Is Ignorance Bliss? - A Pennsylvania Employer's Obligation to Provide Reasonable Accommodation to Employees It Regards as "Disabled" after Buskirk v. Apollo Metals, Inc.

Padmaja Chivukula

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol41/iss3/6

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Is Ignorance Bliss?
A Pennsylvania Employer’s Obligation to Provide Reasonable Accommodation To Employees It Regards As “Disabled” After Buskirk v. Apollo Metals, Inc.

Padmaja Chivukula

On July 26, 1990, Congress passed the Americans with Disabilities Act (“ADA”). The ADA extends the protection in employment which had been provided to other groups through the Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Age Discrimination in Employment Act (“ADEA”) to individuals with a “disability.” Unlike Title VII and the ADEA, however, the ADA's in-

* J.D., 1994 Washington University in St. Louis.
2. 42 U.S.C. § 2000e et. seq. (2003). Title VII provides, inter alia: (a) It shall be an unlawful employment practice for an employer - (1) 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 such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his 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 such individual’s race, color, religion, sex, or national origin.
3. 29 U.S.C. § 621 et. seq. (2003). The ADEA provides that: (a) It shall be unlawful for an employer - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age; (2) to limit, segregate, or classify his employees 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 such individual’s age; or (3) to reduce the wage rate of any employee in order to comply with this chapter. (b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual’s age, or to classify or refer for employment any individual on the basis of such individual’s age. Id.
4. The ADA provides that:
tended beneficiaries are not clearly identifiable by objective criteria like their sex, race, color, ancestry, national origin, religion or birth date. In addition, the ADA, unlike other employment rights statutes, imposes a duty on employers to modify the workplace as an accommodation for disabled employees. Thus, in a departure from previous civil rights statutes, which sought to remedy adverse actions, the ADA imposes upon employers an affirmative duty. Simply put, under the ADA, an employer’s failure to provide an accommodation is discrimination.

The statutory framework of the ADA has led to some unforeseen consequences. Specifically, according to the statute, an employee who has no actual disability is still “disabled” and entitled to protection under the ADA if the employer “regards” the employee as disabled. Since the statute also provides that “disabled” individuals are entitled to an accommodation, the question becomes whether employees who are regarded as being disabled are entitled to an accommodation. The Courts of Appeal have struggled with this issue since the ADA was passed and have reached divergent conclusions.

The Courts of Appeal for the Fifth, Sixth and Eighth Circuits have held that employees who have no actual disabilities but are

---

No covered entity shall discriminate 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.

42 U.S.C. § 12112 (a).


7. The ADA provides that:

(b) Construction. - As used in subsection (a) of this section, the term “discriminate” includes...

(5) (A) 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 such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C § 12112 (b) (2003).

8. See supra note 7.

9. The ADA defines “disability” as follows: “Disability. - The term “disability” means, with respect to an individual - (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”42 U.S.C. § 12102 (2) (2003).

10. See supra note 7.
"regarded as" disabled are not entitled to accommodations. In contrast, the Court of Appeals for the First Circuit has held that "regarded as" employees are entitled to accommodation.

On September 20, 2002, the Court of Appeals for the Third Circuit issued its decision in Buskirk v. Apollo Metals. In Buskirk, the Court of Appeals again addressed whether the ADA and the Pennsylvania Human Relations Act (PHRA) require a Pennsylvania employer to provide a reasonable accommodation to an employee who does not suffer from an actual disability but who the employer regards as disabled. The Court of Appeals declined to resolve the issue, holding instead that the employer had provided a reasonable accommodation to the employee and thus had not violated the ADA.

The Court of Appeals for the Third Circuit, while not resolving the issue, has, nonetheless, provided extensive analysis thereof. This article examines the evolving standards articulated by the Court of Appeals in order to attempt to provide some guidance as to the responsibilities of Pennsylvania employers and the rights of Pennsylvania employees under the "regarded as" disabled prong of the ADA and the Pennsylvania Human Relations Act after Buskirk.

In Section I, this article examines the statutory framework of the ADA including an analysis of the statutory precursor to the ADA, the Rehabilitation Act of 1973 ("Rehabilitation Act"). Section I further examines the regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") and the Supreme Court's analysis of the "regarded as" prong in Sutton v. United Airlines.

13. 307 F.3d 160 (3d Cir. 2002).
15. 43 PA.CONS.STAT. § 951 et. seq. (2003).
16. Buskirk, 307 F.3d at 162.
17. Id. at 168.
Section II reviews the decisions issued by the Court of Appeals for the Third Circuit. Section III attempts to provide some guidance for Pennsylvania employers and employees and concludes that the Court of Appeals should hold that, in order to give effect to Congressional intent and common sense, employees who are "regarded as" disabled are not entitled to accommodation under the ADA.

