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I. INTRODUCTION

The Americans with Disabilities Act ("ADA")[1] prohibits employers from discriminating against a "qualified individual with a disability,"[2] which the Act defines 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."[3] Consistent

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1. 42 U.S.C. §§ 12101-12213 (2000).
2. *Id.* § 12112(a).
3. *Id.* § 12111(8).

with this definition,[4] the ADA not only prohibits employers from intentionally discriminating against qualified individuals because of their disabilities[5]—what is sometimes referred to as garden variety disparate treatment[6]—but also makes it unlawful for employers to fail to make reasonable accommodations for such individuals' "known physical or mental limitations."[7]

For purposes of these provisions, the ADA defines a disability to include: (1) "a physical or mental impairment that substantially limits one or more" of an individual's major life activities,[8] which is often referred to as an "actual disability,"[9] (2) "a record of such an impairment,"[10] or (3) "being regarded as having such an impairment."[11] In this sense, the text of the ADA

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4. *See generally* Maddox v. Univ. of Tenn., 907 F. Supp. 1144, 1149 (E.D. Tenn. 1994) ("[T]he issues of whether [an individual] is an otherwise qualified disabled individual and of whether [an] employer is able to reasonably accommodate its disabled employee are intertwined."), *aff'd*, 62 F.3d 843 (6th Cir. 1995).

5. *See* 42 U.S.C. § 12112(a); Rogers v. CH2M Hill, Inc., 18 F. Supp. 2d 1328, 1342 (M.D. Ala. 1998) ("[The ADA's] purpose is to prohibit intentional discrimination against a disabled person because of that disability.").

6. *See* Thomas Simmons, *South Dakota's Disability Discrimination Laws: Limits and Vantages*, 47 S.D. L. REV. 389, 413 (2002) ("Disparate treatment is the garden variety sort of discrimination against individuals with disabilities. It occurs, for example, when an individual is fired—or not hired—because of the individual's disability."); *cf.* Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 12 (1st Cir. 2004) (criticizing an employer for treating an employee's claim as if it was a "garden variety claim of discrimination" when the real issue was that the employer "failed to make any reasonable effort to accommodate her disability").

7. 42 U.S.C. § 12112(b)(5)(A); *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) ("Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities."); Gretillat v. Care Initiatives, 414 F. Supp. 2d 901, 906-07 (N.D. Iowa 2006) ("An employer can discriminate by failing to reasonably accommodate a known physical limitation of an employee.").

8. *See* 42 U.S.C. § 12102(2)(A) (2000).

9. *See* Murphy v. Facet 58, Inc., 329 F. Supp. 2d 1260, 1266 (D. Utah 2004) ("'Disability' under the ADA is a term of art and can refer to an individual who has an actual disability which 'substantially limits one or more of the major life activities of such individual' . . . ." (quoting 42 U.S.C. § 12102(2))); Ragan v. Jeffboat LLC, 149 F. Supp. 2d 1053, 1062-63 (S.D. Ind. 2001) (observing that "an 'actual' disability . . . is[] a physical or mental impairment that substantially limits one or more major life activities" (citing 42 U.S.C. § 12102(2)(A))).

10. 42 U.S.C. § 12102(2)(B); *see also* Ambrosino v. Metro. Life Ins. Co., 899 F. Supp. 438, 442 (N.D. Cal. 1995). A number of state statutes "also proscribe[] discrimination based on a 'record of . . . impairment,'" and the primary import of these statutes is that, as under the ADA, "an employer or prospective employer may not decline to hire, or terminate the employment of, an individual with a history of disability." Fuqua v. Unisys Corp., 716 F. Supp. 1201, 1207 (D. Minn. 1989) (quoting MINN. STAT. § 363A.03 subdiv. 12(2) (2004)). There is virtually no state court authority addressing whether these state laws also impose upon employers an affirmative duty to accommodate individuals with a history of disability. *See, e.g.*, McLain v. Andersen Windows, Inc., 10 Lab. Rel. Rep. (BNA) (19 Am. Disabilities Cases) 306 (D. Minn. March 6, 2007) (observing that "Minnesota case law does not resolve the issue"). Most state courts considering the issue presumably would seek guidance from cases construing "the analogous provision of the ADA." Thomann v. Lakes Reg'l MHMR Ctr., 162 S.W.3d 788, 797 (Tex. App. 2005).

