision in *Raytheon Co. v. Hernandez* interprets the meaning of "because of the disability" when applying the Title VII disparate treatment proof model to an ADA claim, and demonstrates the limitations of that model in ADA cases. *Raytheon* analyzed a refusal to rehire claim using the *McDonnell Douglas* pretext model. The Court employed traditional "because of" analysis, based in the sameness model, although the case seems better conceptualized under another theory of discrimination law.  

The employee in *Raytheon*, Hernandez, asserted that his former employer did not rehire him due to his past drug use. The employer itself informed the EEOC during its investigation that Hernandez had been "rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation." The employer also argued that it had a rule barring the
rehire of any previous employee discharged for violating a company rule.123 Hernandez had been under the influence of drugs and alcohol in the workplace, a violation of company policy that led to his initial discharge.124

In the lower court, Hernandez apparently framed the case as a disparate treatment claim only.125 The court of appeals held the employer could not rely on its no-rehire policy because the policy itself violated the ADA when applied to former drug addicts.126 In essence, the court of appeals reasoned that employers cannot meet the second prong of *McDonnell Douglas* by asserting something that in itself violates that Act. That could not be legitimate or non-discriminatory, by definition. The Supreme Court unanimously rejected that analysis. Applying its narrow definition of disparate treatment, the Court focused instead on the fact the rule was neutral, meaning there was no motive to single out individuals with disabilities.127

The Supreme Court considered the disparate treatment claim as a *McDonnell Douglas* pretext claim, following the proof model laid out by the court of appeals.128 The Court reversed the lower court decision on the grounds that the court had mistakenly conflated the disparate treatment and disparate impact models when it found the employer’s blanket no-rehire policy violated the ADA, regardless of whether the human resources worker knew about the past drug usage.129 The Court reasoned “[h]ad the Court of

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123. *Id.* at 47.

124. *Id.* at 46-47. There did not appear to be any dispute that during his prior employment with the company, Hernandez both drank and used cocaine and that he failed a drug test at work when it tested positive for cocaine. *Id.* There was some dispute in the case whether the human resources employee who rejected Hernandez knew about the drug use, or only that he had been fired for violating company policy. *Id.* at 47. The human resources employee testified that she relied upon a separation summary that reflected as the reason for Hernandez’s separation only “discharge for personal conduct (quit in lieu of discharge).” *Id.*

125. *Id.* at 49. Subsequently, he attempted to raise a disparate impact claim, which both the district court and the court of appeals found untimely. *Id.* at 47, 53.

126. *Id.*

127. *Id.* at 53-54. The Court held that once the employer proffered a neutral rule in its defense, the only relevant question for the court of appeals was whether Hernandez had presented sufficient evidence from which a jury could conclude the employer’s claim that it relied upon its rule was pretextual. *See id.* at 53. On remand, the Ninth Circuit found there was indeed sufficient evidence that it was Hernandez’s status as a substance abuser that lead to his rejection, rather than the company’s reliance on its no-rehire policy. *See Hernandez v. Hughes Missile Sys. Co.,* 362 F.3d 564, 568-69 (9th Cir. 2004). Among the evidence was the fact the human resources employee pulled Hernandez’s entire personnel file, which included his drug test results and a letter from his A.A. counselor, and that the employer seemingly changed its reason from that submitted to the EEOC (which admitted reliance on Hernandez’s past substance abuse) to the no-rehire rule only after EEOC conciliation attempts failed. *See id.* at 569.

128. *Id.* at 49-51.

129. *Id.* at 54-55. The Court pointed to language in the court of appeals decision that Raytheon’s policy “screens out persons with a record of addiction,” which the Court noted was something that “pertain[ed] to disparate-impact but not disparate treatment claims.” *Id.* at 54 (citations omitted). The Court also noted that a finding by the lower court that the human resources employee “may have made the employment decision in this case ‘remaining unaware of [respondent’s] “disability”’ was
Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, non-discriminatory reason under the ADA.\textsuperscript{130} With its focus on intentional discrimination, a \textit{McDonnell Douglas} pretext analysis seems ill-suited to Hernandez’s claim.\textsuperscript{131} There was no evidence that the employer adopted the rule to exclude drug users. The better method of attack would have been through a disparate impact\textsuperscript{132} or a reasonable accommodation claim. Alternatively, a mixed-motive claim also may have fared better.\textsuperscript{133}

\textit{Raytheon} reflects the inadequacy of Title VII disparate treatment causation concepts in addressing the role disability plays in an employer’s decision-making process. Many of the workplace rules that hinder employees with disabilities are uniform rules that do not directly implicate disability. By holding that employers can never be found to be in violation of the ADA under disparate treatment theory if they rely on a uniform, otherwise neutral rule (with no other evidence of discriminatory animus), the Court in effect relegates most ADA claims to the reasonable accommodation proof model.\textsuperscript{134} This would be fine if courts recognized problematic because she could in no sense have based her hiring decision “even in part” on his disability as required to prove disparate treatment. \textit{Id.} at 54 n.7 (alteration in original).\textsuperscript{130} \textit{Id.} at 51.

\textsuperscript{131} On remand, the Ninth Circuit found sufficient evidence for a jury to consider “whether Raytheon failed to re-hire Hernandez because of his ‘status as an alcoholic,’ rather than in reliance on a uniform no-hire policy.” \textit{See} Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 568 (9th Cir. 2004).

\textsuperscript{132} One commentator has suggested that disparate impact is the better theory for analyzing \textit{Raytheon}. \textit{See} Elaine W. Shoben, \textit{Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?} 42 BRANDEIS L.J. 597, 610-11 (2004) (describing \textit{Raytheon} as “a case litigated as a pretext case when the more fruitful avenue may well have been disparate impact”).

\textsuperscript{133} Hernandez was in essence attacking the application of the no-rehire rule, that had the effect of screening out individuals with disabilities, in particular those with a record of past substance abuse problems or those perceived to have a drug addiction. \textit{See id.} at 611. 42 U.S.C. § 12112(b)(6) prohibits using qualification standards that screen out or tend to screen out individuals with disabilities, and the Supreme Court in \textit{Raytheon} recognized this language allowed for disparate impact claims under the ADA. \textit{Raytheon}, 540 U.S. at 53; \textit{cf} Reichmann v. Cutler-Hammer, Inc., 183 F. Supp. 2d 1292, 1296 (D. Kan. 2002) (outlining what a disparate impact claim would require under the ADA); \textit{see also} Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

\textsuperscript{134} Whether a plaintiff finds success litigating a \textit{McDonnell Douglas} pretext claim in an ADA case will likely depend on the factual defense raised by the employer. For example, in one case, a plaintiff alleged he was fired because part of his arm and left hand were amputated, while his employer alleged he was fired for violating a company policy against working on personal projects during working hours. Ordahl v. Forward Tech. Indus., 301 F. Supp. 2d 1022, 1025 (D. Minn. 2004). Although the plaintiff also had an accommodation claim in regard to charges the employer refused to allow him to train to operate some new equipment, the case presents in many respects a classic pretext
that reasonable accommodation plays a distinct role in discrimination law, at least with regard to courts’ concerns about causation. Unfortunately, as the next section reveals, this is not what has happened, as some courts approach reasonable accommodation issues using inappropriate concepts of causation.

III.
WHAT IS DISCRIMINATION “BECAUSE OF” DISABILITY WHEN THE PLAINTIFF REQUESTS AN ACCOMMODATION?

Title I establishes that failure to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” is discrimination “because of” disability.135 Aside from the definition of disability itself, this provision poses some of the most difficult challenges to the interpretation of the ADA. As noted in the beginning of this Article, ADA scholarship currently reflects a debate over the proper conception of reasonable accommodation as part of civil rights law.136 The case law reveals a judiciary that finds it difficult to understand how failing to accommodate is discrimination when viewed through the lens of traditional formal equality principles.137 Courts in a number of cases have limited the reach of accommodation law by finding a lack of connection between the accommodation and the corresponding disability.

Lower courts’ use of causation to limit the reach of accommodation law occurs in several specific contexts. First, some courts have erected roadblocks by insisting that the requested accommodation be sufficiently connected to the plaintiff’s disability. These courts may mistakenly tie the accommodation to the major life activity that is limited rather than the

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135. 42 U.S.C. § 12112(b)(5)(A) (2000). Title I of the ADA also prohibits denying job opportunities to an applicant or employee if the denial is “based on the need of [the] covered entity to make reasonable accommodations to the physical or mental impairments of the employee or applicant.” Id. § 12112(b)(5)(B).

136. See supra notes 8-9 and accompanying text.

137. See, e.g., EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (describing as “affirmative action with a vengeance” requiring an employer to accommodate an otherwise qualified employee with a disability by reassigning him to an open position when there is another candidate the employer views as a superior choice); see also Anderson, supra note 5, at 7-11 (discussing Humiston-Keeling and other case law resisting reassignment as a reasonable accommodation under formal equality principles).
physical or mental impairment itself;\textsuperscript{138} take an unduly narrow view of what impairment is involved and thus find no causal connection between the disability and the requested accommodation;\textsuperscript{139} or divorce the person’s actions or conduct from the person’s disability, allowing the employer to refuse to accommodate the conduct.\textsuperscript{140}

Second, a number of courts have determined that individuals who are only “regarded as” disabled, as opposed to meeting the criteria for an actual disability, are not entitled to any accommodation. These courts conclude that no reasonable accommodation is required because the individuals seeking accommodation do not have an impairment that substantially limits a major life activity other than their employers’ perception of their limitations.\textsuperscript{141} To the contrary, many of these courts characterize granting accommodations to such individuals as “a windfall.”\textsuperscript{142}

Third, courts may be influenced by Justice Scalia’s dissenting opinion in \textit{US Airways, Inc. v. Barnett}.\textsuperscript{143} Justice Scalia would not permit any accommodation claim unless the individual proved the work-related obstacle would not be an obstacle but for the employee’s disability.\textsuperscript{144} This type of but-for causation requires that a workplace policy be uniquely burdensome on individuals with disabilities, substantially limiting the types of accommodations employers would be required to make.\textsuperscript{145} At least one circuit court has shown a willingness to be influenced, if not governed, by Scalia’s reasoning on this point.\textsuperscript{146}

Each of these topics is discussed in the sections that follow.

\textbf{A. Requiring a Particular Causal Link between the Accommodation and the Statutory Elements of Disability}

The ADA directs employers to make reasonable accommodation to “the known physical or mental limitations” of the employee with a disability.\textsuperscript{147} The language is similar to the first part of the statutory

\begin{itemize}
  \item \textsuperscript{138} See Wood v. Crown Redi-Mix, Inc., 339 F.3d 682 (8th Cir. 2003), discussed \textit{infra} Part III.A.1.
  \item \textsuperscript{139} See Felix v. New York City Transit Auth., 324 F.3d 102 (2d Cir. 2003), discussed \textit{infra} Part III.A.2.
  \item \textsuperscript{140} See \textit{infra} Part III.A.3.
  \item \textsuperscript{141} See, e.g., Newberry v. E. Tex. St. Univ., 161 F.3d 276, 280 (5th Cir. 1998) (concluding that an employer “need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment”); see also \textit{infra} Part III.B.
  \item \textsuperscript{142} See, e.g., Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003) (describing the granting of reasonable accommodations to “regarded as” employees as “improvidently provid[ing] those employees with a windfall”); see also \textit{infra} Part III.B.
  \item \textsuperscript{143} 535 U.S. 391, 411-18 (2002) (Scalia, J., dissenting).
  \item \textsuperscript{144} \textit{Id.} at 413.
  \item \textsuperscript{145} \textit{Id.}; see also \textit{infra} Part III.C.
  \item \textsuperscript{146} See Peebles v. Potter, 354 F.3d 761, 768-69 (8th Cir. 2004).
  \item \textsuperscript{147} 42 U.S.C. § 12112(b)(5)(A) (2000).
\end{itemize}
definition of disability, which requires the employee to establish "a physical or mental impairment that substantially limits" a major life activity. In the typical case (if there be such a thing under the ADA), this would seem straightforward. The employee, for example, informs the employer that she has asthma, a respiratory impairment. The employer would be required to accommodate the physical consequences of her limited ability to breathe. This might include giving her a parking space nearer to the building to shorten her walk or moving her office to a lower floor if the building has no elevator.

