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Kaplan and Regarded As: Does the ADA Discriminate between Real and Perceived Disability

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KAPLAN AND "REGARDED AS": DOES THE ADA DISCRIMINATE BETWEEN REAL AND PERCEIVED DISABILITY?

I. INTRODUCTION

The Americans with Disabilities Act of 1990[1] (ADA) provides a clear and far-reaching national directive with the purpose of eliminating discrimination against people with disabilities.[2] The Act extends protection not only to those who are actually impaired, but also to individuals who are regarded as disabled.[3] Congress extended protection to so-called "regarded as" individuals because they recognized that perceptions of disability are as disabling as the physical limitations that flow from actual impairments.[4] This Comment examines a recent Ninth Circuit decision that severely limits the protections of "regarded as" individuals.

In *Kaplan v. City of North Las Vegas*,[5] the Ninth Circuit held that the ADA does not require employers to provide reasonable accommodations to employees who are "regarded as" disabled.[6] In so holding, *Kaplan* adopted the Eighth Circuit's reasoning and

1. 42 U.S.C. §§ 12101–13 (2000).

2. 42 U.S.C. § 12101(b)(1) (2000).

3. 42 U.S.C. § 12102(2)(C) (2000); Deane v. Pocono Med. Ctr., 142 F.3d 138, 140 (3d Cir. 1998) (en banc). Courts and commentators tend to refer to such individuals as "regarded as" or "perceived as."

4. *See* H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453 (approving the rationale expressed by the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987)). The ADA defines disability in three ways. 42 U.S.C. § 12102(2). Physical impairments limiting a major life activity constitute the first prong of disability. § 12102(2)(A). A record of such impairment is the second prong. § 12102(2)(B). The third and final prong recognizes disability in cases where the individual is not physically impaired, but the employer regards the individual as disabled. § 12102(2)(C).

5. 323 F.3d 1226 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

6. *See id.* at 1232.

conclusion in *Weber v. Strippit, Inc.*,[7] and rejected a previous decision to the contrary in the First Circuit.[8]

Reaction to *Kaplan* has been mixed. The Eleventh Circuit criticized the decision for ignoring the basic principle that courts may not selectively interpret statutes to obtain what they believe is a wiser or more pragmatic result.[9] Other commentators, however, have lauded *Kaplan* as a common-sense acknowledgment that employers cannot accommodate something that does not exist.[10]

Kaplan is best understood in the context of two landmark civil rights acts: the ADA and the Rehabilitation Act of 1973[11] ("Rehabilitation Act"). Both prohibit covered entities from discriminating against disabled individuals.[12] The ADA covers private employers,[13] state government services,[14] and public accommodations,[15] but excludes the federal government.[16] The Rehabilitation Act covers entities receiving federal funding, executive agencies, and the United States Postal Service.[17] The ADA explicitly requires courts to construe the Act to grant at least as much protection as the Rehabilitation Act provides.[18]

This Comment examines the Ninth Circuit's reasoning in *Kaplan* and concludes it is erroneous. Part II briefly describes a prima facie claim under the ADA, focusing on aspects relevant to the holding in *Kaplan*. Part III summarizes the facts of *Kaplan* and its procedural background. Part IV presents the Ninth Circuit's analysis

7. 186 F.3d 907 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000).

8. *Kaplan*, 323 F.3d at 1231. In *Katz v. City Metal Co.*, the First Circuit concluded "regarded as" plaintiffs are entitled to reasonable accommodations. *See* 87 F.3d 26, 33–34 (1st Cir. 1996).

9. D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1238 (11th Cir. 2005).

10. *See, e.g.*, *Worker "Regarded As" Disabled Not Entitled to Reasonable Accommodation*, WASH. EMP. L. LETTER (Perkins Coie LLP, Seattle, Wash.), June 2003, at 3, 6.

11. Pub. L. No. 93-112, 87 Stat. 355 (1973) (as relevant to the employment context, codified as amended at 29 U.S.C. §§ 705, 791–94d (2000)).

12. 42 U.S.C. § 12112(a) (2000); 29 U.S.C. § 794(a) (2000).

13. *See id.* §§ 12111–17.

14. *See id.* §§ 12131–65.

15. *See id.* §§ 12181–89.

16. *Id.* § 12111(5)(B).

17. 29 U.S.C. § 794(a).

18. 42 U.S.C. § 12201(a); Bragdon v. Abbott, 524 U.S. 624, 632 (1998).

of Kaplan's ADA claim.[19] Part V argues that legal precedent renders *Kaplan* erroneous, that the Ninth Circuit conducted a flawed exercise in statutory construction when it interpreted the ADA. Part V closes by observing that inconsistent usage of the lay and legal meanings of the term "disabled" has led to the inadvertent conception of the issue at hand. Part VI addresses the implications of allowing employers to deny reasonable accommodations to "regarded as" plaintiffs. Finally, Part VII concludes that the Ninth Circuit erroneously decided *Kaplan* because it failed to follow precedent and incorrectly applied principles of statutory interpretation to the ADA.

II. RELEVANT ASPECTS OF A CLAIM UNDER THE ADA

To appreciate the implications of *Kaplan* and to evaluate the Ninth Circuit's reasoning, knowledge of the statutory structure of the ADA and judicial decisions interpreting the Act is necessary. This section briefly explains the most salient aspects of a claim under the ADA.

