“REGARDED AS DISABLED” CLAIMS UNDER THE ADA: SAFETY NET OR CATCH-ALL?

Risa M. Mish†

The Americans with Disabilities Act (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.”1 The ADA defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”2 In order to establish a claim under the ADA, a plaintiff must demonstrate that she: (1) is a disabled person within the meaning of the ADA; (2) is qualified to perform the essential functions of her job either with or without reasonable accommodation; and (3) was discriminated against because of her alleged disability.3

To meet the first prong of this prima facie case—that is, to demonstrate that one is a disabled person within the meaning of the ADA—a plaintiff must show either that she: (1) has a physical impairment that substantially limits one or more her major life activities; or (2) has a record of such an impairment; or (3) is “regarded as having such an impairment.”4 This last test, known as the “regarded as disabled” test, is a particularly interesting facet of the ADA. The test focuses less on the extent of an individual’s actual impairment and more on how others perceive the individual, as well as the effect of those perceptions on the attitudes toward, and assumptions about, the individual’s abilities.

The ADA regulations provide that an individual is “regarded as

† Risa M. Mish is a partner in the law firm of Collazo Carling & Mish LLP in New York. The firm’s practice is devoted to the representation of employers in all areas of labor and employment law. The author gratefully acknowledges the assistance of Stanley L. Meyer, an associate at the firm, in preparing this article.

1. 42 U.S.C. § 12112(a).
2. 42 U.S.C. § 12111(8).
3. See, e.g., Siemon v. AT&T Corp., 117 F.3d 1173, 1175 (10th Cir. 1997) (delineating what a plaintiff must establish to go forward with a claim under the ADA).
disabled” if she: (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) has none of the impairments specified in the ADA subsection, but is treated by an employer as having a substantially limiting impairment. Therefore, an individual will be “regarded as disabled” when others behave toward that individual as if she had a substantially limiting impairment, regardless of whether the individual actually has such an impairment.

The “regarded as disabled” provision, which is derived from similar language in the ADA’s precursor statute, the Rehabilitation Act of 1973, was intended by Congress to provide relief to individuals who are discriminated against because of the “myths, fears, and stereotypes associated with disabilities.” In short, the “regarded as disabled” provision was designed as a safety net for the individual who, though not in fact disabled from performing a particular job, was nevertheless discriminated against based upon the erroneous assumptions of others about such individual’s ability to perform that job.

The legislative history of this provision, though scant, provides two examples of individuals who would be considered “regarded as disabled,” and therefore entitled to ADA protection: (1) a severe burn victim who is denied employment based on the employer’s personal discomfort with disfigurement; and (2) an individual whose pre-employment physical reveals a back anomaly, and who is denied employment despite the absence of any symptoms of actual back impairment because of the employer’s fear of injury and increased insurance or workers’ compensation costs.

Significantly, neither example offered by Congress includes an employee who is not only perceived as disabled, but is also in fact unable to perform the essential functions of the job in question. To the contrary, the legislative history specifically notes that the phrase “essential functions” is included within the definition of “qualified individual with a disability” in order to “ensure that employers can continue to require that

5. 29 C.F.R. § 1630.2(h)(1)-(3).
6. See, e.g., Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (stating that the focus is on the impairment’s effect upon the attitudes of others).
all applicants and employees, including those with disabilities, are able to perform the essential... functions of the job in question.” Both the legislative history and the actual language of the ADA make clear that the “regarded as disabled” provision is intended to benefit only those employees erroneously perceived to be disabled, and who are in fact fully able to perform the essential functions of that job.

In practice, however, this safety-net provision of the ADA is sometimes used as a sort of “catch-all” for purported disability discrimination claims that would otherwise be dismissed for failure to meet the definition of a “qualified individual with a disability.” Specifically, plaintiffs who are unable to demonstrate that they have an impairment substantially limiting a major life activity, and that they are able to perform the essential functions of the position from which they are excluded, nevertheless argue that they are entitled to ADA protection because an employer “regarded” them as disabled. Even more troubling, these would-be ADA plaintiffs are relying (sometimes successfully) on legitimate, business-related actions by employers—such as having prospective employees undergo post-offer, pre-employment physicals to confirm the employees’ ability to perform essential job functions, or referring problem employees to Employee Assistance Programs—to support “regarded as disabled” claims.