These types of accommodations are intuitively causally related to the disability. The employee has a breathing impairment that limits her ability to walk even normal distances, and the accommodations reduce the amount of walking she must do. Courts struggle less to recognize that denial of the requested accommodations was "because of" the disability if the causal connection fits within the courts' intuitive comfort zone. When the impairment in question is susceptible to a narrow interpretation, or the accommodation requested is not as intuitively connected to the impairment itself, however, employees are less likely to see their accommodation requests succeed.

This section identifies three ways courts have used the "because of" requirement to limit accommodations requests. First, they have required as part of the plaintiff's threshold proof of disability that the accommodation match the major life activity that the plaintiff alleged was substantially impaired by a physical or mental impairment. Second, they have narrowly defined the impairment involved, thereby reducing the scope of what must be accommodated. Finally, they have disaggregated the plaintiff's

148. Id. § 12102(2)(A).
149. The definition of "physical or mental impairment" in the EEOC's regulations lists the respiratory system as one of the bodily systems that may be affected by a disorder or condition. 29 C.F.R. § 1630.2(h)(1) (2004).
150. The employee in a case like this could also allege her ability to work is limited. Because the accommodations discussed in the hypothetical relate to her workplace, it is unlikely a court would have the same analytical problem as the hypothetical describes. A person in the shoes of this hypothetical employee should not have to resort to using ability to work as the alleged major life activity substantially impaired by her asthma, however, especially in light of the EEOC's interpretive guidance that makes ability to work the major life activity to be evaluated only if no other major life activity is substantially limited. See TECHNICAL ASSISTANCE MANUAL, supra note 10, at I-2.2(a)(iii).
151. In most cases, the issues center on whether the plaintiff has a disability and whether the requested accommodation is itself reasonable, not whether there is a causal link between the disability and the accommodation. As an example, the Tenth Circuit in Albert v. Smith's Food & Drug Center, 356 F.3d 1242 (10th Cir. 2004), considered an asthma case in which a woman working as a cashier requested reassignment to another position due to her difficulties breathing when exposed to things like cigarette smoke and perfume on customers. Id. at 1245. The court first determined that she raised a sufficient claim that her asthma was a disability. Id. at 1251. The court then considered whether reassignment to a vacant position was reasonable, focusing on whether a sufficient interactive process had taken place, not on whether there was a sufficient connection between her breathing abilities and her alleged difficulties with the job. See id. at 1252-53.
disability-related conduct from the disability itself, thereby allowing the employer to refuse to accommodate the conduct and discharge the employee.

1. Requiring a Causal Link between the Accommodation and the Major Life Activity Alleged to Be Substantially Limited

One way courts have limited the scope of the accommodation mandate is by requiring some causal connection between the requested accommodation and the major life activity that the employee alleges was substantially limited.\(^5\) In other words, discrimination because of disability means refusing to accommodate the major life activity at issue. This requirement reflects a fundamental misreading of the statute.

The Eighth Circuit’s decision in *Wood v. Crown Redi-Mix* illustrates this misunderstanding.\(^5\) In that case, the plaintiff, Mr. Wood, suffered a back injury. In his attempt to establish a disability under the ADA, he argued that his ability to procreate was limited because of his injuries.\(^5\) Mr. Wood requested reassignment to another position that would not require him to drive a ready-mix truck, lift more than 50 pounds, or perform extensive bending, twisting, and lifting.\(^5\) The court denied Wood’s claim because the accommodation had nothing to do with his inability to procreate:

The ADA forbids discrimination against an employee “because of the disability of such individual.” To avoid a charge of discrimination, covered entities must provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” This language means that “the ADA requires employers to reasonably accommodate limitations, not disabilities.” Where the reasonable accommodation is unrelated to the limitation, we do not believe an ADA action may lie. Put another way, there must be a causal connection between the major life activity that is limited and the accommodation sought.\(^5\)

The “limitations, not disabilities” language the court relies upon is correct, but inapposite. This language comes from a case emphasizing the individualized inquiry required by the ADA.\(^5\) The court in that case was reiterating the fact that simply having a condition, such as diabetes, does not automatically render that person covered under the statute; rather, the statute compels an individualized inquiry as to whether that condition


\[^{153}\] Id.

\[^{154}\] Id. at 684, 686. The plaintiff in *Wood* also argued that his injuries limited his ability to walk, stand, bend, lift and twist. *Id.* at 684.

\[^{155}\] Id.

\[^{156}\] Id. at 686-87 (citations omitted).

substantially limits one or more major life activities. The individual is entitled to reasonable accommodations of his or her disability only if such limitation is found.

The Wood court erred by mixing the concept of limitation with that of major life activities to create an erroneous causation requirement. The reasonable accommodation mandate directs employers to make accommodations to “the known physical or mental limitations” of the individual with a disability. It does not say the employer must only accommodate the major life activities that a physical or mental impairment limits. While there is no discussion of the basis for the terminology in the legislative history of the ADA, the use of “physical or mental limitations” rather than “major life activities” indicates Congress intended to focus on the impairment at issue, and not any technical part of the definition of disability, when the question of accommodations is reached.

The statutory definition of disability simply describes a requirement the impairment must meet to qualify for protection under the statute as a threshold matter. After that threshold is satisfied, the statute turns the focus to the individual’s limitations. This is not to suggest that persons with disabilities are entitled to accommodation for whatever limitations they might allege, which is most likely what the court in Wood feared would result if it adopted a contrary rule. The accommodation must still address the limitations associated with the individual’s physical or mental

158. Id. at 164 (“The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.”) (quoting 29 C.F.R. § 1630.2(j) App. (1995)).
160. The House Report simply repeats the statutory language and then turns to a discussion of the scope of what is a reasonable accommodation. See H.R. REP. No. 101-485, pt. 2, at 61 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 349. Other parts of the report emphasize that Congress had in mind a broad concept of accommodation, not one to be carefully controlled through restrictive interpretation of causation. See id. at 65, 1990 U.S.C.C.A.N. at 347-48 (describing reasonable accommodation as “best understood as a process in which barriers to a particular individual’s equal employment opportunity are removed” and emphasizing a “problem-solving approach” to determining accommodations).
161. Although the case is not about accommodations per se, the Supreme Court’s decision in Bragdon v. Abbott, 524 U.S. 624 (1988), is instructive here. In that case, the plaintiff was refused treatment in a dentist’s office because she was HIV positive. Id. at 628-29. The dentist would treat her only in a hospital setting, where she would have to pay for use of the hospital facilities. Id. at 629. She sued under Title III of the ADA, which prohibits places of public accommodation from denying full and equal enjoyment of the goods and services they offer. See 42 U.S.C. § 12182 (b)(2)(A)(i) (2000). To establish her disability claim, she argued that her major life activity of procreation had been limited by her HIV infection. Bragdon, 524 U.S. at 637. The Court agreed. Id. at 638-39. The case was remanded for consideration on the merits of her denial claim. Id. at 655. The outcome is interesting for the fact that her procreative status had nothing to do with the purpose for which she sought services, but it was the basis for finding ADA coverage. See Issacharoff & Nelson, supra note 8, at 332 (suggesting “the Court bizarrely construed the ADA to ensure that a person with HIV is classified as disabled for purposes of a visit to the dentist—something that could not possibly be affected by whether a person is able to procreate”).
impairment because otherwise it would not be a reasonable accommodation of that individual's disability.

As an illustration, consider an employee who has multiple sclerosis that causes a substantial limitation of her hearing. In addition to the hearing problem, the employee experiences some dizziness and vertigo. The dizziness and vertigo alone do not limit a major life activity, but they are caused by her multiple sclerosis. The employee asks her employer to move her office to the first floor because there is no elevator and she is concerned about experiencing dizziness when she is climbing the stairs. The employer refuses the request. Under the ADA, the employer should be required to move the office, unless it can prove the move would cause undue hardship, because the move accommodates the known physical or mental limitations of the employee, a qualified individual with a disability. No further causal connection should be required.

Some courts view the attendant consequences of the disability too narrowly, perhaps as part of their narrow approach to the definition of disability. In the case of the employee with multiple sclerosis, she has established that she is an individual with a physical impairment entitled to the protection of the antidiscrimination statute. The statute now requires consideration of limitations generally posed by the disability and directs the employer to accommodate those limitations.

The Seventh Circuit recognized this in Vande Zande v. Wisconsin Department of Administration, in which it held an employer was required to accommodate a paraplegic employee's bout with pressure ulcers. Although the pressure ulcers were episodic, and not the basis for finding her to have a disability, the court reasoned that "[o]ften the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment." The Wood court should have applied this analysis. That court assumes, for sake of argument, that Wood's back injury substantially limited his ability to procreate, thereby bringing him within the protection of the statute. Under the proper analysis, the employer must now accommodate the physical limitations of that back injury to the extent that the request

163. See 42 U.S.C. § 12112(b)(5)(A) (2000) (requiring employer to demonstrate that an otherwise reasonable accommodation would "impose an undue hardship on the operation of the business").
164. 44 F.3d 538, 544 (7th Cir. 1995).
165. Id. The Seventh Circuit analogized Vande Zande's condition to that of a person with AIDS, in that the disabling aspect of AIDS is not the presence of the HIV antibodies in the bloodstream, but rather the "series of opportunistic diseases" that result from the individual's immune system having been destroyed. Id. It is those diseases, not the HIV infection, "which (so far as relevant to the disabilities law, often prevent the individual from working." Id.
meets the general standards for a reasonable accommodation. It is irrelevant that his request for reassignment to a position requiring less bending, twisting, and heavy lifting was not directly connected to Wood's inability to procreate. The limitations were related to his impairment, namely his back injury. They were, in the plain terms of the statute, "known physical . . . limitations of an otherwise qualified individual with a disability." Denying this accommodation was discrimination "because of" Mr. Wood's disability.

2. Requiring a Causal Link between the Accommodation and the Individual's Impairment, With "Impairment" Narrowly Construed

Even if the court recognizes that the physical or mental impairment requires accommodation, not the major life activity, it may nonetheless employ causation-based reasoning to determine just what "impairment" means. A recent Second Circuit case illustrates how a court can use "because of" concepts to narrow the impairment for which the employee can receive an accommodation. The plaintiff in Felix v. New York City Transit Authority, a subway worker, suffered from Post-Traumatic Stress Disorder (PTSD) as the result of the trauma of being stuck inside a subway train near a station that was firebombed. Her symptoms included "feelings of apprehension and anxiety, recurrent problems with insomnia, and an inability to work in the subways." She requested as an accommodation that she be reassigned to clerical work, rather than having to work in the subway itself. The Transit Authority argued, and the Second Circuit agreed, that it was not required to provide the accommodation because "there was no nexus between the major life activity impaired and the accommodation requested."
The Second Circuit's theory was that the disability in question was Felix's insomnia, not her PTSD.\textsuperscript{174} In the course of its reasoning, the court uses the terms "disability" and "impairment" as if they are interchangeable and at no point acknowledges that the language of the statute requires accommodation of limitations, not disabilities.