I. STATUTORY FRAMEWORK

A. The Rehabilitation Act and Arline

Congress first codified the "regarded as" framework in the Rehabilitation Act. The Rehabilitation Act provides that no "qualified handicapped individual" will be excluded from participation in any program receiving federal financial assistance. The Rehabilitation Act defines a "handicapped individual" as any person who: "(1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment."21

In School Board of Nassau County v. Arline, the Supreme Court interpreted the "regarded as" prong of the Rehabilitation Act. In Arline the plaintiff was a school teacher who had contracted tuberculosis. The disease went into remission for several years. In 1977 and thereafter, the plaintiff had two relapses for which she was hospitalized. After her third relapse her employer, the School Board of Nassau County, ("School Board") terminated her employment. The School Board advised her that she was terminated not because of "anything she did wrong" but because of the recurrence of her tuberculosis. The plaintiff filed suit alleging that, by firing her, School Board violated the Rehabilitation Act. The plaintiff contended that the School Board terminated her because of her record of handicap and because

21. Arline, 480 U.S. at 279 (quoting 29 U.S.C. § 706(7) (which has since been amended)).
23. Id. at 276.
24. Id.
25. Id.
26. Id.
27. Arline, 480 U.S. at 276.
28. Id.
they regarded her as having a handicap.\textsuperscript{29} The Supreme Court agreed.\textsuperscript{30} The Court concluded that the plaintiff was a handicapped individual because of both her record of impairment and because her employer regarded her as having an impairment.\textsuperscript{31} The Supreme Court stated in the "regarded as" section of the Rehabilitation Act: "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."\textsuperscript{32}

In light of its conclusion that Arline was "handicapped" under the Rehabilitation Act, the Court then turned to the question of:

whether Arline is otherwise qualified for the job of elementary school teacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks. The basic factors to be considered are well established .... \textsuperscript{33}

The Court then stated that the "next step in the 'otherwise qualified' inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry".\textsuperscript{34}

It is important to note that, in \textit{Arline}, the plaintiff did not request an accommodation from the School Board. Rather, the School Board fired her upon learning of her relapse. The sole question in \textit{Arline} was, therefore, whether, by terminating her because of its fears regarding tuberculosis, the School Board's actions violated the Rehabilitation Act.\textsuperscript{35} The Supreme Court's reference to "accommodation" in light of the "medical findings" directed the lower court to evaluate the threat, if any, plaintiff's tu-

\textsuperscript{29} Id.
\textsuperscript{30} Id. at 277.
\textsuperscript{31} Id. at 285.
\textsuperscript{32} Arline, 480 U.S. at 284.
\textsuperscript{33} Id. at 287.
\textsuperscript{34} Id. at 288.
\textsuperscript{35} Id.
berculosis posed to the school population. If the School Board’s fears regarding the dangers of tuberculosis were found to be valid, the plaintiff’s termination would not violate the Rehabilitation Act, and if their fears were invalid, termination would violate the Rehabilitation Act. The only “accommodation” which would have been required upon reinstating the plaintiff was a modification of the School Board’s attitude.

B. ADA Definitions

The ADA provides that: “No covered entity shall discriminate 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.”

The ADA defines “disability” as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment.” “Impairment is any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one of the body’s systems or any mental disorder.” A “qualified individual with a disability” is an:

individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

A reasonable accommodation is defined as including, but not limited to, the following:

36. Id.
38. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).
39. 29 C.F.R. § 1630.2(h).
(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.\(^{41}\)

The ADA further provides that an accommodation is not reasonable if it poses an "undue hardship."\(^{42}\) The Supreme Court recently held that an accommodation that would run afoul of the employer's seniority rules is generally an "undue hardship" and, therefore, not reasonable.\(^{43}\)

The statute also provides a number of defenses. Specifically, the ADA authorizes employers to utilize "qualification standards" which are job related and consistent with business necessity provided there is no reasonable accommodation of the qualification standard which would allow the individual to perform the job.\(^{44}\) These qualification standards can include a

\(^{42}\) The ADA defines an "undue hardship" as:
(A) In general. - The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
(B) Factors to be considered. - In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-
(i) the nature and cost of the accommodation needed under this chapter;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

\(^{44}\) 42 U.S.C. §12113(a). The ADA states:
(a) In general. - It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be jobrelated and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
requirement that the individual not pose a direct threat to the health and safety of themselves or others. In addition, an employer who can show that it attempted in good faith to provide a reasonable accommodation will not be liable for compensatory or punitive damages.