This article examines in detail two recent cases in which courts permitted ADA plaintiffs to proceed to trial. In both cases, the “evidence” proffered by the plaintiffs to support a “regarded as disabled” claim relied on a challenge to legitimate, business-related employer actions. In both cases, the court seemingly disregarded the plaintiffs’ obligation to demonstrate that they were “otherwise qualified” to perform the jobs from which they allegedly were discriminatorily excluded. These cases illustrate the chief perils of reading the “regarded as disabled” prong too broadly: impeding an employer’s ability to conduct legitimate workplace inquiries and interfering with employer actions designed to ensure that employees comply with work rules and are able to perform the jobs for which they are hired.

I. **EEOC v. Joslyn Manufacturing Co.**

In *EEOC v. Joslyn Manufacturing Co.*, the EEOC alleged that defendant Joslyn Manufacturing Company (“Joslyn”) violated the ADA when it failed to hire an individual named Aaron Cruz for a position as a punch press operator because, *inter alia,* the company regarded Mr. Cruz

12. The EEOC contended alternatively that Joslyn violated the ADA by failing to hire
as disabled. Before applying to work at Joslyn, Mr. Cruz had worked in various capacities at Oscar Mayer Company. During his employment at Oscar Mayer, Mr. Cruz began suffering from carpal tunnel syndrome. Mr. Cruz's condition ultimately required surgery, which led him to file for workers' compensation benefits.

In connection with his application for benefits, Mr. Cruz was examined by two different physicians, who noted his complaints of soreness and stiffness in his hands, as well as numbness or tingling in his fingers. One of the physicians concluded that Mr. Cruz's carpal tunnel injury had resulted in "substantial industrial loss to his right hand and a moderate industrial loss to his left hand." Cruz received a "lump sum payment of approximately $15,000 for a percentage loss of his wrists or hands."

One month after this medical examination, Cruz applied for the position of punch press operator at Joslyn. The position required Cruz to take a part from a box at waist level, insert it into a die located six to eight inches higher, cycle the press, remove the part, and throw the part into another box. This procedure constituted the essential function of the punch press operator position.

In connection with his application for employment at Joslyn, Cruz was given a tour of the facilities, including the punch press room. Cruz told the Joslyn managers that he could operate the punch press. In addition, Cruz received a copy of Joslyn's job description for the punch press operator position and signed a certification stating that he was capable of performing the job as described. Joslyn representatives told Cruz that, in the event he was offered the position, he would be required to undergo a post-offer, pre-employment medical examination. Cruz agreed.

After reviewing Cruz's application and the results of his interviews with various Joslyn personnel, Joslyn offered Cruz the punch press operator position. Cruz then arranged for the required post-offer medical examination. At the medical examination, Cruz completed a medical history form on which he indicated that he had undergone surgery for carpal tunnel syndrome. The physician reviewing the medical history form and conducting the examination had, coincidentally, worked as a punch

Mr. Cruz because of his "record of disability." Id. at *1. Although the court denied Joslyn's summary judgment motion on this basis, the "record of disability" analysis is beyond the scope of this article and will not, therefore, be discussed herein.

13. See id.
14. See id. at *4.
15. Id. at * 5.
16. Id.
17. See id. at *5-6.
18. Id. at *7.
press operator during college, and so was personally familiar with the physical demands of the position. The physician conducted range-of-motion and muscle-strength tests on Cruz which caused Cruz to feel tingling and numbness in his fingertips.  

Based on the examination, the physician documented on Cruz’s work-status discharge sheet a recommendation that Cruz not work in a position involving “repetitive motions of bilateral hands.” Due to the physician’s recommendation and the fact that the punch press operator position required repetitive bilateral hand movements, Joslyn withdrew its offer of employment to Cruz.

In analyzing Joslyn’s motion for summary judgment on the ADA “regarded as disabled” claim, the court correctly acknowledged that Cruz’s failure to qualify for the position of punch press operator could not, by itself, establish that he was a disabled person within the meaning of the ADA because “[a]n employer does not necessarily regard an employee as disabled simply by finding the employee incapable of satisfying the singular demands of a particular job.” The court then stated, however, that “the proper test [to determine whether an employer regards an employee as disabled] is whether the impairment, as perceived, would affect the individual’s ability to find work across a class of jobs or a broad range of jobs in various classes.”

The court went on to conclude that the EEOC had presented sufficient evidence that Cruz’s impairment, as “perceived” by Joslyn, affected Cruz’s ability to find work across a class of jobs. The court based this conclusion on three factors: (1) Cruz’s “educational and employment background demonstrate a capacity for low and semi-skilled work, but not jobs that require a college education or any type of professional training”; (2) Cruz’s “perceived impairment” disqualified him from seven other positions at Joslyn; and (3) Cruz’s “perceived impairment” disqualified him from the job that he formerly held at Oscar Mayer.