The general rule against discrimination under the ADA is that no covered entity may discriminate against people with disabilities at any point in the employment process.[20] Thus, the key elements of a claim of discrimination are as follows: (1) disability, (2) status as a "qualified individual" with a disability, and (3) adverse treatment because such individual is disabled.[21]

"Disability" is a term of art with three alternative definitions: (1) a physical or mental condition that substantially limits a major life activity; (2) a record that such condition exists; or (3) being "*regarded as*" having such condition.[22] Congress intended any individual prong to suffice to establish that an individual is disabled for purposes of the ADA.[23]

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19. Because the Ninth Circuit's holding is predicated on broad legal principles and not narrowly tailored to the facts of the case, this Comment focuses on the broad doctrinal aspects of the decision.

20. 42 U.S.C. § 12112(a) (2000). The ADA specifically prohibits discrimination in regard to "job applications procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

21. *See* Broussard v. Univ. of Cal., 192 F.3d 1252, 1255–56 (9th Cir. 1999).

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

23. *See* H.R. REP. NO. 101-485, pt. 3, at 27 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 450 ("If an individual meets any one of these three tests, he

The Act defines a "qualified individual with a disability" as a person with a disability who, with or without reasonable accommodations, is capable of performing the essential functions of the job that the individual holds or desires.[24]

The ADA's "central" non-discrimination directive is to provide reasonable accommodations.[25] Because various forms of reasonable accommodations may suffice in any one case, the ADA lists only a few as a guide on the matter.[26] Rather than provide an extensive list, the Act requires an interactive process to determine what, if any, reasonable accommodations are available.[27] The Ninth Circuit has held that an employer who is aware of an employee's need for accommodation has an affirmative duty to engage the employee in this interactive process.[28]

Under the ADA, employers discriminate when they treat an individual adversely because the individual falls within one of the Act's three definitions of disability.[29] The ADA lists seven specific forms of adverse treatment.[30] Among these examples is an employer's failure to make reasonable accommodations.[31] Similarly, the Ninth Circuit has held that failure to engage in the interactive process constitutes discrimination.[32]

With this framework in mind, the following sections describe the pertinent facts, procedural background, and reasoning in *Kaplan*, followed by four rationales for concluding its holding is erroneous.

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or she is considered to be an individual with a disability for purposes of coverage under the ADA.").

24. 42 U.S.C. § 12111(8).

25. H.R. REP. NO. 101-485, pt. 3, at 39.

26. *See, e.g.*, 42 U.S.C. § 12111(9)(A)–(B) (listing accommodations such as making facilities accessible, restructuring job schedules, and acquiring equipment or devices).

27. 29 C.F.R. § 1630.2(o)(3) (2005).

28. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2003); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001).

29. 42 U.S.C. § 12112(a).

30. *Id.* § 12112(b)(1)–(7).

31. *Id.* § 12112(b)(5).

32. Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002); *see also* Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Kaplan arose from Frederick Kaplan's service as a deputy marshal with the City of North Las Vegas ("the City").[33] On May 3, 1995, after six years in the field, Kaplan injured his right wrist and thumb during a training exercise.[34] On May 23, 1995, the City reassigned Kaplan to a light duty position as an "Inmate Worker Coordinator."[35]

On the same day that the City reassigned Kaplan, he began receiving care at an outpatient rehabilitation center.[36] Outpatient rehabilitation continued throughout the summer of 1995.[37] In July, his physician ordered testing for arthritis.[38] On August 1, 1995, doctors diagnosed Kaplan with rheumatoid arthritis.[39] Upon final examination, doctors concluded Kaplan's condition was permanent.[40]

The City terminated Kaplan on August 31, 1995.[41] It did so because of the diagnosis of rheumatoid arthritis and the concern that the effects of the disease would permanently render Kaplan unable to handle firearms.[42]

B. Procedural Background

On June 7, 1996, Kaplan filed a complaint in the United States District Court for the District of Nevada, claiming that the City violated the ADA.[43] The district court granted the City's motion for summary judgment, concluding Kaplan was not disabled within the meaning of the ADA.[44] Kaplan appealed, and the Ninth Circuit

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33. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1227 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

34. *Id.* at 1228.

35. As an Inmate Worker Coordinator, "Kaplan was not required to arrest or detain . . . prisoners," nor was he required to use a firearm. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1229.

42. *Id.* According to the job description in effect at the time of Kaplan's dismissal, a deputy marshal was required to use firearms. *Id.* at 1227.

43. *Id.* at 1229.

44. *Id.*

reversed, holding that a genuine issue of material fact existed on the issue of disability.[45]

The City filed another motion for summary judgment.[46] The district court, concluding that Kaplan failed to prove he was a qualified disabled individual under the ADA, granted summary judgment for the City on April 22, 2002.[47] Again, Kaplan appealed the summary judgment.[48] The Ninth Circuit denied Kaplan's appeal, holding that he could not perform the essential functions of the peace officer position and that the City did not have a duty to accommodate him.[49]

IV. REASONING OF THE COURT

In *Kaplan*, the Ninth Circuit identified two issues on appeal.[50] The first was whether Kaplan could perform the essential functions of his job without accommodation at the time the City terminated him.[51] The second was whether the City was required to provide Kaplan with reasonable accommodations once it regarded him as disabled, even though he actually was not.[52] Together, these two issues comprise the second element of the prima facie case—whether Kaplan was a "qualified individual" with a disability.[53]

A. *Whether* Kaplan *Could Perform the Essential Function of a Peace Officer Without an Accommodation*

A claim under the ADA requires plaintiffs to show that they could have performed essential job functions at the time of termination.[54] The Ninth Circuit concluded that Kaplan could not do so.[55] As a peace officer,[56] Kaplan had to "restrain prisoners, use