C. The EEOC Regulations

Under the ADA, Congress granted the EEOC the authority to promulgate regulations to carry out the employment provisions in Title I. The Supreme Court has stated, without deciding, that the EEOC does not have the authority to issue regulations defining the term "disability." The Court has not definitively held what deference, if any, is due the EEOC regulations on this point. The regulations do, however, provide the EEOC's position and are, as the statements of the agency charged with enforcing the ADA, somewhat persuasive.

The EEOC regulations provide an individual is "regarded as" being disabled if he or she:

(1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such a limitation;

46. 42 U.S.C. § 12113(b). The ADA states: (b) "Qualification standards. - The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Id.
47. 42 U.S.C. § 1981a(a)(3) provides:
Reasonable Accommodation and Good Faith Effort. - In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment;

(3) has none of the impairments defined in paragraph h(1) or h(2) of this section but is treated by a covered entity as having a substantially limiting impairment.\footnote{50}

The EEOC has issued regulations which provide guidance in determining whether an individual's impairment "substantially limits one or more major life activities."\footnote{51} According to the EEOC, "major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\footnote{52} The regulations provide that "substantially limited" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.\footnote{53}

The EEOC provided examples to illustrate employees who, it believed, would establish that their employer "regarded" them as disabled.\footnote{54} According to the EEOC, an employee who suffered "strabismus" or crossed eyes and is perceived, incorrectly, by their employer as being unable to see and, therefore, disqualified from a supervisory position would satisfy the first definition of "regarded as" disabled.\footnote{55} The EEOC explains that the employee, though suffering from no actual impairment, is nonetheless disabled by the employer's biases.\footnote{56} Further, an employee who has a facial scar, which the EEOC considers an impairment, and is rejected from a job as a sales person due to the employer's belief that the scar

\footnotesize{\begin{itemize}
\item \footnote{50. 29 C.F.R. § 1630.2(1).}
\item \footnote{51. 29 C.F.R. §§ 1630.2(h)-(j).}
\item \footnote{52. 29 C.F.R. § 1630.2(1).}
\item \footnote{53. 29 C.F.R. § 1630.2(j)(1).}
\item \footnote{54. See EEOC Enforcement Guidance, Section 902: Definition of the Term "Disability" March, 1995 at page 25 available at http://www.eeoc.gov/docs/902cm.html.}
\item \footnote{55. \textit{Id.}}
\item \footnote{56. \textit{Id.}}
\end{itemize}
would shock and repel customers satisfies the second definition of "regarded as" disabled. The EEOC reasons that the employee has an impairment that would not be substantially limiting in a major life activity but for the employer's negative attitudes. Finally, an individual who is rejected from employment because the employer incorrectly concludes that the employee suffers from the Human Immunodeficiency Virus satisfies the third definition of "regarded as" disabled. The EEOC argues that the applicant for employment, who suffers no impairment, is "disabled" under the ADA due to the employer's treatment of that individual.

The EEOC also issued "Interpretative Guidance on Title I of the Americans With Disabilities Act" soon after the Act was passed. In the guidance, the EEOC opined that Congress incorporated the "regarded as" definition of disability in light of the Supreme Court's decision in Arline. Thus the EEOC concluded that:

if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a legitimate non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

It is significant to note that none of the examples provided by the EEOC address the issue of reasonable accommodation. Rather, the EEOC is primarily concerned with those scenarios in which the employer acts unilaterally on the basis of its own biases. In these cases the only "accommodation" that would be required would be the education of the employer and reinstatement of the employee.

57. Id.
58. Id. The EEOC recently filed suit in Alabama against McDonald's Corporation on behalf of an employee who has a severe port wine stain which covers her entire face alleging that McDonald's refused to promote her to manager on the basis of its erroneous perception of her condition as substantially disabling. Id.
59. EEOC Enforcement Guidance, supra note 54.
60. Id.
61. 29 C.F.R. Part 1630 Appendix I.
63. Id.
D. Sutton v. United Airlines

In Sutton v. United Airlines, the Supreme Court addressed, *inter alia*, the “regarded as” portion of the definition of disability. In Sutton, twin sisters who suffered from severe myopia applied for jobs as airline pilots with United Airlines. Uncorrected, the sisters’ vision was 20/400 or worse. With correction, the sisters both had vision within the normal range. Based upon a United Airlines policy prohibiting individuals with myopia from becoming airline pilots, their applications for employment were rejected. They filed suit alleging that United Airlines discriminated against them because of their disability, myopia, and/or because United Airlines incorrectly regarded them as disabled because of their myopia. United Airlines moved, under Fed.R.Civ.P. 12(b)(6), to dismiss the case for failure to state a claim upon which relief could be granted. The District Court granted the motion and the Court of Appeals for the Eleventh Circuit affirmed. The Suttons appealed.