In reaching this conclusion, the court erred in several key respects. First, the court incorrectly relied on evidence (or, more accurately, suppositions) about how other employers might treat Cruz’s impairment. Specifically, the court hypothesized about how a past employer, Oscar Mayer, would have treated Cruz’s impairment. The court also assumed that, given Cruz’s lack of education and broad employment experience, his

---

19. See id. at *7-8.
20. Id. at *9.
21. Id. at *17 (citing 29 C.F.R. § 1630.2(j)(3)(i)); see also Wooten, 58 F.3d 382 at 386; Welsh v. City of Tulsa, Okla., 977 F.2d 1415, 1417 (10th Cir. 1992); Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986)).
23. See id. at *19.
impairment would affect future employers. The perceptions of employers other than the defendant, however, should have been irrelevant to the “regarded as disabled” analysis.

Indeed, one of the very cases on which the Joslyn court purported to rely, Cook v. Rhode Island Dep’t of Mental Health,\(^{24}\) makes clear that the perception of other, or future, employers should be irrelevant to the “regarded as disabled” analysis. In Cook, which was brought under the Rehabilitation Act, the plaintiff-applicant was excluded from a position at a mental health facility based on the employer’s perception that the applicant’s morbid obesity made her unfit to work as an institutional attendant for the mentally retarded. The employer argued that the applicant could not proceed with a “regarded as disabled” claim because she had not demonstrated that her condition precluded her from employment other than the position she sought. The court rejected this argument, explaining that the statute

simply does not condition such claims on either the quantum of a plaintiff’s application efforts or on her prospects of finding other employment. By way of illustration, suit can be brought against a warehouse operator who refuses to hire all turquoise-eyed applicants solely because he believes that people with such coloring are universally incapable of lifting large crates, notwithstanding that other warehousemen might hire the applicants.\(^{25}\)

Similarly, in Sutton v. United Air Lines, Inc.,\(^{26}\) the court affirmed dismissal of “regarded as disabled” claims brought under the ADA by two applicants for pilot positions at United Air Lines. The applicants were denied employment based on the airline’s requirement that pilots have 20/100 uncorrected vision. In assessing the airline’s reason for disqualifying the applicants, the court explained:

We are concerned with whether United regards Plaintiffs as “disabled,” not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as “substantially limited” in a major life activity. It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters.\(^ {27}\)

In addition to incorrectly basing its “regarded as disabled” conclusion on the supposed perceptions or practices of other employers, the Joslyn court erred in its analysis of whether Cruz’s impairment “substantially

\(^{24}\) 10 F.3d 17 (1st Cir. 1993).

\(^{25}\) Id. at 25-26 (emphasis added).

\(^{26}\) No. 96-1481, 1997 U.S. App. LEXIS 33608, at *40 (10th Cir. Nov. 26, 1997).

\(^{27}\) Id. at *31 (emphasis added).
limited” him in the major life activity of working. Cruz could not demonstrate that he was “regarded as disabled” unless he could show that his impairment, or perceived impairment, “substantially limited” him in the performance of a major life activity. 28 The EEOC argued that Cruz’s perceived disability “substantially limited” his ability to work because it significantly restricted his ability to perform either “a class of jobs or a broad range of jobs in various classes” as compared to the average person with comparable training, skills and abilities. 29 The Joslyn court agreed. 30

However, the ADA regulations define a “class of jobs” as “[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment.” 31 In Joslyn, the defendant introduced evidence, unrebutted by the EEOC or Cruz, that at least fourteen other diverse types of jobs existed at Joslyn that utilized similar training, skill or abilities, did not require repetitive hand movements, and from which Cruz’s impairment would not have disqualified him. 32 The court disregarded this evidence, finding instead that the EEOC had satisfied a “minimal” burden of raising a genuine issue of fact as to whether Cruz’s impairment substantially limited him by asserting that seven other jobs required the type of hand movement from which Cruz was restricted. These seven jobs were all variations on the machine operator position for which Cruz applied. 33