45. Kaplan v. City of N. Las Vegas, 2 F. App'x 727, 728 (9th Cir. 2001).
46. *Kaplan*, 323 F.3d at 1229.
47. *Id.*
48. *Id.*
49. *Id.* at 1233.
50. *Id.* at 1227.
51. *Id.*
52. *Id.* *Kaplan* states the issue by using both the legal and lay meaning of "disability." *See* discussion *infra* Part V.D.
53. *Id.* at 1229 n.4. For the prima facie elements, see *supra* text accompanying note 21.
54. *Id.* at 1230.
55. *Id.*
56. The Ninth Circuit also refers to this position as a "deputy marshal." *See*

firearms, and engage in hand-to-hand combat."[57] Neither party disputed this description of Kaplan's duties.[58]

Both parties also agreed that when the City terminated Kaplan, he could not grasp objects without severe pain.[59] Testimony further established that Kaplan could not perform essential job functions until one year after his termination.[60] Thus, on the first issue, the Ninth Circuit concluded that Kaplan could not perform the essential duties of his position *without* accommodation.[61] The next section describes the court's analysis of the second issue on appeal—whether Kaplan was *entitled* to reasonable accommodations.

B. Whether Kaplan *Was Entitled to Reasonable Accommodation*

In broad doctrinal terms, the *Kaplan* court articulated the issue as whether "regarded as" plaintiffs are entitled to reasonable accommodation under the ADA.[62] Kaplan fell under the "regarded as" prong of the ADA because he was fired based on a misdiagnosis for rheumatoid arthritis.[63] The court noted a split in other federal circuits with respect to this inquiry.[64]

1. Why the ADA Cannot Be Interpreted Literally

The Ninth Circuit first explained that courts must begin statutory

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id. at 1227.

57. *Id.* at 1230.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 1231.

62. *Id.*

63. *Id.*; *see also* 42 U.S.C. § 12102(2) (2000).

64. The *Kaplan* court noted that the weight of authority disfavored interpreting the ADA to require accommodation to "regarded as" plaintiffs. *Kaplan*, 323 F.3d at 1231 (citing Weber v. Strippit, Inc., 186 F.3d 907, 916–17 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998)). In addition, the Court also cited two cases holding to the contrary. *Id.* (citing Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 163 (E.D.N.Y. 2002)). Since the Ninth Circuit decided *Kaplan*, several more cases have held that the ADA does require reasonable accommodations to "regarded as" plaintiffs. *See, e.g.*, D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1237 (11th Cir. 2005); Kelly v. Metallics W., Inc., 410 F.3d 670, 675 (10th Cir. 2005); Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004).

construction by attempting to give effect to a statute's plain meaning.[65] The court identified the plain meaning of the ADA as defining discrimination to be the failure of employers to implement reasonable accommodations to qualified people with disabilities.[66] Further, the plain meaning of the ADA clearly does not distinguish between people based on the three prongs of the disability definition.[67]

Although the language of the ADA at issue in *Kaplan* is admittedly plain and unambiguous according to the Ninth Circuit, *Kaplan* noted that some courts have considered the Act to lead to bizarre results.[68] Thus, *Kaplan* initiated an inquiry beyond the literal language of the act.[69]

2. A Sensible Interpretation

The *Kaplan* court used two examples to explain why a literal interpretation of the ADA could lead to absurd results. Without explanation, the court first stated that if employees merely "regarded as" disabled were entitled to reasonable accommodations, employees would be better off "if their employers treated them as disabled[,] even if they were not."[70] According to the Ninth Circuit, this application would produce a result that does nothing to ameliorate one of the stated purposes of the ADA—to dispel stereotypes that do not accurately reflect the abilities of disabled individuals.[71]

Second, the court reasoned that a rule that required reasonable accommodation of "regarded as" plaintiffs, would discourage employees to inform employers about their abilities.[72] Further, it would dissuade employers from understanding all of their

65. *Kaplan*, 323 F.3d at 1231–1232.

66. *See id.* at 1232 (citing 42 U.S.C. § 12112(b)(5)(A) (2000)).

67. *Id.* (citing 42 U.S.C. §§ 12102(2), 12111(8) (2000)). The three-pronged disability definition under the ADA to which *Kaplan* refers is the tripartite disjunctive definition for that term. *See supra* text accompanying note 22.

68. *Kaplan*, 323 F.3d at 1232 (citing Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999)).

69. *Id.* (citing Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001) for the proposition that courts "must look beyond the plain language of a statute when the literal interpretation would lead to an absurd result").

70. *Id.*

71. *Id.* (citing 42 U.S.C. § 12101(a)(7) (2000)).

72. *Id.*

employees' talents.[73] Ultimately, the court concluded that requiring reasonable accommodations for these plaintiffs would do nothing to dispel the problem of discrimination against the disabled.[74] It would only provide a "windfall" for those employees who are merely "regarded as" disabled.[75]

A contrary rule would waste limited employer resources on individuals who were not disabled under the lay meaning of the word.[76] It would also needlessly divert such resources from assisting individuals who suffered from *actual* disabilities and were in genuine need of accommodation.[77] Therefore, the *Kaplan* court concluded that "regarded as" plaintiffs are not entitled to reasonable accommodations.[78]

V. ANALYSIS

The *Kaplan* court's reasoning is unpersuasive for several reasons. First, the court failed to consider Supreme Court precedent requiring employers to provide reasonable accommodations under the Rehabilitation Act irrespective of the disability-definition prong.[79] Because both Congress and the Supreme Court require the ADA to grant at least as much protection as the Rehabilitation Act, any decision reaching a contrary result, such as *Kaplan*, is erroneous.[80]