The Supreme Court held that the Suttons physical condition must be evaluated with reference to their corrected vision. Since, with glasses, both Suttons had normal vision, the Supreme Court held that they were not disabled within the meaning of the ADA. The Supreme Court then considered whether the Suttons had stated a claim that United Airlines unlawfully regarded them as disabled.

The Supreme Court stated that:

There are two apparent ways in which individuals may fall within [the statutory definition of “regarded as disabled”]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly be-

64. 527 U.S. 471 (1999).
65. Id. at 489-494.
66. Id. at 475.
67. Id.
68. Id.
69. Sutton, 527 U.S. at 476.
70. Id.
71. Id.
72. Id.
73. Id.
74. Sutton, 527 U.S. at 477.
75. Id. at 477-89.
76. Id. at 489.
lieves that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment one does not have or that one has a substantially limiting impairment when in fact the impairment is not so limiting.\textsuperscript{77}

The Supreme Court expressed doubt with regard to the authority of the EEOC to issue definitional regulations\textsuperscript{78} and, in fact, abandoned the definitions set forth in the regulations in favor of its own formulation which combined the first and second prongs of the EEOC’s definition and paraphrased the third.\textsuperscript{79} The Court then analyzed the Suttons’ claim that, because of their vision, United Airlines regarded them as substantially impaired in the major life activity of working.\textsuperscript{80} The Court noted that, since the parties had not disputed the EEOC’s regulations, it would assume, without deciding, that the EEOC regulations were reasonable.\textsuperscript{81} Pursuant to the regulations, the Court concluded that:

\begin{quote} 
[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.\textsuperscript{82} 
\end{quote}

The Court held that the Suttons’ allegations were insufficient to establish that United Airlines viewed them as incapable of performing any job other than global airline pilot.\textsuperscript{83} Thus, the Court held that the Suttons had failed to establish that United Airlines

\begin{itemize}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 479. The Court noted that “[n]o agency, however, has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term “disability” § 12102(2).” \textit{Id.}
\item \textsuperscript{79} \textit{See supra} section I.C.
\item \textsuperscript{80} \textit{Sutton}, 527 U.S. at 490. The Court noted that the petitioners had not made “the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing.” \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 492.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 493.
\end{itemize}
regarded them as substantially impaired in a broad range of jobs. Accordingly, the Court affirmed the lower court's dismissal of the Suttons' claims that United Airlines regarded them as disabled.

The Suttons did not ask United Airlines for an accommodation. Rather, they asked United Airlines to hire them despite their vision problems. Had the Suttons prevailed, United Airlines would have been required to modify its vision policy and hire them. No further accommodations would have been required.

II. STATUS OF THE LAW IN PENNSYLVANIA

The Court of Appeals for the Third Circuit has issued several opinions in the last few years which have raised the issue of whether accommodations are required for employees who are regarded as disabled. Although the Court of Appeals has held, in each instance, that the issue was not properly before it, the Court of Appeals has, nonetheless, provided substantial guidance to Pennsylvania employers and employees attempting, in good faith, to comply with the ADA.

A. Deane v. Pocono Medical Center

In Deane v. Pocono Medical Center, the Court of Appeals for the Third Circuit first identified, but failed to decide, the issue of whether or not a "regarded as" employee was entitled to an accommodation. In Deane the defendant, Pocono Medical Center ("PMC") refused to allow plaintiff Stacy L. Deane ("Deane") to return to her position as a registered nurse after she suffered a work related injury. PMC determined, after Deane advised them of her intent to return to work and her restrictions, that Deane could not perform her previous job and that there were no other jobs available for which she was qualified. Deane then filed suit in the United States District Court for the Eastern District of Pennsylvania alleging that PMC violated the ADA by terminating her either because of her actual disability or because of PMC's inaccurate perception of the severity of her impairment. The district

84. Id.
85. Id. at 494.
86. Id. at 475.
87. 142 F.3d 138 (3d cir. 1998) (en banc).
88. Id. at 140.
89. Id. at 141.
90. Id. at 144.
court concluded that Deane was not actually disabled. The district court also granted PMC's motion for summary judgment of Deane's claims that PMC regarded her as disabled on the basis that:

(1) PMC regarded Deane's impairment as limiting only her ability to work as a nurse on the surgical/medical floor, not her ability to work as a nurse in general; (2) Deane could not have been generally precluded from working in her field because, following her termination from PMC, she held two positions as a nurse; and (3) PMC's perception of Deane's impairment was not motivated by myth, fear or stereotype and, therefore was not actionable under the ADA.