11. 42 U.S.C. § 12102(2)(C); *see also* Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 12 (1st Cir. 1997) ("The definition in the ADA of 'disability' covers three categories,

does not differentiate between the Act's prohibition of intentional discrimination and its imposition of an affirmative duty to accommodate,[12] and thus appears to extend the Act's reasonable accommodation obligation equally to all three statutorily defined types of disabilities.[13]

Despite the breadth of the ADA's definitional provisions,[14] the interplay between the Act's protection of individuals with a record of a substantially limiting impairment (commonly known as a "record of disability")[15] and the employer's duty to accommodate a disabled individual's limitations is a complex[16] and unsettled question.[17] The text of the ADA does not

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including the mere perception that someone is disabled.").

12. *See* Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 195 (1999) (noting that "the antidiscrimination and accommodation requirements of the ADA share the same definition of disability"); *cf.* Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 207 F.3d 945, 959 (7th Cir. 2000) (Wood, J., dissenting) (asserting that "the accommodation duty and the duty to avoid discrimination are nothing more than two sides of the same coin").

13. *See* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1236 (11th Cir. 2005) ("The text of [the] statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not."); *cf.* Cigan v. Chippewa Falls Sch. Dist., 388 F.3d 331, 335 (7th Cir. 2004) (acknowledging that any person who is "statutorily disabled" under the ADA might be entitled to "the full set of accommodations appropriate to a genuinely disabled person") (parenthesis omitted).

14. *See generally* Cox v. Ala. State Bar, 392 F. Supp. 2d 1295, 1300 (M.D. Ala. 2005) ("The word 'discriminate' is defined broadly to include 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.'" (quoting 42 U.S.C. § 12112(b)(5)(A) (2000))); Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1154 (D. Colo. 1996) ("The ADA defines 'disability' in very broad terms."), *aff'd in part, rev'd in part, and vacated in part*, 124 F.3d 1221 (10th Cir. 1997).

15. *See* McKenzie v. Dovala, 242 F.3d 967, 972 (10th Cir. 2001) ("A record of disability is a history of impairment that substantially limited a major life activity of a plaintiff."); *cf.* Eshelman v. Agere Sys., Inc., 16 Am. Disabilities Cases (BNA) 481, 483 (E.D. Pa. 2004) ("Prohibiting discrimination against an individual with a record of disability is intended to protect an individual with a history of disability, regardless of whether the individual is currently substantially limited in a major life activity.").

16. *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 n.2 (3d Cir. 1999) (characterizing the question of "whether a plaintiff who relies exclusively on . . . the 'record of a substantially limiting impairment' standard is legally entitled to reasonable accommodations" as a "difficult" issue[]); *cf.* Vera v. Williams Hospitality Group, Inc., 73 F. Supp. 2d 161, 168 (D.P.R. 1999) (observing that the "inquiry into reasonable accommodation is one of the most complex aspects of the ADA"). *But cf.* Weber v. Strippit, Inc., 186 F.3d 907, 916 (8th Cir. 1999) ("The reasonable accommodation requirement is easily applied in a case of an actual disability.").

17. *See* Mash v. Xerox Corp., No. 98-506 GMS, 2000 WL 1728250, at *11 n.18 (D. Del. Apr. 11, 2000) ("It is not clear . . . that employees who meet only the 'record of' . . . definition[] of 'disability' are entitled to reasonable accommodations under the ADA."); Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL'Y 1, 86 (2001) ("[T]he question of whether individuals with a 'record of' disability are entitled to reasonable accommodations is unsettled in the case law.").

definitively resolve the issue,[18] and there is as yet relatively little case law addressing it[19] (or, for that matter, any other aspect of the ADA's record of disability provision).[20] Moreover, those few courts that have discussed whether an employer is obligated to accommodate an individual with a record of disability are not in agreement as to how that question should be resolved.[21]

This article explores the issue,[22] which has been described as a controversial question "worthy of study."[23] The article begins with a brief overview of the ADA's record of disability provision.[24] The article then

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18. *See* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 n.6 (7th Cir. 1998) ("The precise scope of the 'record of impairment' prong of the statute is not entirely clear as it relates to the right to demand reasonable accommodations of the employer."); Fontanilla v. City & County of S.F., 11 Am. Disabilities Cases (BNA) 1207, 1221 (N.D. Cal. 2001) (observing that "the terms of the ADA are ambiguous with respect to the obligation to provide reasonable accommodation to employees . . . who are not actually disabled").