Second, the Ninth Circuit previously held that the ADA requires employers to initiate an interactive process and to implement reasonable accommodations with employees whom they believe are disabled.[81] The *Kaplan* decision contradicts this rule because it holds that such employees are not entitled to reasonable

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73. *Id.*
74. *Id.*
75. *Id.* (citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999), for the observation that "regarded as" plaintiffs would receive a windfall because of their employers' "'erroneous perception of disability'").
76. *Id.* Although *Kaplan* does not express it, its use of "disabled" is not the term of art defined under the ADA; rather, it uses the lay meaning of the word. *See* discussion *infra* Part V.D.
77. *Kaplan*, 323 F.3d at 1232.
78. *Id.* at 1233.
79. *See infra* Part V.A.
80. *Id.*
81. *See supra* note 28.

accommodations.[82]

Third, the *Kaplan* decision's exercise of statutory interpretation contradicts Supreme Court precedent. The Supreme Court's interpretation of the Act reveals that it is unnecessary for courts to apply statutory construction doctrines to the ADA's definition of "disability" for the following reasons: (1) the language of the Act is not ambiguous; (2) it does not thwart the overall statutory scheme; and (3) it does not lead to absurd results.[83]

Finally, the court's use of multiple meanings for the term "disabled" is flawed. Congress has consistently used the same term of art to define disability since it passed the Rehabilitation Act in 1973.[84] Congress adopted that same term of art verbatim as the definition of disability under the ADA.[85] This long, consistent use of a term of art to denote disability under the ADA suggests that the Ninth Circuit's mixing of the lay and legal terms renders its analysis erroneous as contrary to Congressional intent.[86]

A. The ADA Does Not Discriminate Between the Various Prongs of Disability

The ADA requires courts to interpret it as providing at least as much protection as the Rehabilitation Act of 1973.[87] The Ninth Circuit has held that the ADA's legislative history demonstrates Congress' intent that courts incorporate judicial interpretations of the Rehabilitation Act into the ADA.[88]

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82. *See infra* Part V.B.

83. *See infra* Part V.C.

84. *See* H.R. REP. NO. 101-485, pt. 3, at 27 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 450 ("The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988.").

85. *See id.*

86. *See infra* Part V.D.

87. Bragdon v. Abbott, 524 U.S. 624, 632 (1998); *see also* 42 U.S.C. § 12201(a) (2000) ("[N]othing in this [Act] shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973 . . . ."); H.R. REP. NO. 101-485, pt. 3, at 69 ("[N]othing in the ADA is intended or should be construed to limit the scope of coverage or to apply lesser standards than are required under . . . the Rehabilitation Act of 1973.").

88. Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995).

The Supreme Court in *School Board of Nassau County v. Arline*[89] held that employers are required to provide reasonable accommodations irrespective of whether disability is based on actual impairment, a record of such impairment, or being "regarded as" impaired.[90] *Kaplan*, however, eliminated accommodations for employees who are disabled under the "regarded as" prong.[91] Thus, the *Kaplan* holding is erroneous because it does not grant at least as much protection under the ADA as the Rehabilitation Act on this same issue.

1. Each Prong of Disability Is on Equal Ground

Arline is the most relevant Supreme Court case addressing the issue presented in *Kaplan*. In *Arline*, the county school board fired a public school teacher after she suffered a third relapse of tuberculosis within two years.[92] The Plaintiff, Gene Arline, argued that she was disabled, and as such, that she was protected under the Act.[93] The Court agreed that Arline was disabled because her tuberculosis was an acute form affecting her respiratory system, which required a stay at the hospital on several occasions.[94] Thus, she satisfied the "actual impairment" and "record of impairment" prongs of disability.

The school board conceded that Arline had an actual impairment.[95] It argued, however, that it was justified in dismissing Arline because of the threat her relapses posed to the health of others.[96] Thus the school board admittedly dismissed Arline because it regarded her impairment as disabling.

The Supreme Court rejected this argument and stated that employers could not justify discrimination against employees by distinguishing between the effects of a disease on others and the effects of a disease on the patient.[97] Also, the Court explained that Congress was just as "concerned about the effect of an impairment

89. 480 U.S. 273 (1987).
90. *Id.* at 281–85, 289 n.19.
91. *See supra* Part IV.B.
92. *Arline*, 480 U.S. at 276.
93. *Id.* at 276–77.
94. *Id.* at 280–81.
95. *Id.* at 281.
96. *Id.*
97. *Id.* at 282.

on others as it was about its effect on the individual."[98] The Court then turned to the only unanswered question—whether Arline was an otherwise "qualified individual" for the job of elementary school teacher.[99]

The Court approached this issue in two steps.[100] First, it asked whether Arline could perform "the essential functions" of the job in question.[101] Second, it addressed whether the school board could make reasonable accommodations for her.[102] The Supreme Court did not inquire into Arline's "entitlement" as the *Kaplan* court did;[103] rather, the Court focused on the school board and whether it could provide reasonable accommodations.[104] Thus, in *Arline*, the Court conducted an extensive analysis into the three definitions of disability under the Act. Ultimately, the Court concluded that employers must provide reasonable accommodations, irrespective of whether disability is based on physical impairment, a record of such impairment, or being "regarded as" so impaired.[105]

2. *Kaplan* Is Analogous to *Arline*

In *Kaplan*, the Ninth Circuit failed to address whether *Arline* was binding precedent, although other circuits confronting the same issue have so concluded.[106] In addition, Congress quoted *Arline* in explaining its rationale for including "regarded as" under the definition for disability:

> [A]lthough an individual may have an impairment that does not in fact substantially limit a major life activity, the