The court begins by asserting the well-worn requirement that discrimination be "because of the disability":

Reading the requirement of reasonable accommodation in this light, an employer discriminates against an employee with a disability only by failing to provide a reasonable accommodation for the "disability" which is the impairment of the major life activity. Other impairments that do not amount to a "disability" as defined by 42 U.S.C. § 12102(2)(a) does not require accommodation under the ADA.\textsuperscript{175}

Confusingly, the Second Circuit then reasoned that "[t]he principle is not altered by the fact that the disability (which must be accommodated) is caused by another impairment (which need not be accommodated)."\textsuperscript{176}

According to the court, while the plaintiff's inability to work in the subway and her insomnia stemmed from the same traumatic incident and the same psychological disorder, PTSD, it was nonetheless only her insomnia that was relevant and which required accommodation.\textsuperscript{177}

The court's reasoning reflects a particularly limited view of what "because of the disability" signifies. The court reads "because of" to require a causal connection that the statute does not. The Second Circuit acknowledged that Felix's insomnia stemmed from her PTSD,\textsuperscript{178} yet refused to consider the PTSD as the impairment at issue:

[W]e do not view [Felix's] insomnia and fear of the subway as a singular mental condition: They are two mental conditions that derive from the same traumatic incident. In cases involving conditions like AIDS that are discrete diseases with pervasive effects, it will frequently be obvious that the lesser impairment is caused by the disability. However, in situations like plaintiff's where it is not clear that a single, particular medical condition is responsible for both the disability and the lesser impairment, the plaintiff must show a causal connection between the specific condition which impairs a major life activity and the accommodation.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{174} \textit{Id.} at 105.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} Felix's employer conceded that she had a disability because of the insomnia she suffered. \textit{Id.} at 104. This presumably aided the Second Circuit in its parsing of her condition into two parts—the inability to sleep and the inability to work in the subway—rather than focusing on the actual disorder she alleged, PTSD.
\item \textsuperscript{178} \textit{Id.} at 105 (noting that the insomnia and inability to work in the subway both stemmed from the same "resultant psychological disorder").
\item \textsuperscript{179} \textit{Id.} at 107.
\end{itemize}
The Second Circuit distinguished the Seventh Circuit's decision in *Vande Zande*, insisting that the pressure ulcers in that case were ""a characteristic manifestation of [the] disability" and thus were 'a part of the underlying disability," unlike the insomnia at issue in *Felix*.181

The hypothetical the Second Circuit used to illustrate why Felix was not entitled to accommodation reflects the court's error in logic. The court asserts that a person injured in an auto accident who loses the ability to walk, which qualifies as a disability, is not entitled to accommodation of another injury received in the same accident, such as injury to his arms, that does not itself substantially limit a major life activity.182 If, however, the person suffers a spinal cord injury that limits both walking and use of the person's arms, he would be entitled to accommodation of the full known consequences of his impairment. If the limitations were caused by separate injuries, and were accordingly separate impairments, the person would be entitled only to accommodation of the impairment at issue, the one that limits his ability to walk.

PTSD is analogous to the spinal cord injury scenario because it is a disorder with a cluster of symptoms, including insomnia.183 Upon finding that the plaintiff's PTSD substantially limits a major life activity, the question should have become what accommodations were necessary for the limitations associated with that disorder.184

The Second Circuit's reasoning confuses the symptom (insomnia) with the impairment (PTSD).185 Felix sought an accommodation (being reassigned outside of the subway) for her impairment (the psychological disorder PTSD). The PTSD substantially impaired her ability to sleep thus qualifying the condition as a disability for ADA purposes. When the Transit Authority denied her reassignment request, it certainly may have discriminated against her "because of the disability."186 Again, the ADA requires no more causal connection than that.187

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180. *Id.* at 106 (citing *Vande Zande* v. Wis. Dep't of Admin., 44 F.3d at 544 (alteration in original)); see also *supra* notes 164-165 and accompanying text discussing *Vande Zande*.

181. *Felix*, 324 F.3d at 106 (quoting *Vande Zande*, 44 F.3d at 544).

182. *Id.* at 105.


184. See *Arnold* v. County of Cook, 220 F. Supp. 2d 893, 896 (N.D. Ill. 2002) (suggesting that a better analogy would be a person with allergies who has a minor reaction to rubber, but who is entitled to accommodation of that allergy even if "using rubber bands" is not itself a major life activity).

185. The DSM-IV recognizes primary insomnia, a stand-alone disorder, but cautions that it "must be distinguished from [insomnia that occurs in conjunction with other] mental disorders that include insomnia as an essential or associated feature." DSM-IV, *supra* note 170, at 599.

186. Even if the accommodation Felix requested was for a known physical or mental impairment, the accommodation might not have been reasonable if working in the subway was an essential function of the Railroad Clerk position. See 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination against qualified individuals with disabilities); *id.* § 12111(8) (defining "qualified individual with a disability" to include individuals who can perform the essential functions of a job with or without a reasonable
Another look at the hypothetical of the employee with multiple sclerosis is useful. Following the logic of the Second Circuit, rather than considering her multiple sclerosis as the physical or mental impairment, the court would consider her individual physical manifestations and she would receive accommodation only for those manifestations that were substantially limiting. Her hearing limitation would be treated as a separate impairment from her dizziness. Her hearing limitation is substantial, so she is entitled to reasonable accommodation to address the effect of her hearing loss affects her job performance. Her dizziness is not, so she would not be entitled to accommodation for that.

The basic definition of "physical or mental impairment" reflects why this approach is incorrect. The definition has two parts: the disorder or condition part and the affected bodily systems part. Multiple sclerosis is the condition and its effect is on the neurological and special sense organ systems related to hearing and balance. The Second Circuit's approach effectively cuts out the disorder itself, focusing solely on the effect. In essence, this leads back to the same place as Wood, with an emphasis on connecting the accommodation to the major life activity at issue. While it appeared to follow the strictures of the ADA more closely than the Wood court because it purported to focus on the impairment, in the end, the Felix court constructed another inappropriately narrow interpretation of "because of the disability."
Conceivably, the Second Circuit’s limited view of Felix’s claims could stem from a simple misunderstanding of PTSD as a stand-alone psychological disorder.\footnote{193} As likely, however, it stems from the common belief that accommodations represent preferential treatment. The court argues that to adopt the plaintiff and EEOC’s position in the case, namely that Felix was entitled to accommodation of any of the conditions that flowed from her PTSD, would “transform the ADA from an act that prohibits discrimination into an act that requires treating people with disabilities better than others who are not disabled but have the same impairment for which accommodation is sought.”\footnote{194} Consequently, the court uses “because of the disability” as a device to limit the scope of the employer’s accommodation obligation.

3. *Disability-related Conduct must not be Distinguishable from the Disability Itself*

Professor Kelly Cahill Timmons has identified a third area where courts interpret the causal nature of “because of the disability” to restrict the scope of the ADA’s antidiscrimination mandate, in cases where the employee has engaged in some form of misconduct related to that employee’s disability.\footnote{195} These cases predominately involve mental disabilities such as depression, bipolar disorder, or PTSD, but also physical conditions such as diabetes.\footnote{196} In a representative case involving mental disability, for example, the employee has some sort of outburst, or violates a company rule, and is discharged.\footnote{197} The employee generally did not ask for an accommodation before the event that caused her discharge.\footnote{198}

The courts in these cases find the causal connection between the disability and the employee’s conduct lacking. For example, in *Hamilton v. Southwestern Bell Telephone Co.*,\footnote{199} the employee, Hamilton, was discharged after an angry encounter in which he struck a co-worker.\footnote{200} Four months before the incident, Hamilton was diagnosed with PTSD after he

\footnote{193. The plaintiff in *Felix* argued that her insomnia and fear of the subway stemmed from a singular mental disorder but the Second Circuit explicitly rejected that, stating that “[t]hey are two mental conditions that derive from the same traumatic incident.” *Felix*, 324 F.3d at 107.}

\footnote{194. *Id.* The comparison theme in the Second Circuit’s reasoning is reflected again in Part III.B of this Article, in regard to how courts treat accommodation claims by individuals only regarded as having a disability.}

\footnote{195. See Cahill Timmons, *supra* note 100.}

\footnote{196. *Id.* at 189, 206-10 (noting how mental disabilities and some physical impairments can manifest themselves in conduct that might be undesired by employers).}

\footnote{197. See *id.* at 211-12 (describing outburst cases involving Tourette’s syndrome, frontal lobe dysfunction, and bipolar disorder, among others).}

\footnote{198. *Id.* at 215.}

\footnote{199. 136 F.3d 1047 (5th Cir. 1998).}

\footnote{200. *Id.* at 1049, 1052.
rescued a drowning woman.\(^{201}\) About a month before the co-worker incident, Hamilton mentioned his PTSD to his supervisor.\(^{202}\) The court upheld Hamilton's discharge, reasoning that "the cause of [his] discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment."\(^{203}\)

There was at least a hint that the encounter may have been triggered by Hamilton's difficulties handling stress after developing PTSD. The Fifth Circuit described the encounter as follows:

Several weeks after the rescue, Hamilton, slamming an office door, angrily confronted a physically smaller female manager in front of witnesses after she returned to work from a shopping trip. In response to her appeal not to speak to him in such a tone, he slapped her hand down, yelling that she "get that f_bbox ing finger out of my face." Additional profanity followed. He stormed from the office but returned to continue his abusive harangue, yelling "You f_bbox ing bitch!" [The employer] found this behavior to be an egregious violation of its policies, suspended . . . and discharged [Hamilton] at the end of the month.\(^{204}\)

It would not be out of character for a person with PTSD to overreact to a minor matter.\(^{205}\) The court nonetheless rejected per se any claim the incident was caused by Hamilton's alleged disability: "Although Hamilton argues that the incident was caused by his PTSD, we are persuaded that the ADA does not insulate emotional or violent outbursts blamed on an impairment."\(^{206}\)

It is not clear that the court in Hamilton was squarely presented with an accommodation issue for two reasons. First, the court found that the plaintiff had failed to prove that his mental condition substantially limited any major life activities, and second, the court found that no adverse action had been taken against him because of his alleged disability.\(^{207}\) The Fifth Circuit's reasoning suggests, however, that the outcome would not have been different had it been squarely presented with a reasonable accommodation claim. The Hamilton court simply considered an employer's discharge of an employee for "egregious and violent behavior"

\(^{201}\) Id. at 1049.
\(^{202}\) Id.
\(^{203}\) Id. at 1052.
\(^{204}\) Id.
\(^{205}\) DSM-IV, supra note 170, at 464 (noting individuals with PTSD report "irritability or outbursts of anger").
\(^{206}\) Hamilton, 136 F.3d at 1052.
\(^{207}\) There is some indication in the case that Hamilton suggested he needed some restructuring of his position so that he could better handle stresses associated with it, which he was less able to handle due to the PTSD. Id. at 1049 (noting employee "sought to reduce the stress he experienced in his position"). The Fifth Circuit in its analysis referenced pretext, and analogized the case to "a protected activity-retaliatory discharge claim." Id. at 1052.
to be beyond the ADA's reach. While indeed that might be a reasonable conclusion after consideration of whether the employee was a qualified individual, or whether he posed a direct threat to the health and safety of others, the court instead rests its decision on the causal language of the ADA. The employer's actions were not "because of" the disability.