19. *See, e.g.*, Barnes v. Nw. Iowa Health Ctr., 238 F. Supp. 2d 1053, 1090 n.17 (N.D. Iowa 2002) ("The Eighth Circuit has not squarely addressed whether a failure-to-accommodate claim is a viable cause of action when the ADA plaintiff is disabled because of a 'record of' disability."); *see also* John Gustafson, *Accommodations in "Record of" Cases Will Be Next Big ADA Issue, Attorney Says*, EEO UPDATE, Oct. 14, 1999, at 2 ("The courts have only just begun to consider the applicability of the reasonable accommodation requirement to the 'record of' category of ADA protection . . . ."); James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 39 (2005) ("I am unaware of any decision regarding accommodation requirements in 'record of' claims . . . .").

20. One commentator recently described the record of disability provision as the "least debated, least understood, and most poorly considered" aspect of the ADA, and lamented that the provision has been so thoroughly ignored by the courts and commentators that it "barely exists in practice anymore." Alex B. Long, *(Whatever Happened to) The ADA's "Record Of" Prong(?)*, 81 WASH. L. REV. 669, 673 (2006); *see also* Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1285 n. 111 (2006) ("There have been very few cases under [the 'record of'] definition in the nearly sixteen years since the ADA's enactment . . . .").

21. *See* Rule v. Jewel Food Stores, Inc., 15 Am. Disabilities Cases (BNA) 1558, 1569 n.21 (N.D. Ill. 2004) ("[W]hile there is substantial authority in support of the view that a plaintiff is not entitled to 'reasonable accommodation' if he is not in fact disabled, the caselaw is not uniform and the competing arguments are sufficiently strong that reasonable minds can disagree."); Helen A. Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 MISS. L.J. 917, 922 (2006) ("To date, the federal courts are split as to whether individuals . . . 'with a record of' a disability are ensured workplace accommodations under the ADA.").

22. There has been surprisingly little academic consideration of the issue, even though "[t]he 'record of' definition of disability is likely to be the subject of future litigation with regard to an employer's reasonable accommodation duty." Nancy L. Abell et al., *The Americans With Disabilities Act: Rights, Responsibilities and Recent Results*, SL061 ALI-ABA 737, 792 (2006); *see also* Gustafson, *supra* note 19, at 1 ("[T]he next big [ADA] issue . . . will be whether reasonable accommodations are required for individuals with records of substantially limiting impairments.").

23. *See* Peter David Blanck, Commentary, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER RACE & JUST. 33, 56-57 (1998); *see also* Long, *supra* note 20, at 721 ("One of the more interesting questions with regard to an ADA plaintiff's prima facie case is whether an employer must accommodate an individual with a history of disability.").

24. For broader academic discussions of the record of disability provision, see Justin S. Gilbert, *Prior History, Present Discrimination, and the ADA's "Record Of" Disability*, 31 U. MEM. L. REV. 659 (2001); Long, *supra* note 20.

discusses the competing views of whether an employer is obligated to accommodate the limitations of an individual with a record of disability.[25] The article ultimately concludes that the question of whether such an individual is entitled to an accommodation should be determined on an individualized, case-by-case basis.[26]

II. OVERVIEW OF THE ADA'S RECORD OF DISABILITY PROVISION

The ADA itself does not define what constitutes a record of a substantially limiting impairment.[27] However, the applicable interpretive regulations indicate that this aspect of the ADA's disability definition[28] was intended to prevent discrimination against persons with a history of disability.[29] Thus, in order to claim the protection of the record of disability provision,[30] an individual must have been classified (or misclassified)[31] at

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25. *See generally* Luke A. Sobota, Comment, *Does Title III of the Americans With Disabilities Act Regulate Insurance?*, 66 U. CHI. L. REV. 243, 243 (1999) ("In the face of the ADA's textual ambiguity, courts have developed competing interpretations of the ADA.").

26. *See generally* EEOC v. Dollar Gen. Corp., 252 F. Supp. 2d 277, 291-92 (M.D.N.C. 2003) ("Ultimately, the determination of 'whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis.'") (internal bracketing and ellipses omitted) (quoting 29 C.F.R. pt. 1630, app. § 1630.9 (2005)); Bates v. United Parcel Serv., 204 F.R.D. 440, 445 (N.D. Cal. 2001) ("The ADA requires individualized analyses when determining what accommodations are required under the ADA and whether a particular individual even qualifies for protection under the ADA.").

27. *See* Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1120 (5th Cir. 1998); Burch v. Coca-Cola Co., 119 F.3d 305, 321 (5th Cir. 1997). One court has observed that "[d]efining 'record of impairment' is difficult." Lloyd v. E. Cleveland City Sch. Dist., 232 F. Supp. 2d 806, 812 (N.D. Ohio 2002).