On appeal, an en banc court reversed. The Court of Appeals held that there was a genuine issue of material fact as to whether PMC regarded Deane as disabled. First, with regard to the district court's conclusion that only those employer perceptions which are based upon myths, fears or stereotypes are actionable, the court stated:

Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC Regulations ... make clear that even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability...thus whether or not PMC was motivated by myth, fear or prejudice is not determinative of Deane's regarded as claim.

The Court of Appeals then dismissed the district court's reliance on Deane's subsequent employment by noting that her ability to perform as a nurse was not in question. Rather, the question was solely whether PMC incorrectly perceived her to be incapable of working as a nurse. With regard to the final point, the court

91. Id.
92. Deane, 142 F.3d at 144.
93. Id.
94. Id.
95. Id. at 144-45.
96. Id.
97. Deane, 143 F.3d at 144.
stated that there was "sufficient evidence to create a genuine issue of material fact as to whether PMC regarded [Deane] as substantially limited in the major life activity of working." This evidence included PMC officials attesting to "confusion as to the extent of Deane's physical capacity ... [and] evidence that PMC fundamentally misunderstood and exaggerated the limitations that the wrist injury imposed on Deane." There was also evidence that "PMC did not evaluate Deane, contact her physician or independently review her medical records."

With regard to whether Deane was a "qualified individual with a disability," the court analyzed whether Deane could perform the essential functions of the job, with or without accommodation. In this connection, the court examined the conflicting evidence with regard to whether heavy lifting was an essential function of Deane's job as a nurse. The court concluded that there was a genuine issue of material fact as to whether lifting was an essential function. Thus the Court of Appeals reversed and remanded for trial.

The majority opinion does not address whether a "regarded as" employee is entitled to an accommodation. In the majority's view, if lifting was not an essential function of Deane's job, then Deane would not be entitled to an accommodation of her lifting restriction. The court stated that: "In view of this conclusion, we need not reach the more difficult question addressed by the panel whether 'regarded as' disabled plaintiffs must be accommodated by their employers if they cannot perform the essential functions of their jobs." In a footnote the court provided, however, an extensive analysis of the arguments of both sides on this issue. With regard to Deane's position the court noted that Deane purported "that, as a matter of statutory interpretation, 'regarded as' plaintiffs are entitled to the same reasonable accommodations from their employers as are actually disabled plaintiffs." Deane claimed that this contention was supported by the Arline deci-
Deane further alleged that if reasonable accommodations are not provided for "regarded as" plaintiffs, the ADA would be ineffective in its purpose of "ferreting out disability discrimination in employment." This is because, following Deane's logic, the regarded as prong of the disability definition is premised upon the reality that 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.

The court summarized PMC's position, noting that "PMC initially stated that a 'regarded as' plaintiff's only disability is the employer's irrational response to her illusory condition." Thus there was no reason to reach any accommodations. PMC further stated that if Deane's interpretation of the ADA were to be adopted, both healthy employees and "legitimate 'regarded as'" employees could require employers to provide accommodations for them that were not provided for "similarly situation coworkers."

The court, while not directly deciding the issue, concluded that: acknowledge[d] the considerable force of PMC's argument, [but took] no position on the accommodation issue, and note that the EEOC has not taken an official position yet either...[The court] note[d], however, that if it turns out that a "regarded as" plaintiff who cannot perform the essential functions of her job is not entitled to accommodation (and therefore does not have to be reinstated), he or she need not necessarily be without remedy. The plaintiff still might be entitled to injunctive relief against future discrimination...to compensatory or punitive damages under 42 U.S.C. § 1981(a)...and/or counsel fees under 42 U.S.C. § 1988(b).