98. *Id.*
99. *Id.* at 287.
100. *See id.* at 287–88.
101. *See id.* at 287–88, 288 n.17 (citing 45 C.F.R. § 84.3(k) (1985)). Section 84.3(k) is the Rehabilitation Act equivalent to regulations promulgated under the ADA and contains the same definition of a qualified individual. *See* 29 C.F.R. § 1630.2(m) (2005).
102. *Arline*, 480 U.S. at 288.
103. *See* discussion *supra* Part IV.B.
104. *Arline*, 480 U.S. at 287–89, 287 n.17, 289 n.19.
105. *See id.*
106. *See* D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1236 (11th Cir. 2005) (citing *Arline*, 480 U.S. at 287–89, 289 n.19); *see also* Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 775 (3d Cir. 2004) (characterizing the *Arline* decision as requiring employers to provide reasonable accommodations to "regarded as" employees).

> reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[107]

Since Congress applied *Arline* in constructing this provision of the ADA, *Arline* was therefore mandatory authority for *Kaplan*.

Moreover, the rule in *Arline* was directly on point. Generally, when a U.S. Supreme Court case addresses a specific issue, a circuit court is bound to follow the decision of the High Court on that issue.[108] A circuit court may only deviate from the High Court's precedent if the case under consideration is distinguishable from the prior case, or there is some other principled basis for departure.[109] The following comparison of *Kaplan* and *Arline* reveals there is no principled basis for distinguishing *Kaplan*.

Each case involved individuals who were physically impaired. Frederick Kaplan sustained a serious injury to his wrist and thumb in 1995.[110] Gene Arline suffered a relapse of tuberculosis three times in two years.[111] Each was terminated after having worked more than five years for his or her employer.[112] Kaplan was hired in 1989 and terminated in 1995;[113] Arline taught elementary school beginning in 1966 until the school board dismissed her in 1979.[114]

Each case turned on the issue of perceived disability. In *Kaplan*, the City dismissed Kaplan only after learning doctors had diagnosed him with rheumatoid arthritis.[115] The diagnosis was incorrect and

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107. H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453 (quoting *Arline*, 480 U.S. at 283).

108. 5 AM. JUR. 2D *Appellate Review* § 601 (2005) ("[A] Court of Appeals is bound by the decisions of the Supreme Court until such time as the Supreme Court informs it that the rule of decision has been changed.")

109. *Id.* at § 599 ("Stare decisis does not apply where the facts are essentially different, for a perfectly sound principle as applied to one set of facts might be entirely inappropriate when a factual variance is introduced.").

110. Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1227 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

111. *Arline*, 480 U.S. at 276.

112. *See Kaplan*, 323 F.3d at 1227–28; *Arline*, 480 U.S. at 276.

113. *Kaplan*, 323 F.3d at 1227, 1229.

114. *Arline*, 480 U.S. at 276.

115. *Kaplan*, 323 F.3d at 1229.

Kaplan would later recover.[116] Arline's employer forced the "regarded as" issue when it argued that it dismissed her because of its fear that Arline's tuberculosis was contagious.[117]

True, *Kaplan* and *Arline* differ in that Kaplan filed suit under the ADA,[118] while Arline sued under the Rehabilitation Act.[119] However, the Supreme Court[120] and the Ninth Circuit[121] have recognized and followed Congress' mandate that the ADA grant at least as much protection as the Rehabilitation Act.[122] Moreover, Congress took the statutory definition of disability under the ADA directly from the Rehabilitation Act.[123]

The *Kaplan* court construed the ADA to excuse failure to accommodate in exactly the same context that *Arline* read the Rehabilitation Act to require accommodation. *Kaplan* thus violated the ADA's explicit mandate that courts construe it to provide at least as much protection as the Rehabilitation Act.[124]

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116. *Id.*

117. *Arline*, 480 U.S. at 281. The school board acknowledged that Arline was impaired by tuberculosis and that it was aware of her record of hospital stays. *Id.* The school board argued, however, that it terminated Arline not for these reasons, but rather, solely because it feared her condition would affect others. *Id.* Because the defendant argued the first two prongs of disability were irrelevant, the Court had to base its remand of the case on the "regarded as" prong. *See id.* at 281–83.

118. *Kaplan*, 323 F.3d at 1229.

119. *Arline*, 480 U.S. at 276.

120. Bragdon v. Abbott, 524 U.S. 624, 632 (1998) ("The directive requires us to construe the ADA to grant at least as much protection as provided by . . . the Rehabilitation Act.").

121. Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

122. "[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under . . . the Rehabilitation Act of 1973." 42 U.S.C. § 12201(a) (2000).

123. *See* H.R. REP. NO. 101-485, pt. 3, at 27 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 450; *Bragdon*, 524 U.S. at 631–32; *Collings*, 63 F.3d at 832 n.3 (noting that "[t]he ADA defines a disability in substantially the same terms as the Rehabilitation Act" of 1973).

124. 42 U.S.C. § 12201(a); *see also Bragdon*, 524 U.S. at 631–32; *Collings*, 63 F.3d at 832 n.3.

B. Kaplan *Creates a Contradiction Under the ADA*

Similar to the Supreme Court's holding in *Arline*, the Equal Employment Opportunity Commission (EEOC) regulations that govern the ADA and associated Ninth Circuit case law that interprets these regulations also require employers to provide reasonable accommodations irrespective of which statutory definition of disability is implicated.