This narrow analysis, however, does not suffice as a matter of law to satisfy the “substantially limited” requirement. Other courts examining this issue have consistently refused to find that plaintiffs were “substantially limited” in the major life activity of working where evidence was presented that, notwithstanding plaintiffs’ physical impairments, they were qualified to perform the essential functions of other jobs. For example, in McKay v. Toyota Motor Manufacturing, U.S.A., Inc., 34 the plaintiff, an employee in the company’s body-weld division, was fired after her symptoms of carpal tunnel syndrome were shown to prevent her from performing the repetitive motions required of her position and to cause her to be absent from work. The EEOC, as in Joslyn, argued that the plaintiff was “substantially limited” in the major life activity of working because her carpal tunnel syndrome disqualified her “from performing any

29. Id. at *16.
30. See id. at *20-21.
31. 29 C.F.R. § 1630.2(j)(3)(i).
33. See id. at *22.
34. 110 F.3d 369 (6th Cir.), reh’g en banc denied, 110 F.3d 369 (May 12, 1997).
manual labor exceeding light duty.\textsuperscript{35} The court, however, rejected this argument, holding instead that

the physical restrictions caused by plaintiff's disability do not significantly restrict her ability to perform the class of jobs at issue, manufacturing jobs; at best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than ten pounds. It follows that her limited impairment would not significantly restrict her ability to perform a broad range of jobs in various classes.\textsuperscript{36}

The *Joslyn* court likewise should have found that Cruz was not "substantially limited" in the major life activity of working because, even if he was unable to perform punch press operator and other machine-operator positions, Cruz was still able to perform many other jobs, at Joslyn and elsewhere, that did not require repetitive hand motion. Instead, the *Joslyn* court incorrectly allowed the ADA claim to proceed, based on the narrow "evidence" that Cruz was restricted from performing the job for which he applied and a handful of other nearly identical jobs at Joslyn.

The most serious error made by the *Joslyn* court, however, was that it performed its "regarded as disabled" analysis without first determining whether Cruz's undisputed physical impairment actually disqualified him from performing the essential functions of the job for which he applied. Indeed, regardless of whether Cruz's carpal tunnel syndrome might have precluded him from performing 10, 100, or 1,000 other jobs, if his medical condition precluded him from being able to perform the essential functions

\begin{footnotes}
35. *Id.* at 373.

36. *Id.*; see also *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 336 (5th Cir. 1997) (plaintiff with carpal tunnel syndrome was not "substantially limited" in the major life activity of working because she was able to perform a different job at the same plant that did not entail repetitive hand motions); *Ouzts v. USAir, Inc.*, No. 94-625, 1996 U.S. Dist. LEXIS 11610 (W.D. Pa. July 26, 1996), *aff'd*, 118 F.3d 1577 (3d Cir. 1997) (dismissing ADA claims by plaintiffs whose carpal tunnel syndrome prevented them from performing their original jobs and holding that plaintiffs were not "substantially limited" in their ability to work because they were able to perform other jobs at the airline and at least one of the plaintiffs had actually worked in another industry); *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995) ("impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one"); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (evidence showing inability to perform certain physical jobs failed to establish inability to work generally); *Soileu v. Guilford of Me.*, Inc., 928 F.Supp. 37, 49 (D. Me. 1996), *aff'd*, 105 F.3d 12 (1st Cir. 1997) (plaintiff who is capable of performing other jobs "is not substantially limited in his ability to work and thus not disabled under the ADA"); *Kohnke v. Delta Air Lines, Inc.*, No. 93C7096, 1995 WL 505973, at *4 (N.D. Ill. 1995) (in order to be "substantially limited" in the major life activity of working, "an ADA plaintiff must be precluded from working generally").
\end{footnotes}
of the actual job for which he applied at Joslyn, he was not a “qualified individual with a disability” within the meaning of the ADA and, therefore, not entitled to proceed with an ADA claim against Joslyn. When the court instead focused its attention on the extent to which the plaintiff’s condition might limit his alternate job prospects, the court glossed over the linchpin of ADA analysis; that is, whether the plaintiff was a “qualified individual with a disability.”

The Joslyn court cited Cook v. State of Rhode Island in support of its decision, which actually underscores the error of its analysis. In Cook, an employer barred an applicant from a position as institutional attendant for the mentally retarded (IA-MR) based solely on the fact that the applicant was “morbidly obese.” However, in contrast to the facts of Joslyn, the employer’s own pre-employment physical examination of the applicant resulted in a satisfactory report which “found no limitations that impinged upon her ability to do the job.” Moreover, the IA-MR position for which the applicant applied “did not demand any elevated level of mobility, lifting ability, size or stature.” Notwithstanding this evaluation, and the fact that the applicant had worked for the employer previously as an IA-MR without any difficulty, the employer refused to hire the applicant based on the employer’s speculation that the applicant’s weight would “promote absenteeism and increase the likelihood of workers’ compensation claims.”