In its conclusion, the court implied that PMC's true error was not necessarily failing to accommodate Deane, but rather in failing to expend more effort in determining whether Deane was entitled to an accommodation. In the last line of the opinion the court stated that:

108. Deane, 143 F.3d at 148, n.12.
109. Id.
110. Id. at 149, n.12.
111. Id.
112. Id.
113. Deane, 142 F.3d at 149.
[w]hile it may turn out that a reasonable accommodation for Deane is impossible (or is not required because she is a "re-
garded as" plaintiff), nevertheless, an employer who fails to
engage in the interactive process runs a serious risk that it
will erroneously overlook an opportunity to accommodate a
statutorily disabled employee and thereby violate the ADA.\footnote{114}

The Honorable Morton I. Greenberg, in his dissent, concluded
that "this case is quite straightforward but somehow has become
complicated."\footnote{115} The dissent noted that the issue presented by the
case was simply "whether a person who is not actually disabled
can demand a reasonable accommodation from an employer."\footnote{116}
The dissent stated that "Congress did not pass the ADA to permit
persons without a disability to demand accommodation."\footnote{117} In the
dissent's view, it was critical that Deane asked for an accommo-
dation.\footnote{118} This was not, as the dissent stated, "a case in which the
employer perceived the employee to be disabled and then refused
to make the accommodation which it believed she needed."\footnote{119} Rather,
this was a case where PMC acted, not on its misperception of
Deane's condition, but on Deane's own characterization of her
condition.\footnote{120} Thus, "even if PMC regarded her as more disabled
than she actually was, this misperception does not matter for she
is not entitled to any accommodation."\footnote{121}

B. Taylor v. Pathmark\footnote{122}

A year after the Court of Appeals for the Third Circuit con-
cluded PMC did too little to determine the extent of its employee's
impairment, it determined that Pathmark Stores perhaps did too
much. \textit{In Taylor v. Pathmark}\footnote{123} the court reaffirmed that:

To successfully claim that he was wrongly regarded as dis-
abled from working, a plaintiff need not be the victim of neg-
ligence or malice; an employer's innocent mistake (which may

\begin{footnotes}
\item[114] Id. (quoting Megine v. Runyon, 114 F.3d 415, 420-421 (3d Cir. 1997)).
\item[115] Deane, 142 F.3d at 150 (Greenberg, J., Dissenting).
\item[116] Id.
\item[117] Id.
\item[118] Id.
\item[119] Id.
\item[120] Id.
\item[121] Id.
\item[122] Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999).
\item[123] Id. at 182.
\end{footnotes}
be a function of "goofs" or miscommunications) is sufficient to subject it to liability under the ADA...although the employer's state of mind is clearly relevant to the appropriate remedies.\textsuperscript{124}

The court recognized, however, "a limited defense of reasonable mistake where the employee is responsible for the employer's erroneous perception and the employer's perception is not based on stereotypes about disability."\textsuperscript{125}

In Taylor, defendant Pathmark Stores, Inc. ("Pathmark") hired the plaintiff Joseph B. Taylor ("Taylor") in 1981.\textsuperscript{126} In December of 1991, while working as a Frozen Foods Manager, Taylor slipped and sprained his right ankle.\textsuperscript{127} Thereafter, in January 1992, plaintiff aggravated his injury when he fell down a flight of stairs.\textsuperscript{128} He did not return to work until November of 1992.\textsuperscript{129} At that time, Pathmark advised Taylor that his previous position had been filled.\textsuperscript{130} Pathmark provided Taylor with a number of light duty positions as an accommodation from November of 1992 until April of 1994.\textsuperscript{131} At this juncture, Taylor's manager asked him to provide an updated doctor's note detailing his restrictions.\textsuperscript{132} Taylor provided the requested note from his family physician.\textsuperscript{133} Contemporaneously, for reasons that are unclear, Pathmark's corporate office requested an update on Taylor's condition from Taylor's orthopedic surgeon.\textsuperscript{134} This doctor opined that, since he had not seen Taylor in several months, his condition must have improved.\textsuperscript{135}

Based upon the note from the orthopedic surgeon, Taylor's manager required him to work a full shift at the cash register.\textsuperscript{136} Taylor did not feel he could do so without a stool or breaks and left the building.\textsuperscript{137} Thereafter, Taylor was made aware of the incon-