The courts in the misconduct cases therefore appear to be doing the same thing the courts in Wood and Felix did: disaggregating the disability into constituent parts and then dismissing the claims because the part they choose to concentrate on, the employee's conduct, is not itself "the disability." The Seventh Circuit apparently believes that conduct can be separated from disability if the court concludes the individual has some kind of control over his behavior. For example, the Seventh Circuit characterized a police officer as trying to "bootstrap his disease into the line of causation" when he argued that he drove his squad car recklessly because he experienced a diabetic reaction causing disorientation and memory loss. According to that court, the cause of the officer's discharge was the officer's failure to keep his blood sugar under control, which it viewed as

208. See id. The Fifth Circuit also looked to the retaliatory discharge context for the proposition that "the rights afforded to the employee [under the ADA] are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors." Id. (citation omitted). Interestingly, in an earlier case, the Fifth Circuit seemed to recognize that an employer's reason might be pretextual. See Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998) (reasoning that if the employee's "excessive absences were linked to his disability, and [the employer] knew that when they fired him, we might say that excessive absence is a pretext or even a proxy for [the plaintiff's] disability").

209. The ADA defines a qualified individual with a disability as someone who can perform the essential functions of a job with or without a reasonable accommodation. 42 U.S.C. § 12111(8) (2000). Arguably, the employee in Hamilton would not have been qualified to supervise office workers if he had uncontrollable violent outbursts. See Calef v. Gillette Co., 322 F.3d 75, 87 (1st Cir. 2003) (holding that an employee whose uncontrollable behavior threatens the life of others is not qualified for employment, even if the behavior stems from a disability); cf Hypes v. First Commerce Corp., 134 F. 3d at 726-27 (finding that even if employee's absences were related to his disability, he was not otherwise qualified for a position as a loan analyst because that position required a full-time in-office schedule).

210. Under the ADA, the employer can set as a qualification standard that the applicant or employee not pose a direct threat to the health and safety of other individuals in the workplace. 42 U.S.C. § 12113(b) (2000). "Direct threat" is defined in the EEOC regulations as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (2004).


212. Disaggregation of a disability into its parts and focusing on only one part is not new in disability law. A dissenting group of justices in School Board of Nassau County v. Arline, argued that the proper interpretation of the Rehabilitation Act required isolating contagiousness from the other effects of tuberculosis, and that Congress did not intend to extend coverage to contagiousness. 480 U.S. 273, 291-93 (1987) (Rehnquist, C.J., dissenting). The majority disagreed, finding that tuberculosis was the disability at issue and the contagious effects of the disease could not "be meaningfully distinguished from the disease's physical effects" on the plaintiff. Id. at 282.

213. See Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) (reasoning that a maintenance worker who drove while intoxicated and lost his license was not compelled to drive drunk, thus his alcoholism was not the cause of his demotion for lack of a driver's license).

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separate from his diabetes. Similarly, a federal district court upheld the dismissal of grocery store bagger with Tourette’s Syndrome on the ground that his outbursts of vulgar speech were misconduct, although related to his disability. That court based its ruling on a Fourth Circuit case that reasoned “misconduct related to a disability is not itself a disability; an employer is free to fire an employee based on misconduct related to a disability.”

Professor Cahill Timmons notes courts’ tendency to evaluate these cases as disparate treatment claims. Since the employees generally have not requested accommodations prior to their misconduct, the only accommodation available to them is “a second chance,” which Professor Cahill Timmons asserts “the ADA does not require.” If there is no accommodation available, employees may have no choice but to allege a traditional violation of antidiscrimination principles using disparate treatment theory. Unfortunately, doing so places them squarely under the umbrella of the Supreme Court’s reasoning in Raytheon.

Although they can show a but-for connection between their disabilities and their discharges, they cannot show that the employers’ discharging them was pretext for animus toward them as individuals with a disability.

215. See id.
217. Id. The Fourth Circuit case was taken out of context. In that case, the court actually held that an employee who was discharged because he experienced epileptic seizures on the sales floor of a shoe store did state a prima facie case of discrimination because of his disability. Martinson v. Kinney Shoe Corp., 104 F.3d 683, 686 (4th Cir. 1997). The language the Ray court relied on is found in a footnote, which follows a footnote in which the court reasons that “[b]oth a disease and its physical manifestations can constitute disabilities.” Id. at 686 n.2. The Fourth Circuit followed that by stating “[b]y contrast, misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.” Id. at 686 n.3.
218. Cahill Timmons, supra note 100, at 214.
219. Id. at 215. Whether a request for reinstatement, when the employee’s dismissal was for conduct related to the employee’s disability, is a reasonable accommodation is an interesting question that is beyond the scope of this Article. At least one district court has indicated a willingness to distinguish cases in which the employee requested an accommodation prior to the incident of misconduct. See United States v. Miss. Dep’t of Pub. Safety, 309 F. Supp. 2d 837, 841-42 (S.D. Miss. 2004) (denying employer’s motion for summary judgment because as a matter of law, plaintiff police cadet was not solely responsible for his misconduct; rather it was caused by cadet officer’s refusal to accommodate his diabetes-related need to eat to maintain his blood sugar).
220. Cahill Timmons apparently would resolve misconduct cases by evaluating workplace conduct rules under disparate impact theory. Cahill Timmons, supra note 100, at 245. Following this approach, if a workplace rule is found to have a disparate impact, and is not job-related or there is a less discriminatory alternative, the employer would not be entitled to enforce the rule and the employee would presumably be entitled to reinstatement. Cahill Timmons acknowledges a number of hurdles plaintiffs would have to overcome in order to effectively utilize this theory in workplace rule violation cases. See id. at 245-59, 273-82.
Misconduct will generally always be a legitimate, non-discriminatory reason for adverse action, in and of itself.\textsuperscript{222}

It is disingenuous to say these discharges are not "because of" the individual's disability. They certainly meet but-for causation. But for his PTSD, the employee in Hamilton would not have engaged in the angry outburst. Similarly, the police officer would not have lost control of his car and the grocery store bagger would not direct vulgar comments toward customers. At this point, courts explain that "mere" but-for causation has never been sufficient for ADA purposes.\textsuperscript{223}

What seems to be at work here is courts' antipathy for preferences. The Fifth Circuit in Hamilton in strong terms stated it would not construe the ADA to let the plaintiff "avoid accountability for his actions."\textsuperscript{224} Similarly, in a Seventh Circuit case involving an alcoholic who lost his driver's license and was demoted from a job that required occasional driving, the court reasoned that allowing the employee to avoid the demotion would "give alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity."\textsuperscript{225} The prospect of allowing employees to avoid the consequences of their work behavior, even if that behavior is causally related to their disability, is unacceptable preferential treatment in the eyes of many courts.\textsuperscript{226}

\textsuperscript{222} Cahill Timmons notes a problem with courts failing to define adequately "misconduct." Cahill Timmons, supra note 100, at 223. She points to the Seventh Circuit, which has apparently suggested it be defined based on whether the plaintiffs can be expected to control their behavior. See id. at 226 (citing Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995), wherein the court found a maintenance worker who drove while intoxicated and lost his license was not compelled to drive drunk, thus his alcoholism was not the cause of his demotion for lack of a driver's license). The Seventh Circuit's approach is problematic for a number of reasons, not the least of which is that it feeds directly into stereotypes about mentally ill people. See id. (noting the control standard "may ultimately be more harmful than helpful to plaintiffs with mental disabilities" because of the view that people with mental disabilities have no control over their behavior).

\textsuperscript{223} See Siebenken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) (citing Despears, 63 F.3d 636, and Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 933-34 (7th Cir. 1995)).

\textsuperscript{224} Hamilton v. Sw. Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (noting that employer held Hamilton "accountable" for his actions and that court would not allow him to "hide behind the ADA and avoid accountability for his actions").

\textsuperscript{225} Despears, 63 F.3d at 637.

\textsuperscript{226} The Sixth Circuit recently suggested that it sees a distinction between conduct that is work-related and that which is not, with only the former being a legitimate basis for discharging an employee with a disability. See Chandler v. Specialty Tires of Am., 134 Fed. Appx. 921, 929 (6th Cir. 2005). In Chandler, the plaintiff suffered from depression and attempted suicide, but there was no direct indication that her illness caused her to violate any company policies. Id. at 923. She was discharged solely because her employer thought she could not be trusted to handle here job duties. Id. The Sixth Circuit overturned summary judgment for the employer, noting the plaintiff had been a model employee before the suicide attempt. Id. at 929. While its prior case law supported the conduct versus disability distinction, the court found nothing in the case law that permitted the employer to discharge an employee when the conduct had no workplace impact. Id. (reasoning that while its prior holdings were "premised upon the reasonable conclusion that a disabled employee should not be allowed to violate workplace or societal rules any more than a non-disabled employee," where no such rules are violated,
B. Denying Perceived Disability Claimants Reasonable Accommodation by Finding no Discrimination "Because Of" a Disability

Another troubling causation issue involves individuals who do not have an actual disability, but are perceived as having one by their employers. These individuals are entitled to the protection of the ADA, but whether they are entitled to have their perceived disabilities accommodated is an open question.

The Findings and Purposes section of the ADA reflects Congress’s concern with discrimination arising from “stereotypic assumptions not truly indicative of the individual ability of . . . individuals [with disabilities] to participate in, and contribute to, society.” The statutory definition of disability accordingly includes not only individuals who actually have a physical or mental impairment that limits a major life activity, but also individuals “regarded as having such an impairment.”

In its interpretive guidance, the EEOC suggests there are three ways an individual may qualify for coverage under the “regarded as” prong of the statutory definition:

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

The Interpretive Guidance gives as an example of the first category an individual with high blood pressure controlled by medication but reassigned by the employer to less strenuous work anyway because of unsubstantiated fears he will suffer a heart attack. The second category example is a person with a prominent facial scar discriminated against by an employer because of the negative reactions of customers. The third category example is an individual rumored to be HIV positive, who is not, but is discharged because the employer believes the rumor.
As with the actual disability prong, courts have taken a narrow approach to interpreting the "regarded as" prong, generally finding that even if the employer perceived the employee to have an impairment, the employer did not perceive that impairment to be substantially limiting. If an individual manages to pass through that gate, she is entitled to the general protection of the ADA not to be discriminated against because of her disability. Things become murky, however, when the accommodation mandate is factored into the picture.

For example, an employee with diabetes who can control it with medication, and who therefore does not have an actual disability under the first prong of the statutory definition, might nonetheless be regarded by his employer as having a disability that substantially limits the performance of his job. Say this employee requests more flexibility in when he takes his breaks so that he can take his medication. If the employer refuses the request, and it is otherwise reasonable, has the employer discriminated against the employee because of the employee's disability?

The eight circuits that have considered the question so far are split. Of those refusing accommodations, two circuits have simply stated without further explanation that no right to reasonable accommodation exists if the employee is only regarded as having a disability. Two others reached the same conclusion by suggesting that any such accommodation would be an unfair "windfall" to the employee and a "pervasive and troubling result."
This perspective comes largely from a comparison of "regarded as" employees to other employees with similar limitations who cannot establish coverage under the statute. These courts do not find the denial of accommodations to be discrimination "because of the disability" of the employee, because they in effect recognize only one prong (the actual disability prong) of the definition of disability to be relevant to the accommodation mandate. They do not see a causal connection between the perceived disability and the accommodation the employee requests, because the perceived disability is not an actual disability as defined by that prong.