28. The Equal Employment Opportunity Commission ("EEOC") is the federal agency charged with responsibility for administering the ADA. *See* Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 9 n.4 (1st Cir. 1999). Pursuant to that responsibility, the EEOC has "issued regulations and interpretive guidelines to provide additional guidance regarding the proper interpretation of the term 'disability' and other parts of the ADA." EEOC v. Browning-Ferris, Inc., 262 F. Supp. 2d 577, 583 n.7 (D. Md. 2002). While the regulations are not binding, courts typically accord them "great deference" when interpreting the ADA. *See* Rivera v. Apple Indus. Corp., 148 F. Supp. 2d 202, 212 n.5 (E.D.N.Y. 2001) (quoting Muller v. Costello, 187 F.3d 298, 312 (2d Cir. 1999)).

29. *See* 29 C.F.R. § 1630.2(k) (2006); Gallegos v. Swift & Co., 237 F.R.D. 633, 643 (D. Colo. 2006); Couts v. Beaulieu Group, LLC, 288 F. Supp. 2d 1292, 1305 (N.D. Ga. 2003); Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274, 1286 (S.D. Ala. 1999); Cribs v. City of Altamonte Springs, 11 Am. Disabilities Cases (BNA) 1462, 1465 (M.D. Fla. 2000).

30. Individuals need not invoke the record of disability provision if they are currently disabled. *See* Johnson v. Lehigh County, 11 Am. Disabilities Cases (BNA) 269, 270-71 (E.D. Pa. 2000) (indicating that an individual who is actually disabled within the meaning of the ADA "need not additionally establish that she has a record of an impairment . . . ."); *cf.* Taliaferro v. Assocs. Corp. of N. Am., 112 F. Supp. 2d 483, 491 (D.S.C. 1999) ("The ADA describes three types of disability, any one of which can trigger the statute's protections."), *aff'd*, 229 F.3d 1144 (4th Cir. 2000). However, individuals often claim protection under both the actual and record of disability prongs of

some point in the past as having an impairment that constitutes an actual disability within the meaning of the Act[32]—that is, an impairment that substantially limited one or more of the individual's major life activities.[33]

The principal premise underlying the record of disability provision is that individuals who have recovered or are recovering from substantially limiting impairments may be subjected to discrimination based on their medical histories,[34] even though they have no present impairment severe enough to constitute an actual disability within the meaning of the ADA.[35] But while these individuals may experience discrimination as the result of the unfounded fears and prejudices of their employers and coworkers,[36] and

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the ADA's disability definition. *See, e.g.*, Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097, 1127 (N.D. Iowa 2002). *See generally* Arnold v. United Parcel Serv., 136 F.3d 854, 862 (1st Cir. 1998) ("There is no reason [an] employee could not be protected under two prongs simultaneously."), *abrogated on other grounds by* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

31. *See* 29 C.F.R. pt. 1630, app. § 1630.2(k) (2006) ("This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled."); *Phillips*, 78 F. Supp. 2d at 1287 ("As the EEOC regulations recognize, as long as an employer relies upon a record that classifies a person as having a mental or physical impairment that substantially limits a major life activity, that person is considered disabled under the ADA—even if the classification was erroneous.").

32. *See* Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 513 (3d Cir. 2001) ("A plaintiff attempting to prove the existence of a 'record' of disability still must demonstrate that the recorded impairment is a 'disability' within the meaning of the ADA."); Manz v. Gaffney, 200 F. Supp. 2d 207, 214 (E.D.N.Y. 2000) ("A record sufficient to establish an ADA claim . . . must document a disability within the meaning of the ADA."), *aff'd in part and vacated and remanded in part*, 56 F. App'x 50 (2d Cir. 2003); Hannah v. County of Cook, 30 Nat'l Disability L. Rep. (LRP) ¶ 117, at 539 (N.D. Ill. 2005) ("Because [the plaintiff's] past impairment failed to fall under the definition of disability in § 12102(2)(A), she cannot sustain a claim under § 12102(2)(B).").

33. *See* Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) ("Regardless of whether [an individual] is proceeding under a classification or a misclassification theory, the record-of-impairment standard is satisfied only if she actually suffered a physical impairment that substantially limited one or more of [her] major life activities."); Nuzum v. Ozark Auto. Distribs., Inc., 320 F. Supp. 2d 852, 860 n.7 (S.D. Iowa 2004) ("A record of a disability means 'a history of a mental or physical impairment that substantially limits one or more major life activities.'" (quoting Gutridge v. Clure, 153 F.3d 898, 901 (8th Cir. 1998)), *aff'd*, 432 F.3d 839 (8th Cir. 2005).