Congress authorized the EEOC to issue regulations to implement the ADA.[125] In turn, the EEOC outlined an "interactive process" through which employers and employees may determine what, if any, reasonable accommodations are necessary.[126] As explained in the regulations and later approved by the courts, this interactive process involves the employer and employee identifying "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[127]

In *Barnett v. U.S. Air, Inc.*,[128] the Ninth Circuit explained that employers must initiate the process "without being asked" whenever an employer:

> (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.[129]

An employer who is *aware* of an employee's need for accommodation has a *mandatory* obligation to assist the employee in *identifying* and *implementing* reasonable accommodations.[130] Moreover, failure to engage in the interactive process constitutes discrimination.[131]

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125. 42 U.S.C. § 12116.
126. 29 C.F.R. § 1630.2(o)(3) (2005).
127. *Id.*
128. Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc).
129. *Id.* at 1112 (citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. (CCH) § 902 (Mar. 1, 1999)).
130. Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001).
131. *See Barnett*, 228 F.3d at 1116.

The rules in *Barnett* and *Kaplan* apply when employers believe an individual is disabled. Neither rule requires employers to confirm their beliefs. If employers must implement reasonable accommodations when they are "aware" an employee is disabled, it follows that employers are also required to provide reasonable accommodations to employees whom they regard, or perceive, as disabled. *Kaplan*, however, reached the opposite result. Thus, after *Kaplan*, employers must discuss reasonable accommodations with employees they "know" are disabled, but the employees are not entitled to reasonable accommodations if their statutory status as disabled is instead based on their employers' perception, i.e., the "regarded as" definitional prong.

The *Barnett* rule makes more sense within the context of the ADA than does the *Kaplan* rule. Among its stated goals, the ADA attempts to dispel myths and stereotypes about disability.[132] Interaction is certainly an effective means for achieving this worthy goal. By contrast, the rule in *Kaplan* is unlikely to persuade employees to inform employers about their disabilities, or to persuade employers to clearly see all of their employees' talents.[133]

The *Kaplan* court adopted a rule that contradicts prior Ninth Circuit precedent set in *Barnett*. Moreover, *Kaplan* impedes the goal of the ADA as compared to *Barnett*. If employers are indeed obligated to initiate the interactive process when they perceive an employee is disabled per the holding of *Barnett*, *a fortiori*, "regarded as" individuals are entitled to reasonable accommodations.

C. Guidelines of Statutory Interpretation Do Not Require the Ninth Circuit to Look Beyond the Literal Language of the ADA

In addition to contradicting precedent, the Ninth Circuit erroneously interpreted the ADA. The *Kaplan* court conceded that the ADA is not ambiguous in its definition of disability or the rights of the disabled to reasonable accommodations.[134] Nevertheless, the court concluded that a literal interpretation of the ADA produced

132. *See* 42 U.S.C. § 12101(a)(7) (2000).

133. Moreover, the Ninth Circuit failed to explain what leverage a terminated "regarded as" employee would have to educate his former employer. *See* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1227 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003).

134. *See id.*

"bizarre" or "absurd" results with respect to "regarded as" claims.[135] Consequently, the *Kaplan* court proceeded to develop what it thought was a sensible meaning from the Act using methods of statutory interpretation.[136]

However, as explained below, a literal interpretation of the language at issue produces neither bizarre results nor thwarts the overall statutory scheme of the Act.[137] Accordingly, the Ninth Circuit did not persuasively show that any "duty of interpretation" existed.[138] In the Ninth Circuit, the "duty of interpretation" only arises if statutory language is ambiguous.[139] Otherwise, the sole function of the courts is to enforce a legislative act according to its terms.[140] Thus, where the language is plain and unambiguous, statutory interpretation is not required.[141] However, notwithstanding the strong presumption that the plain language of the Act expresses Congress' intent, "a court must look beyond that plain language where a literal interpretation . . . would thwart the purpose of the overall statutory scheme" or lead to an absurd result.[142]

1. The Language of the ADA at Issue in *Kaplan* Is Not Ambiguous

Kaplan acknowledged that the plain language of the ADA strongly suggests that an employer's failure to provide reasonable accommodations to an otherwise qualified individual with a disability constitutes discrimination.[143] Furthermore, the Ninth

135. *Id.*
136. *Id.* at 1231–32.
137. *See infra* Parts V.C.2–3.
138. The language "duty of interpretation" is taken from Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).
139. *Id.*
140. *Id.*
141. *Id.*
142. Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001). This language can be traced to an earlier Ninth Circuit decision. *See* Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp., 518 F.2d 913, 917–18 (9th Cir. 1975).
143. *See* Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1227 (9th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003). Indeed, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" explicitly constitutes discrimination under the Act. 42 U.S.C. § 12112(b)(5)(A) (2000). Furthermore, this language supports the conclusion that "regarded as" individuals are entitled to

Circuit in *Kaplan* agreed that "the ADA's definition of [a] qualified individual with a disability does not differentiate between the three alternative prongs of the disability definition."[144] The Ninth Circuit did not assert that the language of the ADA is susceptible to more than one meaning.[145] They agreed that, "on its face," the language of the Act is plain.[146] Therefore, the *Kaplan* court was bound by the literal interpretation of the ADA, unless the literal interpretation thwarts the overall statutory scheme or produces absurd results. As discussed below, a literal interpretation does neither.

2. The Language in the ADA at Issue in *Kaplan* Furthers the Overall Statutory Scheme of the Act

Requiring an employer to provide reasonable accommodations to an otherwise "qualified individual" who is "regarded as" disabled by the employer does not thwart the overall statutory scheme of the ADA. *Kaplan* singles out one of several stated purposes for the Act to support its argument: to decrease "stereotypic assumptions not truly indicative of the individual ability of [people with disabilities]."[147] In fact, this excerpt somewhat understates the purpose of the ADA. In its entirety, the text of the Act cited by *Kaplan* reads:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, *based* on characteristics that are beyond the control of such individuals *and* resulting

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reasonable accommodations. Congress specified "known" limitations. The only actor to which "known" can sensibly attach is the employer. Thus, where an employer regards its employee as disabled, it is required to make reasonable accommodations. *Kaplan* later concedes the issue is not an easy one. 323 F.3d at 1232–33.