\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 183.
\textsuperscript{127} Taylor, 177 F.3d at 183.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Taylor, 177 F.3d at 183.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Taylor, 177 F.3d at 183.
sistent medical information regarding his condition and sought a new evaluation from the orthopedic surgeon who, after examining Taylor, agreed that he continued to have restrictions and work limitations.\textsuperscript{138} In addition to this information, Pathmark required Taylor to be examined by another doctor in September of 1994.\textsuperscript{139} This doctor, an orthopedic surgeon, advised Pathmark's counsel that Taylor could work with restrictions.\textsuperscript{140} Pathmark did not return Taylor to work and took no action for another year.\textsuperscript{141} Thereafter, in September of 1995, Pathmark's ADA committee sent Taylor's family doctor a questionnaire regarding Taylor's restrictions.\textsuperscript{142} The doctor advised Pathmark that Taylor was suffering from an aggravation of his ankle injury and was temporarily subject to increased work restrictions.\textsuperscript{143} Taylor advised Pathmark in December of 1995 that these temporary restrictions had been lifted and he was released to return to work under the limitations he had prior to April of 1994.\textsuperscript{144} Pathmark terminated Taylor due to his inability to work by letter dated May 13, 1996.\textsuperscript{145} Upon receipt of this letter, Taylor asked that his family doctor advise Pathmark of his improved condition.\textsuperscript{146} His physician did so in June of 1996.\textsuperscript{147} Pathmark did not reinstate Taylor, despite the fact that it realized that its decision to terminate Taylor on the basis of his physical condition was mistaken.\textsuperscript{148} Taylor then brought suit alleging that Pathmark discriminated against him on the basis of his disability or, in the alternative, that Pathmark wrongly regarded him as disabled.\textsuperscript{149} "After Taylor had presented his evidence at trial, the district court granted summary judgment to Pathmark."\textsuperscript{150} Taylor appealed. The Court of Appeals affirmed the district court's conclusion that Taylor was not actually disabled.\textsuperscript{151} The Court of Appeals reversed the district court's conclu-
sion that Pathmark did not regard Taylor as disabled and remanded for a new trial.\textsuperscript{152}

The appeals court concluded that Pathmark may have violated the ADA as a result of its mistaken perception of his actual condition.\textsuperscript{153} Reasoning that since the employer's mistake resulted, at least in part, from the incorrect information provided to it by an agent of the employee, the court found that liability may be avoided.\textsuperscript{154} The court did not address the question of whether accommodation would have been required, reserving that question for the district court.

Significantly, the court announced a new "limited reasonability defense." The court noted that:

\textit{Deane} announced our conclusion that employer mistakes can lead to "regarded as" liability. The question then becomes: what limits, if any, are there to this principle? There are no clear answers in our precedent, the statute, the legislative history or the EEOC's interpretive guidelines. We must, however, answer the question to resolve this case. We believe that guidance can be found in the general logic of the ADA, which requires an interactive relationship between the employer and employee and concomitantly requires an individual evaluation of employees' impairments.

While prejudice is not required, we recognize that the ADA has as a major purpose the protection of individuals who are subject to stereotypes about their abilities. An employer who regards a kind of impairment—epilepsy for example—as disqualifying all people affected by the impairment for a wide range of jobs is thus not entitled to a defense of reasonable mistake; under the ADA, it is the employer's burden to educate itself about the varying nature of impairments and to make individualized determinations about affected employees.\textsuperscript{155}

The court concluded that:

The limited exception to liability for mistakes can be expressed as follows: If an employer regards plaintiff as dis-

\begin{footnotesize}
\begin{enumerate}
\item Taylor, 177 F.3d. at 192.
\item Id.
\item Id. at 192.
\item Id.
\end{enumerate}
\end{footnotesize}
Is Ignorance Bliss?

abled based on a mistake in an individualized determination of the employee's actual condition rather than on a belief about the effects of the kind of impairment the employer regarded the employee as having, then the employer will have a defense if the employee unreasonably failed to inform the employer of the actual situation.156

Put another way, if an employer acted on myths, fears and stereotypes, there would be an ADA violation and no limited reasonability defense. In this instance, the employer would essentially view the employee as disabled and refuse to provide an accommodation. The court could have additionally noted that additional support for the “limited reasonability defense” could be found in the ADA’s elimination of compensatory and punitive damages for employers who attempt, in good faith, to provide a reasonable accommodation.157 Additional support for the “limited reasonability defense” is also found in ADA’s elimination of compensatory and punitive damages for employers who attempt, in good faith, to provide a reasonable accommodation.158

C. Buskirk v. Apollo Metals, Inc.159

In Buskirk v. Apollo Metals, Inc.,160 the Court of Appeals for the Third Circuit revisited the issue of whether an employer is required to provide an accommodation to a “regarded as” plaintiff.161 William Buskirk (“Buskirk”) sued Apollo Metals, Inc., (“Apollo”) claiming that they discriminated against him in violation of the ADA by regarding him as disabled, refusing to accommodate him, and ultimately terminating him.162 Buskirk held a number of different jobs during his employment with Apollo.163 In February 1996, when Buskirk suffered a work related back injury, he was employed as a box maker.164 He was off work for several months and then returned to a light duty position.165 Thereafter, Buskirk