These courts' comparison of "regarded as" individuals to individuals who do not meet any prong of the definition of disability is misplaced. The statute does not distinguish among categories of disability; it requires accommodations for the known physical and mental limitations of the employee with a disability. Employees regarded as having a disability are individuals with a disability and they are entitled under the plain language of the statute to reasonable accommodations of their known physical and mental limitations. Courts taking the anti-preference windfall approach rely on an erroneous concept of causation and either ignore or misapprehend the role of the interactive process in reasonable accommodations law.

1. The Plain Language of the ADA, Categories of Disability, and Known Physical or Mental Limitations at Issue

The ADA makes it unlawful to "discriminate against a qualified individual with a disability because of the disability of such individual." "Discriminate" is further defined to include "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." As discussed above, once the threshold question of disability is resolved, the focus of the accommodation mandate is on the limitations of the individual. By its plain language, there is no requirement in the statutory accommodation mandate that those limitations themselves be substantial.
In the hypothetical example of the employee whose diabetes is only perceived by his employer to be substantially limiting, the employee nonetheless has a disability under the ADA, requiring the employer to accommodate the known physical or mental limitations of that disability. The need to take medication at certain times to maintain appropriate blood sugar levels would be a physical limitation related to the disability (the perceived disability of diabetes). By contrast, the EEOC example of the employee only rumored to have HIV would not have a known physical or mental limitation related to the perceived disability; thus this employee would be unlikely to be able to prove a need for accommodation.

At least some of the courts that reject the right to accommodation for “regarded as” claimants recognize that the language of the statute does not support their interpretation. The Ninth Circuit, for instance, acknowledged that on its face, the ADA does not differentiate among the three prongs. The court then asserted that

[[the absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that “regarded as” individuals are entitled to reasonable accommodations. Moreover, because a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results, we must look beyond the literal language of the ADA.]

The “bizarre results” to which the Ninth Circuit refers occur because the courts view the accommodation of perceived disabilities as a “windfall” to the employee. This windfall is revealed when they compare an individual who qualifies for protection under the “regarded as” prong to an individual who has the same level of physical or mental impairment, but who cannot prove she was perceived as substantially limited. For example, the Eighth Circuit posed the hypothetical of an employee with a heart condition that was not substantially limiting but which nonetheless prevented the employee from relocating to another city. Ordinarily, the employer would be able to discharge that employee but if the employee’s heart condition were perceived to be substantially limiting, the employer would not be able to do so. The court suggested making the employer accommodate the employee with the perceived disability would be

244. In the case of the employee with a facial scar only perceived to be a disability, whether the employee needs accommodation would probably depend on the nature of the scar and whether there are physical or mental limitations associated with it.
245. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).
246. Id. at 1232 (citations omitted).
247. See id. (finding that accommodating employees regarded as disabled would “improvidently provide those employees a windfall”).
248. See id. at 1232; Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999).
249. Weber, 186 F.3d at 916.
250. Id.
“bizarre” because his impairment is no more severe than another employee with the same condition who was not regarded as disabled.\textsuperscript{251}

Similarly, the Third Circuit has expressed concern that accommodating individuals with perceived disabilities would allow “healthy individuals to, through litigation (or threat of litigation) demand changes in their work environments under the guise of ‘reasonable accommodations,’” and “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.”\textsuperscript{252} While that circuit subsequently held that “regarded as” plaintiffs were not per se disqualified from receiving reasonable accommodations,\textsuperscript{253} it did not completely disavow its earlier concerns. In fact, the court left the door open to rejecting accommodation claims by “regarded as” plaintiffs if the claim would produce “bizarre results.”\textsuperscript{254}

The rhetoric these courts employ reveals the real issue. The Third Circuit expressed concern about “healthy” people in effect extorting privileges from their employers.\textsuperscript{255} Courts also express concern that individuals covered by the ADA receive preferential treatment over their similarly situated co-workers who are not.\textsuperscript{256} These courts erroneously, however, identify the two groups for ADA comparison. One category includes people who are being limited in their employment for a reason prohibited by the statute; the other does not. Thus, the two groups are not similarly situated under the statute. The more appropriate comparison is between those who meet the actual disability prong of the definition of disability, and who therefore are unquestionably entitled to an accommodation, and those who meet the “regarded as” prong of the definition.\textsuperscript{257} Those are the two similarly situated groups because Congress brought both those groups within the scope of the statute’s protections

\textsuperscript{251} Id.


\textsuperscript{254} Id. at 774. Similarly, while the Eleventh Circuit has also held that the “regarded as” plaintiff is entitled to reasonable accommodation under the plain language of the statute, it explicitly agreed with the Third Circuit’s reservations about the potential case with “bizarre results.” D’Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005) (quoting Williams, 380 F.3d at 774).

\textsuperscript{255} Id., 142 F.3d at 148 n.12.

\textsuperscript{256} E.g., Weber, 186 F.3d at 917 (expressing concern about “disparity” between workers granted and not granted accommodations).

\textsuperscript{257} The Tenth Circuit recently pointed out that courts like the Ninth Circuit in Kaplan are missing the point in their comparison of the “regarded as” plaintiff to someone with no disability claim. Kelly v. Metallics W., Inc., 410 F.3d 670, 675-76 (10th Cir. 2005) (commenting that the court “fail[ed] to understand the point [of the comparison], for it is in the nature of any ‘regarded as disabled’ claim that an employee who seeks protections not accorded to one who is impaired but not regarded as disabled does so because of the additional component—‘regarded as’ disabled”) (emphasis in original).
without distinction.\textsuperscript{258} Giving the former group the full protection of the Act but not the latter creates a truly bizarre result.\textsuperscript{259}

A perceived disability is limiting, if not in the same physical or mental way as an actual disability. A Fifth Circuit case illustrates the difficulty a plaintiff with a perceived disability may face if the employer is not required to accommodate despite a finding the employer perceived the employee to have a disability. In \textit{Newberry v. East Texas State University},\textsuperscript{260} the plaintiff, Newberry, suffered from obsessive-compulsive disorder (OCD), which impacted his ability to interact with his colleagues and generally complete everyday tasks.\textsuperscript{261} His employer discharged him because of the interpersonal problems with his colleagues.\textsuperscript{262} The trial court submitted the case to a jury, charging them to determine only whether Newberry had an actual disability under the ADA.\textsuperscript{263}

The Fifth Circuit found the district court should have included a charge to the jury asking it to determine whether Newberry was perceived as having a disability, because a reasonable jury could have reached such a conclusion.\textsuperscript{264} The court nonetheless dismissed Newberry's claim because

\textsuperscript{258} The legislative history of the ADA reflects that Congress equated those who met the first prong of the definition of disability and those who met the third prong. In the section explaining the rational for including the "regarded as" prong, the House Report quoted language from \textit{Arline} that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987)). The report further noted the source for the definition of disability, section (7)(B)(B) of the Rehabilitation Act and section 802 of the Fair Housing Act, both defining an "individual with handicaps," reflected Congress's acknowledgment that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from impairment." \textit{Id.} (citing \textit{Arline}, 480 U.S. at 284). In addition, the report even more directly equates the effects of disability discrimination between the two categories, noting there are "common barriers that frequently result in excluding disabled persons," such as "concerns about productivity, safety, . . . and acceptance by co-workers and customers." \textit{Id.}, pt. 3, at 30.

\textsuperscript{259} Courts that find the "regarded as" individual not entitled to an accommodation, because it would not be "fair" to an employee who cannot establish his impairment is a disability, are engaging in the same sort of anti-preference reasoning that was behind the employer's argument against having to modify neutral rules overruled in \textit{Barnett}. The employer's argument in \textit{Barnett} rested on comparing the employee who got an exception to a neutral employer rule to other similarly-situated but non-disabled employees who had to follow that rule. See US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002). Similarly, the objection to accommodating "regarded as" employees rests on comparing their ability to obtain some exception to a work-related rule or policy to other arguably similarly-situated but non-disabled employees. In that comparison, "regarded as" employees are not "truly" disabled or "in genuine need" of accommodation. Yet, they are vulnerable to discharge because of their limitations if they do not receive the requested accommodation.

\textsuperscript{260} 161 F.3d 276 (5th Cir. 1998).
\textsuperscript{261} \textit{Id.} at 278.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.} at 279.
\textsuperscript{264} \textit{Id.}
it found he failed to prove the perception of his disability was what motivated his discharge. The court reasoned as follows:

Newberry was required to show that his disability (or perception or record thereof) was a motivating factor in the decision to dismiss him. Had he been able to show that he in fact suffered a substantial impairment of major life functions, then he might have been able to show that this impairment motivated his dismissal and that [the employer] refused to allow a reasonable accommodation. Now that Newberry must rely only on a perception of disability, however, he must show that this perception was a motivating factor in his dismissal. Newberry cannot show this. All the evidence indicates that the university dismissed him because of his work performance and lack of collegiality. In the absence of any evidence that the university was concerned specifically about Newberry’s being mentally ill—which would be the case if they believed, for example, that mentally ill people are inherently dangerous, and they fired him to avoid the danger—then the perception of him as mentally ill could not have been a motivating factor in his dismissal.

The Fifth Circuit then rejected the duty to accommodate Newberry’s mental illness, focusing entirely on the definition language of the ADA and not on the language of the accommodation mandate itself:

Section 12102(2)(C) [the “regarded as” prong of the statutory definition] is concerned not with symptoms, but with categorization. That is, where an employee engages in conduct that is legitimately a basis for dismissal, and the employer believes that the employee’s conduct is symptomatic of disability, the employer may fire the employee on the basis of the conduct itself, as long as the collateral assessment of disability plays no role in the decision to dismiss... [A]n employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment.

Newberry, however, was fired because of the perception of his disability. He was perceived as being a troublemaker and as a person who could not get along with others. Both of these perceptions were tied to his mental illness, which manifested itself in his difficulty engaging in interpersonal relationships. By separating the behavior from the mental impairment, and thus relieving the employer of the obligation to provide reasonable accommodations for what were in effect Newberry’s mental limitations, the court’s decision allowed his employer to fire him because it does not want to have to work with someone who has OCD. This outcome does little to address the myths and stereotypes that Congress noted faced individuals with disabilities as they seek equal employment opportunity.

265. Id.
266. Id. (citations omitted).
267. Id. at 279-80.
Some have suggested that disabusing the employer of its erroneous perception may be a sufficient remedy for a “regarded as” claim. In other words, the “regarded as” part of the definition of disability plays primarily an educative role. Once the employer is educated as to its erroneous belief, there is no need for additional remedies other than to prohibit future discrimination. Indeed, the EEOC’s own examples may feed into this view, in that none of those examples involved “regarded as” employees with physical or mental limitations that needed accommodation. In each example, the employer could be told to stop acting on its perception of the individual’s disability, and the individual would be in the same position as employees without disabilities.

This argument is unsatisfying. Given that Congress, with the inclusion of the “regarded as” category, recognized how deeply rooted the myths and stereotypes are regarding individuals with disabilities, and the barriers those myths and stereotypes pose to equal participation in society, it is rather naive to believe that all an employer needs is to be told is its perception is erroneous. As the plaintiff in Deane argued, “the perception of disability, socially constructed and reinforced, is difficult to destroy, and in most cases, merely informing the employer of its misperception will not be enough [to eliminate the limitation].”