34. *See* Bailey v. Ga.-Pac. Corp., 306 F.3d 1162, 1169 (1st Cir. 2002); Bizelli v. Amchem, 981 F. Supp. 1254, 1257 (E.D. Mo. 1997).

35. *See* Nathanson v. Med. Coll. of Pa., 926 F.2d 1368, 1382 (3d Cir. 1991) ("A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities."); *see also* Burkett v. U.S. Postal Serv., 32 F. Supp. 2d 877, 879 n.2 (N.D. W. Va. 1999) (observing that the ADA's record of disability provision "protects people who have a history of a disability from discrimination, whether or not they currently are substantially limited in a major life activity").

36. *See* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998) ("[P]eople who have recovered from previously disabling conditions (cancer or coronary disease, for example) . . . may remain vulnerable to the fears and stereotypes of their employers."); *see also* Miranda Oshige McGowan, *Reconsidering the Americans With Disabilities Act*, 35 GA. L. REV. 27, 112 (2000) ("[E]mployers all too often rely on generalizations or inaccurate stereotypes about . . . past impairments.").

thus require protection from "garden variety" disparate treatment,[37] they are less likely to require affirmative accommodations from their employers in order to be productive employees.[38] One court explained this distinction in the following terms:

> In ADA cases involving actual disabilities, as opposed to . . . a history of a disability, it is usually true that the plaintiff cannot perform the essential functions of the job without some kind of reasonable accommodation. The opposite may often be true in the case[] of . . . historical disability; the plaintiff may be perfectly able to perform the job without any accommodation, and the only thing standing in the way may be the employer's preconceived notions of disability.[39]

III. THE VIEW THAT EMPLOYERS NEED NOT ACCOMMODATE INDIVIDUALS WITH A RECORD OF DISABILITY

In *Barnes v. Northwest Iowa Health Center*,[40] a federal district court in the Eighth Circuit held that employers have no duty to accommodate

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37. *See* Miller v. Heritage Prods., Inc., No. 1:02-CV-1345-DFH, 2004 WL 1087370, at *10 (S.D. Ind. Apr. 21, 2004) ("The ADA prohibits disparate treatment against a 'qualified individual with a disability.' That prohibition includes all three definitions [of] disability . . . ." (quoting 42 U.S.C. § 12112(a) (2000))). In this regard, one court has observed that "the same discriminatory animus is afoot whether the plaintiff is 'actually' disabled or only has a 'record of disability.'" Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002); *see also* Friedland, *supra* note 12, at 186 (observing that the ADA's record of disability provision is "comprehensible" for the "purposes of preventing *pure* discrimination") (emphasis added).

38. *See* Alison M. Barnes, *The Americans With Disabilities Act and the Aging Athlete After Casey Martin*, 12 MARQ. SPORTS L. REV. 67, 88 n.109 (2001) ("Unlike more typical ADA plaintiffs, those with [a record of disability] do not need accommodation. Rather . . . they only need the discrimination to stop."); *see also* Peter David Blanck, *The Economics of the Employment Provisions of the Americans With Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 896 n.97 (1997) ("Many qualified individuals with perceived disabilities or with a record of impairment covered under the second and third prong of the definition of disability may not need an accommodation . . . .").

39. Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 676 (7th Cir. 1998) (parenthesis omitted); *see also* Uranyi v. Multiplan Inc., 10 Lab. Rel. Rep. (BNA) (18 Am. Disabilities Cases) 248, 249 (E.D.N.Y. June 12, 2006) (describing an employee who "was no longer disabled" and thus "did not require any accommodations to perform her duties"); McGowan, *supra* note 36, at 158 ("Persons . . . who have a 'record of' a disability generally do not require reasonable accommodations.").