144. *Id.* at 1232 (quotations omitted).

145. *See id.* According to the plain meaning rule discussed by *Kaplan* in part, and more fully in *Carson Harbor Village*, the "duty of interpretation" arises when the language of a statute is ambiguous. *Kaplan*, 323 F.3d at 1231–32 (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001)).

146. *Kaplan*, 323 F.3d at 1232.

147. *Id.* (quoting 42 U.S.C. § 12101(a)(7)) (alteration in original). Indeed, the square brackets in the quotation indicate paraphrasing by the *Kaplan* court.

> from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[148]

The full text illustrates a broader purpose for the ADA than *Kaplan* recognizes. As Congress explained when passing the ADA, society's reaction to its own perception of an individual *is as disabling* as any physical limitations flowing from actual impairment.[149] Moreover, Congress used the same definition of "disability" in the ADA as it had in the earlier Rehabilitation Act because "it has worked well."[150] Thus, the legislative history supports the conclusion that requiring reasonable accommodations for "regarded as" individuals does not thwart the purposes of the Act; rather, it accomplishes the goals of the ADA.

3. Providing Reasonable Accommodations to "Regarded As" Individuals Does Not Produce Absurd Results in the Context of the ADA

As explained above, when a literal interpretation of a statute would produce an absurd result, courts may look beyond the plain language.[151] With respect to providing reasonable accommodations to "regarded as" individuals, courts and commentators offer various hypothetical scenarios to illustrate the potential for absurd results. The following hypothetical is drawn from the facts presented in *Weber v. Strippit, Inc.*[152] and illustrates the Ninth Circuit's concern in *Kaplan*.[153]

A and *B* are at-will employees of Covered Entity (CE), headquartered in State *X*. Each employee is based at home in State *Y* and travels extensively on behalf of CE. *A* suffers a heart attack. Doctors diagnose full recovery within six months. *A*'s heart attack does not substantially limit a major life activity, and he has never had a physical impairment of any kind in the past. Therefore, he is not disabled under the "actual impairment" or "record of impairment"

148. 42 U.S.C. § 12101(a)(7) (emphasis added).

149. *See* H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453.

150. *See* H.R. REP. NO. 101-485, pt. 3, at 27 (1990).

151. *See supra* Part V.C.

152. 186 F.3d 907 (8th Cir. 1999).

153. *Kaplan* adopts the Eighth Circuit's conclusion and rationale in *Weber* without providing independent analysis. *See Kaplan*, 323 F.3d at 1232.

definitional prongs of the ADA. During his recovery, *A* is able to continue traveling for his job. *B* enjoys good health throughout.

CE decides to require all employees, including *A* and *B*, to reside near its headquarters in State *X*. Although *A* is able to travel, doctors advise against relocating for six months to avoid additional stress during his recovery. *B* does not want to move until his daughter graduates high school in six months. *A* and *B* consequently refuse to relocate for six months. CE terminates each for their refusal to relocate.

State *X* and State *Y* have construed the ADA to require employers to provide reasonable accommodations to "regarded as" individuals. If *A* can show CE's decision to terminate his employment was based on its perception that he was disabled by his heart attack, CE will have to provide reasonable accommodations in the form of allowing *A* to delay relocation for six months.[154] *B*, however, has no right to reasonable accommodations because CE does not regard him as disabled.

A keeps his job because CE ultimately views the cause of his relocation delay as stemming from his heart attack. Conversely, *B* loses his job because CE merely views him as a considerate parent. Thus, as *Kaplan* posited, "employees would be better off under the statute if their employers treated them as disabled even if they were not."[155] The Ninth Circuit concluded that such results are absurd.[156]

At first blush this conclusion seems logical, but on closer examination the argument's faults become clear. Foremost, *Kaplan*

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154. The federal circuits are split on several aspects of the reasonable accommodation requirement under the ADA and the Supreme Court has only addressed the issue on narrow grounds. *See generally* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 934–949 (2003) (discussing both the circuit court split and Supreme Court precedent). To avoid obscuring the point of this hypothetical, assume that delaying relocation is a reasonable accommodation in the jurisdictions of State *X* and State *Y*.

155. *Kaplan*, 323 F.3d at 1232. *See* Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 916–920 (1999–2000) (providing a more elaborate example of absurd results which turns on the lay meaning of "disability").

156. *Kaplan*, 323 F.3d at 1232 ("This would be a perverse and troubling result . . . .").

ignored Congress' concerns about the effects of perceived disability. "[M]yths and fears about disability and diseases are *as* handicapping as are the physical limitations that flow from actual impairment."[157] In addition, the House Report illustrates why the "regarded as" prong is as vital as the other definitions of disability in the Act:

> [A] person who is rejected from a job because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as" prong], whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.[158]

Ultimately, the results with which the Ninth Circuit in *Kaplan* was concerned are only absurd if courts use the lay meaning of the word "disability." The ADA, its legislative history, and relevant case law all suggest it is inappropriate to mix the lay and legal meanings of "disability" when evaluating claims under the Act. Thus, when the term "disabled" is used as Congress intended, employers must face their prejudices by providing reasonable accommodations. This understanding of the term will produce results consistent with the overall statutory scheme of the ADA.