Cook is a textbook case of “regarded as disabled” discrimination. In Cook, the employer rejected an otherwise qualified applicant based solely on the employer’s unwarranted assumption that an overweight employee would be absent and injured more frequently than an employee of average weight. By contrast, Joslyn’s rejection of Cruz was based neither on “assumptions” about Cruz’s ability to do the punch press operator job nor on the potential effects of his carpal tunnel syndrome on attendance or insurance claims. Rather, Joslyn rejected Cruz because of a medical recommendation that Cruz not work in a job that entailed repetitive bilateral hand movements—such as the one for which he applied. Under these circumstances, Cruz never should have reached “first base” in an ADA lawsuit because he could not satisfy the basic prerequisite of ADA protection: a showing that he was able to perform the essential functions of the job from which he was excluded.

For example, in Dimond v. J.C. Penney Co., the court dismissed an

38. See Cook v. State of Rhode Island, 10 F.3d 17, 21 (1st Cir. 1993).
39. Id. at 20-21.
40. Id. at 27.
41. Id. at 21.
ADA complaint filed by an employee who was terminated from employment as a customer service representative after being diagnosed with carpal tunnel syndrome. A medical examination of the plaintiff resulted in a recommendation that he not use "his hands on a keyboard or do[] any other type of repetitive motion work." However, keying data into a computer was one of the essential functions of the plaintiff's job. Therefore, the court dismissed the plaintiff's ADA claim, explaining that the plaintiff was not a "'qualified' individual with a disability" because he was unable to perform the essential functions of the position from which he was terminated. Similarly, the Joslyn court should have concluded that Cruz was not "otherwise qualified" within the meaning of the ADA because he was physically unable to perform the essential functions of the position from which he was excluded, and therefore, a prima facie case of disability discrimination could not be established.

In addition, the Joslyn court should have rejected the "regarded as disabled" claim because the employer did not rely on "myths" regarding the abilities of persons with Cruz's medical condition. Rather, the employer based its decision on a physician's assessment that Cruz should not perform the type of job for which he had originally been hired. Other courts have applied this reasoning. For example, in Wooten v. Farmland Foods, the court affirmed the dismissal of an ADA "regarded as disabled" claim because the employer, in making the challenged termination decision, relied upon information supplied by the employee's physician regarding the employee's alleged medical restrictions.

In Wooten, the plaintiff was employed as a ham boner in a meat-packing facility. Six months after returning from a two-week absence, the plaintiff submitted a physician's note which stated that the plaintiff had carpal tunnel syndrome and was restricted to "light duty—no work with meat products—no work in cold environment—lifting 10 lbs. frequently 20 lbs. maximum." No positions were available at the plant to accommodate these restrictions; accordingly, the employer terminated the plaintiff's employment.

The plaintiff brought suit under the ADA, arguing that he was either disabled or regarded as such by the employer. However, in affirming the dismissal of the plaintiff's "regarded as disabled" claim, the court

43. Id. at *6-7.
44. Id. at *10; see also Garcia-Paz v. Swift Textiles, 873 F. Supp. 547, 556 (D. Kan. 1995) (dismissing "regarded as disabled" claim after concluding that plaintiff could not perform the essential functions of her job and "holding as a matter of law that plaintiff is not a 'qualified individual with a disability'" protected by the ADA).
45. See Wooten, 58 F.3d at 382.
46. See id. at 386.
47. Id. at 384.
explained that "[t]he evidence bearing on Farmland Foods' perception of Wooten's impairment indicates that its perception was not based upon speculation, stereotype, or myth, but upon a doctor's written restriction of Wooten's physical abilities." 48

The Wooten court's reading of the ADA's "regarded as disabled" provision appropriately focused on the source of the employer's perception regarding the extent and significance of the plaintiff's physical limitations. Where the employer's "perception" is the result of information obtained from a medical practitioner who has examined the plaintiff and is stating the extent of the plaintiff's actual impairment and restrictions, the employer does not unlawfully discriminate against the plaintiff based on mythical or stereotypical assumptions; rather, the employer acts on the basis of a legitimate, job-related assessment of the employee's ability to perform essential job functions. Under these circumstances, "regarded as disabled" liability ought not to follow unless the plaintiff comes forward with evidence of discriminatory animus, such as disparaging comments or disparate treatment. Indeed, such a reading is fully supported by the legislative history of this provision. 49