40. 238 F. Supp. 2d 1053 (N.D. Iowa 2002).

individuals protected under the ADA's record of disability provision.[41] The plaintiff in *Barnes* suffered from rheumatoid arthritis,[42] an inflammatory disease of the joints[43] that the court described as a "chronic, permanent condition" with alternating periods of flare-ups[44] and remission.[45]

In the plaintiff's case, her condition was sufficiently severe that it prevented her from working for a number of years.[46] However, with the aid of medication, the plaintiff was ultimately able to control her condition to the point she felt capable of returning to work,[47] even though she continued to experience "episodic flare-ups" during which she apparently was unable to care for herself.[48]

Upon concluding that her illness was sufficiently controlled,[49] the plaintiff applied for and was offered employment in a nursing home.[50] However, when a company doctor subsequently concluded that the duties of the position the plaintiff had been offered might be beyond her capabilities,[51] the nursing home revoked its offer without considering any possible accommodations.[52] The plaintiff then brought suit under the ADA alleging, among other things, that the nursing home unlawfully discriminated against her on the basis of her record of disability.[53] The plaintiff moved for partial summary judgment, seeking a determination that she had established a prima facie case that the nursing home impermissibly failed to accommodate her limitations.[54]

The court began its analysis by noting that the Eighth Circuit had not squarely addressed whether a failure to accommodate claim can be maintained by an individual protected only under the ADA's record of disability provision.[55] The court therefore relied by analogy on a prior Eighth Circuit decision,[56] *Weber v. Strippit, Inc.*,[57] and other similar cases

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41. *See id.* at 1090.

42. *See id.* at 1060.

43. *See* Moore v. J.B. Hunt Transp., Inc., 221 F.3d 944, 948 (7th Cir. 2000).

44. *Barnes*, 238 F. Supp. 2d at 1076.

45. *See id.* at 1060 n.1.

46. *See id.* at 1060.

47. *See id.*

48. *Id.* at 1075; *see also Moore*, 221 F.3d at 948 ("Individuals with advanced rheumatoid arthritis . . . can be subject to 'flare-ups,' which result in temporary incapacitation.").

49. *See generally* Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 153 n.2 (3d Cir. 1999) (observing that "serious, chronic conditions . . . are not always perfectly controlled").

50. *See Barnes*, 238 F. Supp. 2d at 1060.

51. *See id.* at 1061.

52. *See id.* at 1060.

53. *See id.* at 1059.

54. *See id.* at 1059, 1063; *cf.* Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 600 (7th Cir. 1998) (indicating that an employer may be required to accommodate "episodic flares [that] were . . . part of [an individual's] disability").

55. *See Barnes*, 238 F. Supp. 2d at 1090 n.17.

56. In *Bizelli v. Parker Am-Chem*, No. 98-3560, an Eighth Circuit case predating *Barnes* that was

holding that employees protected by the ADA because they are erroneously perceived to be disabled[58] are not entitled to reasonable accommodations.[59]

The *Barnes* court concluded that these perceived disability cases effectively hold that an employer's alleged failure to accommodate will not support an ADA claim unless the individual seeking the accommodation is actually disabled,[60] in part because individuals with no actual disability purportedly need no accommodation.[61] The court reasoned that individuals

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settled before a ruling was issued, the EEOC apparently submitted an amicus brief asserting that "restrictions growing from an individual's 'record of' cancer and cancer treatments must be reasonably accommodated." Gilbert, *supra* note 24, at 673 & n.73 (describing the EEOC's position in *Bizelli*). However, in a training manual prepared for use by its employees, the EEOC expressed the seemingly contrary view (and the one ultimately embraced by the court in *Barnes*) that "[o]nly persons who *actually* have a substantially limiting impairment are entitled to reasonable accommodation under the ADA." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA CASE STUDY TRAINING MANUAL, Case Study 1, at 6 (1996); *see also EEOC Official Gives Preview of Guidance on Accommodations*, ADA COMPLIANCE GUIDE NEWSL. (Thompson Publ'g Group, Inc., Washington, D.C.), July 1998, at 6 (discussing the EEOC's reluctance to take a formal position on the issue).

57. 186 F.3d 907 (8th Cir. 1999).

58. The provision of the ADA extending protection to individuals who are "regarded as" having a substantially limiting impairment, 42 U.S.C. § 12102(2)(C), is commonly known as the Act's "perceived disability" provision. Burnett v. W. Res., Inc., 929 F. Supp. 1349, 1356 (D. Kan. 1996). For the author's previous discussion of perceived disability discrimination generally, see Michael D. Moberly, *Perception or Reality?: Some Reflections on the Interpretation of Disability Discrimination Statutes*, 13 HOFSTRA LAB. L.J. 345 (1996).