268. See, e.g., Deane v. Pocono Med. Ctr., 142 F.3d 138, 148, n.12 (3d Cir. 1998) (suggesting that rejecting accommodations for “regarded as” individuals would not leave them remediless because they would be entitled to injunctive relief against future discrimination); Buskirk v. Apollo Metals, 307 F.3d 160, 171 (3d Cir. 2002) (upholding trial court decision not to submit reasonable accommodation claim to jury because employee was reinstated and employer no longer misperceives employee’s medical condition and court “[saw] no need for any additional remedies”); see also 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, 979 (2005) (suggesting that “windfall theory is not completely flawed” and that “operational accommodations” should not be given “to employees [that employers] no longer perceived as disabled”).

Even in decisions upholding a right to accommodation, there is reasoning that suggests courts consider the issue to be about disabusing the employer of stereotypic notions. The Tenth Circuit, for example, held there is a right to reasonable accommodation that extended to a regarded as disabled employee who needed a policy modified in order to continue to work. See Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005). In the course of its reasoning, that court referenced the ADA’s purpose to protect individuals from adverse actions based on “‘stereotypic assumptions not truly indicative of [their] individual ability’ of the employee” and suggested “the ADA encourages employers to become more enlightened about their employees’ capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.” Id. (citation omitted). It is not clear how the court would have responded to an argument from the employer that all it was required to do in the case was give up its stereotypic notions about the capabilities of the plaintiff.

269. The Title I Technical Assistance Manual, which sets out the same categories and examples from the Interpretive Guidance, reflects that the EEOC saw the usual “regarded as” case to involve employers who were acting on “unsubstantiated beliefs or fears that a person’s perceived disability w[ould] cause problems” with productivity, safety, and other workplace issues. TECHNICAL ASSISTANCE MANUAL, supra note 10, at I-2.2(c).

270. See supra note 258.

271. Deane, 142 F.3d at 148 n.12; see also Jacques v. DiMarzio, 200 F. Supp. 2d 151, 167 (E.D.N.Y. 2002) (quoting Deane). For a more in-depth discussion of the social constructs and
Two types of “regarded as” reasonable accommodation cases illustrate why simply disabusing the employer of its perception is not enough. One type involves the individual whose limitations are those imposed by the myths and fears associated with the physical or mental impairment. Newberry illustrates this. The other type involves employees like the hypothetical employee with medication-controlled diabetes, whose real need for accommodation relates to the physical limitations imposed by her diabetes. Each of these types of cases is considered in turn.

Newberry’s work limitations are unlikely to be solved simply by educating his employer on the effects of OCD. To a certain degree, Newberry’s problems came from the way that his co-workers reacted to him. It may not be possible to address situations like this without making some changes in the employer’s policies and practices to accommodate for the extra difficulty posed by co-worker fears and attitudes. Simply telling the employer not to perceive Newberry as having a disability does little to solve that problem. Congress’ intent to address deeply-rooted myths and stereotypes about individuals with conditions, such as OCD, that pose unjustified barriers to employment is not met.

Similarly, in the case of the employee with controlled diabetes who is regarded as having a disability, disabusing the employer’s misperception does not remove the limitations on this individual’s employment opportunity related to her perceived impairment. In this situation, the employer regards the impairment, diabetes, as an actual impediment to job performance. Perhaps this perception is based on the fact the employee has to take breaks to test her blood sugar and take her medication. The employer is told, “Stop thinking this employee is substantially limited in her ability to work.” Does that remove the consequences of the myths and stereotypes espoused by the employer? It does not.

As a practical matter, the end consequence to this employee is the same, namely loss of the job. The employer defends itself now by saying, “I don’t think about the diabetes at all now, I look at what the employee actually can and cannot do. The employee cannot work the same schedule I have set for my other employees, so the employee is less desirable to me for that reason.” Without imposing the accommodation mandate, the supposedly newly bias-free employer would be free to fire the employee.


272. The facts in Newberry reflect that his colleagues complained to the college dean about the way that Newberry interacted with them, and Newberry himself testified that his condition interfered with his relations with other people. Newberry, 161 F.3d at 277-78.

273. A recent student-written article makes a similar observation about what the author calls “residual discrimination,” which he defines as “an employer or entire workplace that has demonstrated deeply discriminatory attitudes toward an employee in the course of a tangible adverse employment action.” See McFarlin, supra note 268, at 966.
Of course, how one could tell the employer is bias-free is hard to say. The firing would appear to be for the same reason as it would have been before—because the employer believes the employee’s (diabetes-related) break needs interfere with the employee’s work performance. The only difference is that the employer now avoids the threshold finding that the employee has a disability.

If courts had not been systematically narrowing the basic definition of disability in the first place, this circularity need not have occurred. According to the legislative history of the Act, the diabetic employee, who must monitor her blood sugar and take insulin, is an employee Congress intended to cover under the actual disability prong. Neither Congress nor the EEOC likely expected that employees in the controlled-diabetes employee’s situation would have to resort to the “regarded as” prong in the first place, and then struggle to get a reasonable accommodation.

Yet having staked out an unduly narrow position on ADA coverage, courts now find themselves with little choice but to reason their way to “bizarre results” in denying accommodations to individuals who have met

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274. In essence, this is what happened to the employee in Newberry. The employer in that case believed his difficulty relating to his environment interfered with his ability to be a professor, and fired him for that reason. See Newberry, 161 F.3d at 277-78. The employee would have gained little if anything from educating his employer about OCD, because the employer could still use his behavioral problems as a basis for evaluating him as an employee.

275. See supra notes 27, 232 and accompanying text discussing the narrowing of the threshold definition of disability.

276. The House Report uses analogous examples of an individual with epilepsy or a hearing loss, noting that both would be covered:

The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test . . . [as is a person with hearing loss], even if the hearing loss is corrected by use of a hearing aid.


277. The EEOC regulations initially provided that mitigating measures were not relevant to determining whether someone had an ADA disability. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1999) (amended 65 Fed. Reg. 36327-01 (June 8, 2000) to rescind the “mitigating measures” language). Some of the examples used in the EEOC’s interpretive materials reflect that the agency thought impairments courts have rejected would be covered as disabilities. In the EEOC’s Technical Assistance Manual, one example to help determine whether a function is essential involves an employee with a disability that prevents the individual from lifting anything over 20 pounds. See TECHNICAL ASSISTANCE MANUAL, supra note 10, at 1-2.3(a) (Changing Essential Functions). Courts have rejected, however, claims by individuals with similar lifting restrictions as not being substantial enough to qualify as a disability. See Williams v. Master Channel Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996) (declaring that a 25-pound lifting limitation does not substantially limit a major life activity); see also Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (holding a lifting limitation of 25 pounds is not a substantial limitation of a major life activity). Another example involves a waitress who has difficulty taking orders in dim light. See TECHNICAL ASSISTANCE MANUAL, supra note 10, at 1-3.9. If this is the extent of her impairment, a court is unlikely to consider her to have an actual disability. See EEOC v. United Parcel Serv., Inc., 306 F.3d 794, 803 (9th Cir. 2002) (reasoning that “it does not follow that seeing as a whole is substantially limited just because the individual has a deficiency in some aspect of vision”).
the disability threshold for claiming the protection of the ADA. As the Eleventh Circuit has noted, "[N]one of the courts to depart from [the ADA's] plain language have pointed to anything—congressional findings, legislative history, or other materials—suggesting that the so-called 'bizarre results' yielded by a faithful reading of the ADA are contrary to Congress's plainly expressed intent."

2. Ignoring the Proper Role of the Interactive Process by Denying Accommodation to "Regarded As" Employees

In justifying their denial of accommodations to "regarded as" plaintiffs, courts have co-opted the rhetoric of the ADA itself. They contend the refusal to accommodate better advances the statute's purposes. In reality, courts are ignoring a fundamental purpose of the ADA: encouraging an interactive process between employer and employee.

In its opinion in Kaplan v. City of North Las Vegas, the Ninth Circuit suggested that accommodating the "regarded as" employee (and thereby treating him better than an equally impaired employee not perceived as disabled) would be a "perverse and troubling result" because "impaired employees would be better off under the statute if their employers treated them as disabled even if they were not."278 The court was concerned that this was inconsistent with a statute whose aim included dispelling stereotypic assumptions about the ability of individuals with disabilities:

Dispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments. Were we to entitle "regarded as" employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly.279

The court's reasoning is correct only if a core part of the reasonable accommodation process is ignored completely: the interactive process. The interactive process is the primary means by which employees disabuse employers of their stereotyped notions about the skills and abilities of employees with physical and mental impairments.280 During the interactive

278. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).
279. Id.
280. The legislative history described the reasonable accommodation interactive process as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to the problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in meaningful equal opportunity for the individual with a disability.

process, the employer is encouraged to “ascertain the precise job-related limitations imposed by the employee’s disability and how [the limitations] can be overcome with a reasonable accommodation,” and “[i]n consultation with the [employee], identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position.”

The suggestion that an individual with a perceived disability could somehow leverage the employer's lack of understanding into an unneeded accommodation misunderstands the role of the interactive process. The employee with a disability has as much an obligation to engage in this process as the employer. Done properly, the employer cannot help but emerge from the process with a better sense of the skills and talents of its employees.

The fundamental problem here is getting courts to recognize that individuals with perceived disabilities are in fact individuals with disabilities under the ADA, and not merely people seeking preferential treatment. Again, the Ninth Circuit’s opinion in Kaplan is illustrative. That court would apparently not be satisfied with the availability of the interactive process, because it expressed the opinion that employers should not have to “waste resources unnecessarily” to accommodate “those not truly disabled,” when those “limited resources would be better spent assisting person who are actually disabled and in genuine need of accommodation to perform to their potential.”


282. As one court observed, “[I]t is hardly a ‘bizarre’ result to hold the employer responsible” if the employer “opt[s] to take adverse action against the employee” rather than “explore [the] employee’s need for a reasonable accommodation.” Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 219 (D. Maine 2001). The Third Circuit has also reflected an understanding of the role of the interactive process and the need for accommodation even when the employer is informed of its misperception of the employee’s limitations. See Williams v. Phila. Hous. Auth. Police Dep’t, 380 F.3d 751, 776 n.19 (3d Cir. 2004). In Williams, the court used the example of a supermarket employee with a back injury not sufficiently severe to qualify as an actual disability but significant enough for the employer to believe the employee cannot work as a cashier because she cannot stand long enough. Id. The court reasoned:

In many cases where an employer regards an employee as having limitations that the employee did not have or limitations greater than the employee’s actual limitations, a simple reasonable accommodation can be devised to allow the employee to continue working even given the employer’s misperception. In such cases, it may be that the employer and employee never reach a meeting of the minds, regardless of who was at fault for failing to do so, as to the employee’s actual limitations. . . . [T]he supermarket might, assuming its erroneous perception amounted to a substantial limitation of a major life activity, be required to reasonably accommodate such a “regarded as” disabled employee by, for example, providing a stool.