By contrast, adoption of the Joslyn reasoning essentially would nullify the post-offer, pre-employment physical, which is a legitimate exercise by employers to determine whether applicants are in fact able to perform the jobs for which they are hired. Under Joslyn, an employer is discouraged from relying in good faith on the results of a post-offer physical examination to deny employment if the discovered impairment would also preclude the applicant from working at other jobs. Such a result was clearly not intended by Congress when it enacted the ADA. The statute expressly permits employers to conduct post-offer, pre-employment medical examinations where such examinations are conducted on all entering employees in the applicant's job category and the information is used to determine an employee's fitness to perform essential job functions. 50

Instead of the approach adopted by the Joslyn court, courts should decline to find "regarded as disabled" liability where the challenged employment decision is based upon medical restrictions revealed in post-offer, pre-employment physicals, and where such restrictions go to the

48. Id. at 386.
49. See H.R. Rep. No. 101-485(III), at 30-31 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 453 ("[I]f a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate, job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the 'regarded as' test.") (emphasis added).
50. See 29 C.F.R. § 1630.14(b).
essential functions of the position sought by the applicant. In such cases, the courts should hold that the plaintiff is not a "qualified individual with a disability" and thus cannot establish a prima facie case of disability discrimination under the ADA.

II. HOLIHAN V. LUCKY STORES, INC.

Another example of how the "regarded as disabled" provision can be read too broadly, and thus be misused, is presented by Holihan v. Lucky Stores, Inc.51 In Holihan, the plaintiff was an employee who had worked as a store manager for the Lucky’s chain of supermarkets for sixteen years without incident. Beginning in 1992, however, Lucky’s began to receive numerous complaints from employees who charged the plaintiff with "hostility and abusiveness, including manhandling, berating and threatening employees." As a result of these complaints, a meeting was convened with the plaintiff and his district manager and supervisor. At this meeting, the supervisor asked the plaintiff to explain these incidents, and inquired if the plaintiff was having any "problems" with which the company could assist. The plaintiff denied the complaints, and denied that he had any problems. The district manager and supervisor determined that the plaintiff would be transferred to another store that had no history of personnel problems.

Over the course of the following three months, the plaintiff’s district manager received fifty-one separate complaints from thirteen different employees, all of whom complained about the plaintiff’s abusive behavior. The employees related that the plaintiff had thrown food from shelves and directed employees to clean it up, had repeatedly threatened to fire the entire staff, and had violated money handling and other office procedures. However, when the district manager and the Division Vice President of Operations met with the plaintiff to discuss these allegations, the plaintiff either denied the allegations or claimed that they were exaggerated. The plaintiff was then told to choose between either a suspension pending a company investigation into the allegations or a leave of absence to obtain counseling. The plaintiff chose the latter option.

Lucky’s Employee Assistance Program ("EAP") referred the plaintiff to a psychologist who diagnosed the plaintiff as "experiencing stress related problems precipitated by work," and recommended that the plaintiff not return to work for three months. The psychologist forwarded this recommendation and diagnosis to Lucky’s.

The plaintiff then filed a workers’ compensation claim based on his alleged work-induced stress. In connection with this claim, the plaintiff

51. 87 F.3d 362 (9th Cir. 1996), cert. denied, 117 S. Ct. 1349 (1997).
was sent by the company’s insurance carrier to a physician who diagnosed the plaintiff as suffering from “Organic Mental Syndrome, Not Otherwise Specified.” This diagnosis was sent to the insurance carrier, but not to Lucky’s.

The plaintiff requested that Lucky’s grant him an extension of his leave of absence. In support of this request, the plaintiff submitted to Lucky’s a “Claimant’s Certification,” prepared by the physician who treated him in connection with his workers’ compensation claim. The certification stated that the plaintiff was suffering from “depression and anxiety” and recommended that he not return to work for another month. Lucky’s granted the plaintiff’s request.

In April and May of 1993, the plaintiff again requested extensions of his leave of absence, and again supported his request with notes from his physician, who diagnosed the plaintiff as having anxiety and depression. Lucky’s granted the first request, but denied the second and fired the plaintiff, explaining that the plaintiff had already exceeded the six months of leave available under the company’s leave of absence policy.