59. *See Barnes*, 238 F. Supp. 2d at 1090 n.16 (citations omitted); *see also* Nuzum v. Ozark Auto. Distribs., Inc., 320 F. Supp. 2d 852, 870 n.16 (S.D. Iowa 2004) ("[I]t is well established in the Eighth Circuit that the ADA does not impose upon an employer a duty to accommodate a 'regarded as' disabled plaintiff."), *aff'd*, 432 F.3d 839 (8th Cir. 2005). However, whether employers must provide accommodations in perceived disability cases "is a subject on which decisions are in conflict." Cigan v. Chippewa Falls Sch. Dist., 388 F.3d 331, 335 (7th Cir. 2004). Unlike the Eighth Circuit, "the First and Third Circuits, as well as some district courts, have ruled that accommodations must be made for employees regarded as disabled." Ammons-Lewis v. Metro. Water Reclamation Dist., 16 Am. Disabilities Cases (BNA) 386, 390 (N.D. Ill. 2004) (citations omitted). For the author's consideration of this unsettled issue, see Michael D. Moberly, *Letting* Katz *Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603 (1998).

60. *See Barnes*, 238 F. Supp. 2d at 1090; *cf.* Williams v. Phila. Hous. Auth., 230 F. Supp. 2d 631, 645 n.14 (E.D. Pa. 2002) ("A number of courts have held that an employer need only accommodate actual disabilities."), *aff'd in part and rev'd in part*, 380 F.3d 751 (3d Cir. 2004).

61. *See Barnes*, 238 F. Supp. 2d at 1090 ("A person without an actual disability would not need any accommodation." (quoting Gilday v. Mecosta County, 124 F.3d 760, 764 n.4 (6th Cir. 1997))). The premise underlying this reasoning appears to be that "[i]f the [individual] were capable but the employer perceived him as incapable, the Court would simply order the [employer] to recognize his capability." Alderson v. Postmaster Gen. of U.S., 598 F. Supp. 49, 55 (W.D. Okla. 1984); *see also* Leonard, *supra* note 19, at 39 ("Persons without actual disabling impairments do not need accommodations to perform a job; rather, they need an injunction that prevents or repairs the injury of employers relying on irrelevant factors.").

protected under the Act's record of disability provision,[62] like those mistakenly perceived to be disabled,[63] presumably are not currently suffering from any substantially limiting impairments,[64] in which case they also arguably need no accommodation.[65]

Another federal district court reached essentially the same conclusion in *McLain v. Andersen Windows, Inc.*[66] The plaintiff in *McLain* was a delivery truck driver for the defendant employer.[67] After aggravating a preexisting knee injury, the plaintiff requested that he be assigned different job duties.[68] When the employer failed to accommodate his request,[69] the plaintiff brought suit under the Minnesota Human Rights Act ("MHRA"),[70] a state statute prohibiting disability discrimination[71] that generally is analyzed in the same manner as the ADA.[72]

The employer subsequently moved for summary judgment on the plaintiff's failure to accommodate claim.[73] The employer argued that even if

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62. 42 U.S.C. § 12102(2)(B) (2000).

63. *See* Cook v. Cub Foods, Inc., 99 F. Supp. 2d 945, 952 (N.D. Ill. 2000) ("Under the ADA, an employee is 'regarded as disabled' if his impairment does not substantially limit a major life activity, but the employer treats the employee as if he had such a disability."); McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1498 (N.D. Ga. 1996) ("[A]n employer becomes subject to [the perceived disability] prong of the statute only when he inaccurately 'perceives' as disabled, an employee, who is *not* substantially impaired, and thereafter negatively stereotypes that employee's abilities to the latter's detriment.").

64. *See Barnes*, 238 F. Supp. 2d at 1090 n.17; *cf.* Lawson v. CSX Transp., Inc., 101 F. Supp. 2d 1089, 1107 (S.D. Ind. 2000) ("A plaintiff could show a record of a substantially limiting impairment if he provides evidence that he faced such limitations in the past even if he is not presently substantially limited."), *rev'd on other grounds*, 245 F.3d 916 (7th Cir. 2001); Kohnke v. Delta Air Lines, Inc., 5 Am. Disabilities Cases (BNA) 345, 348 (N.D. Ill. 1995) ("A person may have a record of a disability under the ADA and presently have no actual incapacity."); Gilbert, *supra* note 24, at 674 (observing that "the individual with a 'record of' substantial limitations may experience no current limitations").

65. *See, e.g.*, Ware v. Wyo. Bd. of Law Exam'rs, 973 F. Supp. 1339, 1354 (D. Wyo. 1997) (embracing the view that "accommodations would not be necessary for someone who did not currently suffer from an impairment," such as "persons with a record of impairment"); Michelle Parikh, Note, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans With Disabilities Act's Disservice to Persons With Mental Illness*, 89 CORNELL L. REV. 721, 752 (2004) ("If the plaintiff is able to establish discrimination on the basis of a past disability that is no longer substantially limiting a major life activity, then it is unclear why her employer would be required to make a reasonable accommodation.").