283. Kaplan, 323 F.3d at 1232.
The ADA provides that employers may not discriminate against qualified individuals with a disability under the ADA. Individuals who are regarded as having a physical or mental impairment that substantially limits a major life activity are individuals with a disability. Accordingly, the Ninth Circuit's concerns about "truly" and "actually" disabled individuals in "genuine need" of accommodation are not those of the Congress that passed that ADA. 284

Once again, the employee with medication-controlled diabetes is a useful illustration. Following the logic of the Ninth Circuit in Kaplan, it would be a waste of resources for the employer to have to sit down and determine whether the employee's diabetes-related limitations symptoms could be accommodated. Yet this is a person who is in genuine need of a simple accommodation to perform her job. With the employer perceiving the employee as having a substantial limitation because of her diabetes, is it actually inconsistent with the statute to require the employer to provide accommodations to those physical or mental limitations the diabetes causes? The employer will have learned of the skills and abilities of the employee and the employee will have an opportunity to continue employment without the unnecessary barriers posed by her condition. 285

A quick look again at the basic statutory language reinforces the proper separate roles that the threshold definition of disability and the reasonable accommodation interactive process play. Qualified individuals with a disability are those who can perform the essential functions of the job, with or without reasonable accommodation. 286 By virtue of that definition, after determining that an individual has a disability (and meets the other prerequisites for the position), the focus turns to whether they can perform the essential functions of the job. 287 To perform the essential functions, does the individual need an accommodation? If so, is it reasonable? If it is

284. As the Eleventh Circuit observed:
Within constitutional limits, Congress may "improvidently" elect to legislate what the Ninth Circuit has characterized as a "windfall" for employees regarded as disabled, or may "compel employers to waste resources," that, in our sister Circuit's judgment, "would be better spent assisting those who are actually disabled." ... We do not think that these judgments and the complex legislative calibrations that underlie them are for us to make. Quite simply, we are without the authority to pass judgment on the wisdom of a congressional enactment." D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1238 (11th Cir. 2005) (citations omitted).

285. The Supreme Court has emphasized the practical nature of the reasonable accommodation process, and its goal of promoting full participation of individuals with disabilities in the workplace, belying the fears of it being a waste of resources. See US Airways, Inc., v. Barnett, 535 U.S. 391, 401 (2002) (noting the ADA's "primary purpose" is "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace," and that "unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike ... sometimes require[s] affirmative conduct to promote entry of disabled people into the work force") (citations omitted).


reasonable, to deny it is to discriminate against that individual. Under this standard, a court may only refuse to accommodate the individual with a perceived disability if the accommodation is not reasonable. Finding an accommodation not to be reasonable because the court views it as a windfall, however, is a conclusion that rests entirely on a value judgment that overrides the language and purpose of the statute.\textsuperscript{288}

The ADA requires accommodation of known limitations. The Act makes no distinction among the prongs of the definition of disability. There is no statutory basis for denying reasonable accommodation to employees regarded as having a disability because the court categorically finds such accommodations insufficiently connected to disability.

C. Justice Scalia’s Influential Dissent in \textit{US Airways v. Barnett}:
\textit{Requiring Accommodations Be Necessary Because of Disability-Unique Limitations}

The dissenting opinion of Justice Scalia in \textit{US Airways, Inc. v. Barnett}\textsuperscript{289} adds another twist to the interpretation of “because of the disability” in the accommodations context. Justice Scalia interprets the “because of” language to require that when an employee requests non-compliance with a work rule, the employee must be able to comply with the rule but for the disability.\textsuperscript{289} If the work rule is inconvenient for employees without disabilities as well as for employees with disabilities, or in Justice Scalia’s terms, “burdens the disabled and non-disabled alike,”\textsuperscript{290} the

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\item \textsuperscript{288} The Supreme Court’s reasoning in \textit{Barnett} suggests that the reasonableness inquiry looks at the nature of the accommodation requested, in terms of its ordinary impact on the workplace. See \textit{Barnett}, 535 U.S. at 400-02 (discussing the general standards applicable to determining whether an accommodation is reasonable). The Court referenced the “reasonable in the run of cases” standard articulated by some lower courts. \textit{id.} at 401-02. The Court found that trumping a seniority plan would ordinarily not be reasonable in the run of cases, because of “the importance of seniority to employee-management relations” and the potential disruption of the expectations of “consistent, uniform treatment” held by other employees under the same plan. \textit{id.} at 403-04. However, given that the Court rejected the argument that accommodations are not due under the ADA when they operate as a preference for the employee with a disability, the Court’s treatment of the request for an exception to a seniority plan should be confined to that unique context. See \textit{id.} at 397-98. The larger consideration is that the accommodation inquiry looks to the relative practical reasonableness of the plaintiff’s request, not a value judgment as to whether the individual deserves to be accommodated. In this sense, it is not the same as the analysis of whether the plaintiff meets the threshold definition of disability, where courts have been invited to employ their value judgments in a gate-keeping role. See Issacharoff & Nelson, \textit{supra} note 8, at 321 (noting how the structure of the ADA, with its “threshold filters on which employees are covered by the Act” lends itself to judicial oversight that “rais[es] the barriers to entry into ADA litigation”). It is not clear that courts see this distinction, however.
\item \textsuperscript{289} 535 U.S. at 411 (Scalia, J., dissenting).
\item \textsuperscript{290} \textit{id.} at 413.
\item \textsuperscript{291} \textit{id.} Scalia acknowledged that seniority rules might have a harsher effect on employees with disabilities because their disability may limit the tasks they can perform in the workplace, thus leading them to have fewer positions they can fill and be more likely to be dismissed from employment. \textit{id.} He equated it, however, to a salary system that does not compensate an employee with a disability more in order to allow them physical therapy to reduce the discomfort associated with their disability. See \textit{id.} In
employee with a disability cannot claim that non-compliance with the work rule would be a reasonable accommodation of the employee’s disability. The employee’s difficulty complying is not “but for” the disability. As discussed later in this section, at least one circuit court has been influenced by this analysis.292

_Barnett_ involved a seniority system.293 The plaintiff sought an exception from the seniority system that would have allowed him to keep a position to which he had been temporarily assigned.294 A more senior employee would otherwise have been entitled to bump him from the position.295 A majority of the Supreme Court decided that an employee with a disability may have the right to reassignment as a reasonable accommodation, even if the employer has a seniority system in place that would otherwise deny that individual the job he or she seeks.296 The employee must, however, prove there are exceptional circumstances that warrant requiring the employer to forego its seniority system in that particular case.297

Justice Scalia would not have permitted any challenge to the seniority system because he was not convinced the requested exception accommodated the employee’s disability.298 In his view, the seniority system was an obstacle shared by all employees, not just those with disabilities.299 He argued that a change to the physical layout of a facility to accommodate a person in a wheelchair would be a proper form of accommodation because it addressed an obstacle caused by the person’s disability.300 Changing a neutral work rule would not, however, because the rule was not an obstacle that would exist only _but for_ the employee’s disability.301 Instead, providing this type of accommodation would just “‘make up for’ the employee’s disability.”302

Does Justice Scalia mean a type of sole causation when he uses the term “but for” in _Barnett_? His reasoning is analogous to that urged by the

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292. See Peebles v. Potter, 354 F.3d 761, 768-69 (8th Cir. 2004); _see also supra_ note 308 and accompanying text.
293. _Barnett_, 535 U.S. at 394.
294. _Id._
295. _Id._
296. _Id._ at 406.
297. _Id._
298. _Id._ at 413-14 (Scalia, J., dissenting).
299. _Id._
300. _Id._
301. _See id._
302. _Id._
employer and rejected by the Court in *Price Waterhouse.*

Justice Scalia believes the individual's disability must have a unique causal role in creating the barrier to employment that the individual seeks to have modified. If the barrier is not solely the result of the individual's disability (as would not be the case with an otherwise neutral rule that is inconvenient for all employees although somewhat more for employees with disabilities), the individual has not shown the required causal link.

This version of but-for causation, however, ignores the fact that the statutory definition of reasonable accommodation includes several types of policies and practices that would appear to fall equally harshly on individuals without disabilities. In pertinent part, the statutory definition references "job restructuring, part-time or modified work schedules, reassignment to a vacant position." By Justice Scalia's formulation, while a nine-to-five work schedule in a particular case might have a harsher effect on an employee with a disability, it nonetheless burdens the disabled and the non-disabled (a working single parent, perhaps) alike and therefore should not entitle the employee with a disability to an accommodation. Yet the statute explicitly contemplates modifying a work schedule if it is otherwise reasonable.

Although the majority in *Barnett* rejected Justice Scalia's assertion that accommodations of neutral rules are being offered merely to "make up for" a disability, his rhetoric signals the anti-preference perspective that runs through ADA case law and thereby influences even decision-making that purports to be in line with Supreme Court precedent. A post-*Barnett* Eighth Circuit opinion extensively quotes Justice Scalia's view of accommodation law, before reluctantly concluding that it has to follow the majority rule that non-compliance with a neutral work rule could be a required accommodation. The court then managed to adopt Justice Scalia's

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303. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237-38 (1989) (noting employer's contention that Title VII requires employee to prove the decision would have been different if the employer had not considered the prohibited characteristic).

304. See id.


306. See 42 U.S.C. § 12111(9)(B) (including "part-time or modified work schedules" within definition of "reasonable accommodation").

307. The majority in *Barnett* recognized that preferences can be necessary in order to achieve the statute's "basic equal opportunity goal;" that sometimes, different treatment is required in order to provide the same workplace opportunities. *Barnett*, 535 U.S. at 397 (noting "were that not so, the 'reasonable accommodation' provision could not accomplish its intended objective").

308. *Peebles v. Potter*, 354 F.3d 761, 768-69 (8th Cir. 2004). The work rule at issue in *Peebles* was one that required documentation that an employee's physician-imposed work restrictions persisted throughout the entire period the employee was absent from work. *Id.* at 764. Although the facts are not entirely clear, Peebles appeared to argue that he should not have to comply with that rule but rather, upon receiving notice of his work restrictions, the employer should have commenced an interactive process with him to determine what accommodations to his job were reasonable. See *id.* at 764-65. The court struggled to see how Peebles' non-compliance with the work rule "served his 'disability-related needs.'" *Id.* at 769. The court also cited its earlier decision in *Wood.* *Id.* (citing *Wood v. Crown Redi-
approach, however, by interpreting *Barnett* to make any "exception not necessitated by the individual's disability . . . presumptively unreasonable."\(^{309}\)

Exactly what the Eighth Circuit means by "necessitated" is unclear.\(^{310}\) Of course, an accommodation that is not necessary would not be reasonable. As stated, the Eighth Circuit's standard adds nothing. As applied, however, it provides another means to limit the scope of the ADA by adopting an unduly shortsighted view of what is necessary.\(^{311}\)

Both Justice Scalia and the Eighth Circuit fail to recognize that there was in fact a causal relationship between Barnett's request for the exception to the seniority system rules and his disability. As Professor Carlos Ball points out, "the accommodation would have been unnecessary had Barnett been able to perform the essential functions of his original cargo handling position. It was the plaintiff's disability, in other words, that directly led to the need for the reassignment accommodation."\(^{312}\) If he were not given the accommodation, Barnett would have lost his job because his disability rendered him unable to perform other jobs at US Airways. Accordingly, his disability necessitated the accommodation.

\(^{309}\) Mix, Inc., 339 F.3d 682, 687 (8th Cir. 2003)). Nevertheless, the court conceded that *Barnett* found disregarding the seniority system at issue in that case a form of accommodation despite the fact it "was not in any way related to [Barnett's] disability." \(^{30}\) Id.

309. I have previously written on *Barnett* and the potential that courts will interpret the holding in the case to create a new presumption against unreasonableness whenever an accommodation request involves some form of variation from general employer policies. See Anderson, supra note 5, at 35-37.