Four months later, the plaintiff reapplied for a job with the company. Although Lucky’s had no available store-manager positions at the time the plaintiff applied, the company did agree to rehire the plaintiff as a clerk. In addition, the plaintiff was informed that he could apply for a store-manager position as soon as one became available. The plaintiff refused the job offer and sued the company under the ADA, alleging that Lucky’s had discriminated against him either because he was disabled, or because the company regarded him as disabled.

The district court granted the defendant’s motion for summary judgment, but the Ninth Circuit reversed in part, holding that while the plaintiff had failed to present sufficient evidence to create a material fact dispute as to whether he was actually disabled, he had presented sufficient evidence to raise a question as to his “regarded as disabled” claim. The court based this latter conclusion on three factors: (1) the plaintiff’s district manager had asked if the plaintiff was “having problems”; (2) the company had strongly encouraged the plaintiff to seek the assistance of the company EAP; and (3) the company had received several doctors’ reports in connection with the plaintiff’s application for workers’ compensation benefits and a leave of absence extension, which diagnosed him as suffering from depression, anxiety, and stress.

The court’s holding in the Holihan case should deeply trouble employers. The case suggests that an employer is subjecting itself to
liability under the ADA merely by meeting with an employee who engages in misconduct and inquiring generally into the reasons for that misconduct; or by referring a poor-performance employee to a counselor; or by receiving documentation from an employee's physician. Because of the employer's efforts to accommodate an employee, liability will stem from any subsequent adverse employment action under the "regarded as disabled" provision of the statute. However, nothing about the employer's conduct in the Holihan case suggests that the employer discriminated against the plaintiff based on an erroneous perception that he was substantially limited in his ability to work. To the contrary, the employer, in fact, offered the plaintiff another position at the company, which alone should have sufficed to bar the "regarded as disabled" claim. Moreover, the employer uniformly applied to the plaintiff a neutral policy limiting leaves of absence to six months (regardless of the reason for the leave), and then offered to consider the plaintiff for a store-manager position when one became available. In other words, the employer did nothing more than insist that all of its employees, including the plaintiff, perform the essential job function of regularly attending work.

In the Holihan case, the plaintiff produced no evidence of disparate treatment to support his discrimination claim. For instance, the plaintiff was unable to show that employees who had not been referred to the company's EAP were permitted to exceed the six-month leave of absence cap, or that the company created managerial positions for such employees when they chose to reapply for employment. Therefore, the plaintiff failed to prove he was treated differently when he was terminated and then not offered a non-existent managerial position.

In addition, the plaintiff did not present evidence that the employer falsely informed him that no managerial positions were available. Unbelievably, the plaintiff was permitted to proceed on a "regarded as disabled" claim based on nothing more than the fact that the employer had referred him to the company's EAP (following a series of employee complaints about his managerial misconduct) and had received from his physicians notes that indicated he was suffering from anxiety and stress. These notes were proffered by the employee to support continuing requests for extensions of his leave of absence, most of which were granted.

Without any evidence linking Lucky's legitimate decision to refer the plaintiff to its EAP to an actual perception that the plaintiff was substantially limited in a major life activity, or to circumstances giving rise

to an inference of discrimination, the court should not have permitted the plaintiff to proceed to trial on a "regarded as disabled" claim. This is particularly so given the prevalence and effectiveness of EAPs in the workplace. A recent survey of Fortune 1000 companies found that a full eighty-eight percent of these companies operate EAPs, with services encompassing assessment and referrals, short-term counseling, crisis intervention, free legal services, and even referrals to child- or elder-care services. The business and psychological communities have widely acknowledged that EAPs are instrumental in improving work performance and conduct issues that might otherwise lead to employment termination.

The Holihan holding is counterintuitive because no employer would needlessly incur the expense of EAPs if the employer truly believed that the employees it was referring to the EAPs were "substantially limited" in their ability to work. To the contrary, companies offer and refer employees to EAPs not because they believe that their employees are disabled, but because they believe that the employees are fully capable of making a positive contribution to the company. These employees could make a positive contribution once they obtain assistance with the issues temporarily interfering with their ability to work.

However, beneficial as EAPs are, an employer will now have to think twice before referring an employee to one, since, under the reasoning of Holihan, doing so might subject the employer to ADA liability under the "regarded as disabled" provision. Ironically, if the employer in Holihan had simply fired the plaintiff without making any attempts to help him, the plaintiff would have had no evidence upon which to base his "regarded as disabled" claim. Instead, because the employer attempted to minimize the consequences of the plaintiff's misconduct by permitting him to have time off from work and receive assistance with his management and communication skills, the employer unwittingly subjected itself to an ADA lawsuit. It is hard to imagine that Congress envisioned this result when it enacted the ADA and included the "regarded as disabled" provision in the statute.