156. Id. at 193.
159. 307 F.3d 160 (3d Cir. 2002).
160. Id.
161. Id. at 162
162. Id.
163. Id. at 163
164. Buskirk, 307 F.3d at 163.
165. Id.
was advised by his physicians to cease working to rest his back.\textsuperscript{166} He did so from June of 1996 to October of 1996.\textsuperscript{167} During this period he collected partial workers' compensation benefits. Buskirk returned to work at Apollo in a light duty position.\textsuperscript{168}

In June of 1997, Apollo advised Buskirk that he was terminated.\textsuperscript{169} Apollo explained that, in its view, Buskirk could not perform the job of box maker, with or without accommodation.\textsuperscript{170} Apollo further advised Buskirk that, based upon their review of his medical documentation, it appeared that his condition would permanently prevent him from returning to the box maker position.\textsuperscript{171} Apollo concluded that, since no other vacant positions were available which would accommodate his physical limitations, their only alternative was to terminate him.\textsuperscript{172} Buskirk filed suit alleging that Apollo's termination of his employment violated both the ADA and the PHRA.\textsuperscript{173}

In \textit{Buskirk}, the court observed that: "[t]he Supreme Court recently has stated that the primary purpose of the ADA is to 'diminish or 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.'"\textsuperscript{174} The court then articulated the test for determining whether plaintiff has established a prima facie case of disability discrimination. The court stated that "a plaintiff must establish that s/he (1) has a 'disability'; (2) is a 'qualified individual'; and (3) has suffered an adverse employment action because of that disability."\textsuperscript{175}

The court held that Buskirk had adduced sufficient evidence to conclude that Apollo perceived him to be disabled and had, thus, satisfied the first prong of the analysis.\textsuperscript{176} The court then turned its attention to whether Buskirk was a "qualified individual."\textsuperscript{177} This inquiry necessarily raised the issue of whether he could perform the essential functions of the job, with or without accommo-
After noting that several courts of appeal had addressed the issue of whether accommodation is required for employees who are "regarded as" disabled, and that the Court of Appeals for the Third Circuit had not decided the issue in either Deane or Taylor, the court held it need not reach the issue since Apollo had accommodated Buskirk. The court also noted that, although not raised by Apollo, the "direct threat" defense may have been available. The court concluded that, by providing a number of light duty assignments, medical leaves of absence and, ultimately, placing him in a position for which he was qualified, no jury could conclude that Apollo failed to accommodate Buskirk. The court did not, however, express an opinion as to whether Apollo's Herculean efforts were, in fact, required by the ADA.

III. CONCLUSION

The "regarded as" definition of "disability" in the ADA was enacted in order to combat the myths, fears and stereotypes of society regarding certain impairments. As the Supreme Court noted in Sutton, in order to state a "regarded as" claim, the employee must prove that the employer either incorrectly believed the employee had a substantially limiting impairment or that the employer incorrectly believed that the limiting impairment the employee had was substantial. In either instance, misperception on the part of the employer as to the employee's true condition is required. But neither instance could occur if the employee had requested an accommodation. If an employee requested an accommodation, the employer would be acting not on its own biases or fears, but on the basis of an employee's request. Deane, Taylor and Buskirk caution employers to act only after engaging in the individualized inquiry the ADA requires. It follows that any employer who does so will be acting on the basis of its good faith analysis of whether the employee's condition is protected by the ADA. Accordingly, an employer who denies a requested accommodation after thoroughly analyzing the employee's condition and job functions does not "regard" the employee as dis-

178. Id.
180. Id.
181. Id.
182. Id.
abled. Rather, the employer "regards" the employee as not disabled. Under these circumstances, according to the Court of Appeals for the Third Circuit, there is no ADA liability. I would recommend that the Court of Appeals provide more certainty in the employment relationship by extending its analysis to definitively hold that there is no ADA cause of action for failure to accommodate an employee who is "regarded as" disabled. The only "accommodation" that a "regarded as" disabled employee requires or is entitled to under the ADA is their employer's education.

To do so would simply be to give full effect to the intent of the "regarded as" prong of the ADA, namely, to combat the disabling nature of discriminatory attitudes. To hold otherwise would increase the likelihood that a Pennsylvania employer would deny a request for accommodation immediately without further inquiry since any decision to deny the accommodation on the basis the employee was not actually disabled may lead to a claim that the employer "regarded" the employee as disabled. By clarifying this issue the Court of Appeals for the Third Circuit will provide a definitive answer to Pennsylvania employers and employees as to whether, in the context of reasonable accommodations under the ADA, ignorance is actionable, or is bliss.