310. The Eighth Circuit found that the employee had not presented any evidence to create a question of fact regarding the reasonableness of the employer's documentation rule. *Peebles*, 354 F.2d at 769. Other than its assertions that the non-compliance had nothing to do with the employee's disability, based on Scalia's *Barnett* dissent, the court does not otherwise analyze what would be considered necessary. See id. at 768-69. In effect, the court seems to be saying that while *Barnett* held that a neutral rule could be an accommodation, the door was left open to decide in a given case that the employee hasn't proven a sufficient causal connection between the non-compliance and his disability, such that the onerous burden of proof that *Barnett* establishes is on the plaintiff. See id. This formulation in effect ignores the fact that the majority specifically rejected Scalia's view of preferences under the ADA. See *Barnett*, 535 U.S. at 398 (explicitly rejecting the position taken by Justice Scalia).

311. There has been some criticism of courts taking an "able-bodied" view when called upon to evaluate whether an accommodation is necessary and therefore reasonable. For example, Judge Richard Posner in the Seventh Circuit rejected a plaintiff's claim that refusing to provide her an accessible sink in the employee kitchenette, instead making her use a bathroom sink, segregated and stigmatized her in violation of the reasonable accommodation mandate. *Vande Zande* v. Wis. Dep't of Admin., 44 F.3d 538, 546 (7th Cir. 1995). Judge Posner rejected her stigma claim as a "merely an epithet." \(^{312}\) Id.

Professor Linda Kreiger offers a cogent critique of Judge Posner's evaluation:

> Whatever one may think of the merits of the *Vande Zande* case, stigma is not just an epithet. That a federal circuit court judge could characterize the concept in this way gives substance to [the] claim that the ADA's crabbed interpretation derives in substantial part from judges' failure to understand the connection between stigma, structural exclusion, and discrimination in the disability rights context.


312. Ball, supra note 40, at 965.
The appeal of Justice Scalia's brand of but-for causation to those uncomfortable with anything that even suggests preferential treatment is clear. His rule has the ability to limit reasonable accommodations in any case in which a similar accommodation could potentially be as useful to an individual who does not have a disability. If both an employee with a disability and one without would find inconvenience lessened by an accommodation, it should not be made available to the employee with a disability. Only if the employee with a disability can establish that her disability creates a unique burden would this approach concede the reach of the ADA's accommodation mandate.

IV. DISCRIMINATION "BECAUSE OF" DISABILITY IN REASONABLE ACCOMMODATION CASES: ELIMINATING CAUSATION-INTENSIVE INQUIRY

Congress used familiar language when it articulated the ADA's causation standard: discrimination must be "because of" disability. In doing so, did Congress intend a limited form of causation? On several fronts, courts are interpreting the statute as if it did. By manipulating that aspect of disability for which the employee must be seeking accommodation, or by finding per se no obligation to accommodate certain disabilities, courts are constricting even further the reach of reasonable accommodation law. They are using "because of the disability" as a particularized causal threshold, a device to deny the connection between the disability and whatever modifications the plaintiff seeks, even when they are otherwise reasonable. They express fear they will be giving plaintiffs a windfall if they do not take this approach.

One could argue that Congress expected the ADA to take a path similar to that of Title VII because it used the familiar causal "because of" language. "Because of" has been used in other antidiscrimination contexts to deny the legal significance of workplace conduct. In sexual harassment cases, especially those involving harassment by someone of the same sex, courts regularly deny claims because they find the harasser's conduct not sufficiently connected to sex. At the same time, however, the phrase has been construed broadly not to require intent, as in disparate impact cases.

Other commentators have shown that courts have a pattern of indiscriminately borrowing from prior statutes when evaluating the ADA.

313. See supra notes 20-22 and accompanying text.
314. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").
In the case of reasonable accommodation law, courts tend to use "because of" as a limiting principle. Congress, however, signaled with a change of language that reasonable accommodations were to be viewed broadly. The employer is not required to accommodate "the disability"; it is required to accommodate "the known physical or mental limitations" of the employee with a disability. Once a person crosses the disability threshold, Congress intended the touchstone to be reasonableness, not a constricted form of causation.

In most cases, causation should be easily resolved. If the known physical and mental limitations of the individual with a disability cannot be separated from the reason for the employment decision, there is sufficient causal connection. For example, the employee with PTSD prone to angry outbursts and the police officer who drove recklessly due to a diabetic reaction were both individuals with known limitations related to their disability. They were not "bootstrapping" their disabilities into the picture—their behavior was causally connected to their disabilities. This is not to say these employees were entitled to the accommodations they sought. They were likely to fail on the merits of their claims, either because they were not qualified to perform the essential functions of the job even with accommodation, because the accommodation would have been an undue hardship, or because they posed a direct threat to the health and safety of themselves or others. In actuality, it is the judiciary that is engaging in "bootstrapping" by bringing its concerns about the scope of accommodation law into what purports to be a statutory causation analysis.

The "because of" causation cases are another practical fallout of a perceived incompatibility between reasonable accommodation and a civil
rights paradigm built on principles of formal equality. ADA case law reflects a recurring attraction toward rules that avoid merit evaluation of the burden accommodation places on the employer as long as the employer treats employees in a similar fashion. The definition of disability has been narrowed to the point that few plaintiffs manage to cross that threshold.\textsuperscript{322} Courts have developed per se rules to interpret a statute intended to require individualized consideration.\textsuperscript{323} Even when per se rules have been rejected, courts have substituted other defense-merits avoiding standards, like presumptions, as \textit{Barnett} demonstrates.\textsuperscript{324}

While post-\textit{Barnett} courts may not be able to reject an accommodation claim merely on the grounds it might give preferential treatment to an employee with a disability, using “because of the disability,” they have developed another set of per se rules that avoid merits evaluation: Employees only regarded as having a disability are not entitled to accommodation.\textsuperscript{325} In addition, employees discharged for conduct violating workplace rules are not entitled to accommodation, nor are employees who request accommodations unconnected to the major life activity they alleged to prove disability.\textsuperscript{326}

Courts have argued these rules are necessary to prevent giving individuals with disabilities a windfall.\textsuperscript{327} As noted earlier, courts have found the ADA’s purposes and findings section language about avoiding stereotypic assumptions just as useful to justify denying accommodations as to grant them.\textsuperscript{328} Granting accommodations to individuals only perceived as having a disability, the argument goes, promotes the stereotype that formed

\begin{itemize}
\item \textsuperscript{322} See Claudia Center & Andrew J. Imparato, \textit{Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers}, 14 STAN. L. & POL’Y REV. 321, 322 (2003) (noting that “[w]ith the definition of disability dramatically contracted, millions of Americans who continue to experience disability discrimination are barred from challenging these abuses in the courts”); cf. Ruth Colker, \textit{The Americans with Disabilities Act: A Windfall for Defendants}, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (finding that in general more than 93% of defendants prevail in reported ADA cases decided on the merits at the trial court level, and 84% in cases that are appealed and available on Westlaw).
\item \textsuperscript{323} Prior to \textit{Barnett}, lower courts were dismissing reasonable accommodation challenges to employer rules that were neutral on their face and applied generally to the workforce. See, e.g., Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (holding that ADA does not require employers to modify a generally applicable business policy precluding transferring employees to another position).
\item \textsuperscript{324} In \textit{Barnett}, the Supreme Court rejected lower courts’ per se rule that employers need not give a preference to employees with disabilities by changing otherwise neutral seniority rules. US Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002). The Court substituted a presumption-based standard, seemingly created from whole cloth, that requires employees to prove that extraordinary circumstances warrant an exception to the seniority rules. See Anderson, supra note 5, at 20-34 (describing the Court’s ruling in \textit{Barnett} as creating without statutory support a presumption that disability discrimination plaintiffs must overcome when challenging a company-imposed seniority system).
\item \textsuperscript{325} See supra, Part III.B.
\item \textsuperscript{326} See supra, Part III.A.
\item \textsuperscript{327} See, e.g., Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003).
\item \textsuperscript{328} See supra, Part III.B.
\end{itemize}
the basis for regarding them as having a disability in the first place. Even the Seventh Circuit’s suggestion that courts can distinguish disability from conduct employees can control (even if the conduct is related to their disability), and refuse to accommodate conduct, finds some support in the purposes and findings section. Congress spoke about the treatment of individuals with disabilities being “based on characteristics that are beyond the control of such individuals.”

Other parts of the purposes and findings section, however, belie such a restrictive approach to causation. In that section, Congress also speaks of a “society [that] has tended to isolate and segregate individuals with disabilities.” It explicitly expresses concern not only about “outright intentional exclusion,” but also “the discriminatory effects” of various physical barriers, policies, and standards, and the fact that individuals with disabilities are “relegated to lesser services, programs, activities, benefits, jobs, or other opportunities.” Finally, Congress stated that one purpose of the Act is “to provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.”

When combined with the expansive requirement that employers must accommodate the “known physical and mental limitations” of their employees with disabilities, the Act is more properly read to suggest that Congress did not see the “because of” requirement as a signal to impose difficult causation requirements. Rather, Congress intended the Act have broad, practical application once the accommodation issue was reached.

The “windfall” mentality appears indelibly ingrained in the judicial psyche. Reasonable accommodation is a form of affirmative action, whose validity under statutes like Title VII continues to be hotly debated. Whereas courts have read principles of affirmative action into statutes like Title VII, the ADA explicitly mandates affirmative steps to provide equal opportunity through accommodation. The “windfall” mentality has no

329. See supra notes 213–215 and accompanying text discussing the Seventh Circuit’s definition of misconduct, which apparently depends on whether court believes employee can control his behavior.
331. Id. § 12101(a)(2).
332. Id. § 12101(a)(5).
333. Id. § 12101(b)(1).
334. See, e.g., Karlan & Rutherglen, supra note 40, at 14 (reasoning that “[r]easonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual’s disabilities and to provide special treatment to him for that reason”); see also EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (describing requiring an employer to prefer a qualified individual with a disability for an open position when the employer wishes to choose another candidate it thinks is superior as “affirmative action with a vengeance”).
336. Beyond the affirmative obligation to provide reasonable accommodation in Title I’s employment provisions, the ADA also contains affirmative obligations in Title III, in regard to access to
place in evaluating what is necessary to achieve the ADA’s goals. As Professor Mary Crossley has observed, “the relevant moral difference between persons with disabilities and those without lies not in any differences in their mental or physical makeup, but in the divergence of how they experience existing structures and practices.” While ADA scholars debate the exact relationship between antidiscrimination and accommodation, their ultimate goal is the same: to urge courts along toward giving accommodation law its equal due within the civil rights area. The restrictive interpretation of “because of the disability” is yet another obstacle to the accomplishment of that goal.

V. CONCLUSION

Although the ADA uses the familiar “because of” language, that language was not a signal to adopt restrictive standards of causation, especially in reasonable accommodation cases. The rationales offered by courts adopting restrictive standards reflect their inability to recognize the particularized ways that disability affects equal opportunity. Individuals with disabilities covered by the ADA are not seeking a windfall; they are seeking removal of barriers that keep them from achieving equal participation in the workforce. Whether an actual or perceived disability, the individual with a disability experiences barriers not encountered by individuals outside the protected class. “Causation” has become just another device by which courts avoid evaluating the burden on employers to provide otherwise reasonable accommodations. Like the river referenced in the opening paragraph of this Article, the judicial “flow” toward the narrowest interpretation of the ADA continues largely unabated by any intervening principles.

places of public accommodation. For example, Title III requires places of public accommodation to “take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,” or “to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities.” 42 U.S.C. §§ 12182(b)(2)(A)(iii), (iv).