It is equally hard to imagine that Congress intended employees to be able to state a claim under the ADA merely because, as in Holihan, they had once provided their employers with medical documentation in connection with an application for workers' compensation benefits or a leave of absence. Submitting physicians' notes to an employer is not only a routine workplace procedure, but also a statutory requirement for procuring certain benefits, such as leave under the Family and Medical Leave Act of 1993. If the mere fact that an employer had a note from an

55. See Daniel S. Levine, Companies Seek to Keep Personal Problems from Becoming Personnel Problems, S.F. BUS. TIMES, Nov. 22, 1996.
56. See 29 C.F.R. § 825.311(b) (1995) (providing that in order to qualify for an FMLA
employee's physician were sufficient to create "regarded as disabled" liability under the ADA, nearly every employee in the country would be able to state such a claim.

An employer's knowledge of an employee's temporary medical condition or impairment should not be sufficient to create a fact dispute about whether the employer regarded that employee as disabled. As the Third Circuit Court of Appeals recently noted in *Kelly v. Drexel University*, it would be unreasonable to permit any member of any protected class to survive summary judgment on a discrimination complaint merely by demonstrating that "an employer was aware that he or she was a member of such a class and that the individual then suffered an adverse employment action." "

In *Kelly*, an employee who was terminated after his job was eliminated alleged that he was discriminated against on the basis of the degenerative joint disease that he suffered in his right hip. The plaintiff argued that either he was disabled within the meaning of the ADA, or that the university regarded him as such. In support of the latter claim, the plaintiff argued that he had a "visible and apparent" limp, and that therefore his employer was clearly aware that he had a physical impairment. In rejecting the plaintiff's "regarded as disabled" claim, the court explained:

> the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action.... If we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions, i.e., anyone, could establish a *prima facie* discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group, e.g., race, age or sex.

While no one would suggest that "regarded as disabled" plaintiffs ought to be barred from proceeding to trial unless they can produce "smoking gun" evidence such as disparaging, disability-related comments made by the relevant decision maker, plaintiffs should not be permitted to leave, an employee must provide a requested Certification of Physician or Medical Practitioner when requesting a leave of absence).

58. Id. at 109.
59. Id.; see also Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (affirming dismissal of "regarded as disabled" claim and rejecting argument that employer's "mere knowledge" of employee's medical condition and work restrictions as documented by his physician showed that employer regarded employee as having a disabling impairment).
survive summary judgment merely by asserting that an employer knew of their medical condition and then later subjected them to an adverse employment action. In enacting the ADA, Congress took care to note that not every physical or mental impairment entitled an individual to statutory protection. Therefore, in assessing "regarded as disabled" ADA claims, courts should be just as vigorous in their analysis of the plaintiff's prima facie case as they are in cases where a plaintiff claims to be actually disabled.

In short, courts should require "regarded as disabled" plaintiffs to demonstrate that: (1) their impairment, as perceived, would substantially limit them in the performance of a major life activity, and not just bar them from a particular job or handful of nearly identical jobs; (2) notwithstanding their impairment or perceived impairment, they can in fact perform the essential functions of the position in question; and (3) the challenged adverse employment action occurred in circumstances giving rise to an inference of discrimination. Regarding this last prong, some evidence must be adduced to demonstrate that the employer in question treated the "regarded as disabled" plaintiff differently than it has treated or would treat other similarly situated individuals who are not regarded as disabled.

If a would-be "regarded as disabled" plaintiff cannot satisfy all three of these tests, a court should dismiss the ADA complaint. One court has stated that to hold otherwise, merely because a plaintiff's particular impairment bars him from satisfying a particular job requirement, or because the plaintiff has shown that the employer had knowledge of a certain medical condition, is "to stand [the ADA] on its head." In addition, by upholding the plaintiff's complaint, a court would be equating truly disabled individuals, who need the protections of the ADA, with those who are merely dissatisfied with an employment outcome and cannot fit themselves into any other statutorily protected category. For the sake of employers who wish to continue to provide employees with valuable benefits such as EAPs and medical leaves of absence, but who may not be willing to do so at the risk of opening the floodgates to meritless and costly ADA litigation, one can only hope that the courts will turn away from an overbroad reading of the "regarded as disabled" provision. Instead, courts should require "regarded as disabled" plaintiffs to satisfy the same requirements of proof as their counterparts who are actually disabled.