D. "Regarded As" Individuals Are Disabled Because Congress Created a Term of Art Within the ADA Encompassing a Broader Meaning of Disability

The preceding three sections each show ways in which the *Kaplan* court erred. There is a common thread among each error found in the Ninth Circuit opinion—careless usage of the term "disabled."

The Ninth Circuit has acknowledged that "[t]he ADA defines 'disability' with specificity as a term of art."[159] Thus, the precise legal meaning of "disability" need not be derived from accumulated legal tradition or historical practice.[160] When courts alternate

157. H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 453 (emphasis added).

158. *Id.*

159. Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 n.2 (9th Cir. 1996).

160. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 539 (1999) (explaining how undefined terms may have default legal meanings based on accumulated

between lay and legal meanings of a term, the courts' conclusions are not credible.[161] The careless mixing of various forms of the term "disabled" in *Kaplan* has led the Ninth Circuit to inadvertently create an issue where none exists.

The ADA defines "disability" to include individuals who are "regarded as" having an impairment that substantially limits a major life activity.[162] Therefore, under the legal term of art adopted by Congress, such an individual is disabled for purposes of the Act. Double meanings are not uncommon in the law. Nevertheless, using the term "disabled" with a modicum of discipline would eliminate the issue presented in *Kaplan* and force courts to remain more faithful to the Act.

As a result, employers would be required to *reasonably* accommodate individuals whom they regard as "disabled." Once employers were disabused of their misperceptions, the individual would no longer be disabled under the "regarded as" prong. Concomitantly, the employer would no longer be required to continue the reasonable accommodations.[163] Thus, by extending coverage to "regarded as" individuals, Congress achieves an elegant resolution to a paradigmatic civil rights problem.

VI. IMPLICATIONS

The Ninth Circuit's mode of analysis is principled, rather than fact-specific, and establishes a general rule. The doctrinal implications of *Kaplan* are thus particularly troubling because future courts will lack the discretion to decline to apply its rule.[164]

Foremost, courts must determine whether Rehabilitation Act cases such as *Arline*[165] will continue to have force in the ADA arena.

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legal tradition and centuries of practice).

161. *See* Branch v. Smith, 538 U.S. 254, 298–99 (2003) (O'Connor, J. concurring in part and dissenting in part) (criticizing as not credible the Court's inconsistent usage of dictionary definitions when interpreting undefined terms).

162. 42 U.S.C. § 12102(2)(C) (2000); 29 C.F.R. § 1630.2(g)(3) (2005); *see Sanders*, 91 F.3d at 1354 n.2 (recognizing that the ADA defines "disability" as a term of art).

163. Provided the individual does not qualify under the "actual impairment" or "record of impairment" prongs of disability.

164. *See* 5 AM. JUR. 2D *Appellate Review* § 601 (2005).

165. 480 U.S. 273 (1987).

Notwithstanding Congress' clear mandate that the ADA provide at least as much protection as the Rehabilitation Act,[166] the Ninth Circuit created a rule in *Kaplan* without addressing *Arline*, suggesting that it and other such cases are not binding authority. Similarly, it is now unclear whether Congress' mandate still holds because the rule in *Kaplan* applies a lesser standard for "regarded as" individuals than the prevailing Rehabilitation Act rule in *Arline*.

Moreover, the *Kaplan* holding renders application of the ADA less certain. Are employers still required to initiate the "interactive process" when they believe an employee is disabled? Under *Kaplan*, this rule is unclear because employees merely "regarded as" disabled are not entitled to reasonable accommodations. It would be absurd to require employers to initiate an interactive process for the purpose of finding a reasonable accommodation if the employee "regarded as" being disabled is not entitled to reasonable accommodation.

For employers, *Kaplan* offers little solace. Employers must still act when they perceive an employee is disabled. To assume *Kaplan* applies, and thus forego taking action, employers must assume that their perceptions about an individual's disability are false, i.e., their employee is neither "physically impaired," nor does the employee have a "record of such impairment." Inherently, however, employers will believe their perceptions are correct. Furthermore, to act prudently and avoid the risk of liability, employers will have to adopt a course of action that assumes their perceptions are correct. Under *Barnett*, that course of action must be to identify and implement reasonable accommodations.[167]

In the interim, while courts sort out the implications of the *Kaplan* rule, "regarded as" individuals will have to protect their rights without the benefit of one of the more robust aspects of the ADA's prohibition against discrimination—the failure to provide reasonable accommodations.[168]

VII. CONCLUSION

The Ninth Circuit's decision in *Kaplan* can be summarized by one inquiry—whether "regarded as" individuals are entitled to

166. 42 U.S.C. § 12201(a); *see* H.R. REP. NO. 101-485, pt. 3,at 69 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 492.

167. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc).

168. *See* 42 U.S.C. § 12112(a), (b)(5)(A).

reasonable accommodations. As explained above, the answer to this question must be "yes." The *Kaplan* court erred by ignoring Supreme Court precedent that requires employers to furnish reasonable accommodations regardless of the disability-definition prong involved. Moreover, the Ninth Circuit rule that requires employers to initiate the "interactive process" when they believe an employee is disabled supports the conclusion that "regarded as" individuals are entitled to reasonable accommodations.

Finally, its alternating use of both the lay and legal meanings of the word "disabled" suggests that the *Kaplan* court was uneasy with Congress' recognition of discrimination that arises solely because an individual is inaccurately perceived as disabled. Congress, however, made this choice after giving the matter great thought. As such, the judiciary must go no further than to apply the ADA in a manner that remains faithful to its text and affords the protections Congress intended.

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