66. 10 Lab. Rel. Rep. (BNA) (19 Am. Disabilities Cases) 306 (D. Minn. March 6, 2007).

67. *See id.* at 307.

68. *See id.*

69. *See id.*

70. MINN. STAT. §§ 363A.01-363A.41 (2004).

71. *See* Larson v. Koch Ref. Co., 920 F. Supp. 1000, 1004 (D. Minn. 1996).

72. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 309 (citing Philip v. Ford Motor Co., 328 F.3d 1020, 1023 n.3 (8th Cir. 2003)). In particular, the MHRA, like the ADA, requires employers to provide reasonable accommodations for their employees' disabilities. *See* Burchett v. Target Corp., 340 F.3d 510, 517 (8th Cir. 2003).

73. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 308.

the plaintiff had a record of disability,[74] as he was alleging,[75] the employer was not required to provide the plaintiff with a reasonable accommodation because, by his own admission, his knee problems did not materially limit any of his major life activities,[76] and employers are only required to accommodate individuals with actual disabilities.[77]

The court agreed with the employer, and entered summary judgment in its favor on the plaintiff's failure to accommodate claim.[78] Relying on the assertion in *Weber v. Strippit, Inc.*[79] that imposing a duty to accommodate in perceived disability cases would lead to "bizarre results"[80] in which equally (but not substantially) impaired—or even unimpaired[81]—individuals are treated differently,[82] the *McLain* court concluded that equally bizarre results would occur if nondisabled employees with a disability history could maintain reasonable accommodation claims.[83] For example, if two employees had the same non-disabling impairment, but one had a history of

74. Like the ADA, the MHRA prohibits employers from discriminating against an individual "who has an actual disability," as well as one with "a record of disability." *Id.* at 309; *see also* Fuqua v. Unisys Corp., 716 F. Supp. 1201, 1207 (D. Minn. 1989) ("The Minnesota Human Rights Act also proscribes discrimination based on a 'record of . . . impairment.'" (quoting MINN. STAT. § 363A.03 subdiv. 12(2) (2004))).

75. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 308.

76. *See id.*; *cf.* Nichols v. ABB DE, Inc., 324 F. Supp. 2d 1036, 1045 (E.D. Mo. 2004) ("[T]he Court . . . cannot allow a reasonable accommodation claim to go forward because [the plaintiff] is not substantially limited in a major life activity.").

77. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 308. Under some circumstances, a knee injury presumably could support an actual disability claim under the ADA. *See* Desai v. Tire Kingdom, Inc., 944 F. Supp. 876, 880 (M.D. Fla. 1996) (rejecting the contention that "a knee injury is not an impairment that could qualify as limiting any major life activity to a significant degree"). However, the *McLain* plaintiff's knee injury resulted in only a "three percent permanent disability," and he conceded that this relatively modest impairment did not "materially limit a major life activity." *McLain*, 10 Lab. Rel. Rep. (BNA) at 308; *cf.* Dodgens v Kent Mfg. Co., 955 F. Supp. 560, 564 (D.S.C. 1997) (holding that the plaintiff's knee injury did not substantially limit his major life activities where "his disability rating [was] only fifteen percent").

78. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 309.

79. 186 F.3d 907 (8th Cir. 1999).

80. *Id.* at 916.

81. The plaintiff in a perceived disability case may "have no actual impairment at all, but be treated by an employer as having a substantially limiting impairment." McInnis v. Alamo Cmty. Coll. Dist., 207 F.3d 276, 281 (5th Cir. 2000); *see also* Jones v. OfficeMax, Inc., 38 F. Supp. 2d 957, 962 (D. Utah 1999) ("A person is a disabled person under the ADA, among other ways, when that person is not impaired, but is perceived as having a disability.").

82. *See McLain*, 10 Lab. Rel. Rep. (BNA) at 308 (citing *Weber*, 186 F.3d at 916). The *Weber* court explained that imposing a duty to accommodate in perceived disability cases would "create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees." *Weber*, 186 F.3d at 917.

83. *McLain*, 10 Lab. Rel. Rep. (BNA) at 309.

disability while the other did not, it would be illogical to require the employer to accommodate the first employee's impairment but not the second employee's identical impairment.[84]

The *Barnes* and *McLain* courts are not alone in drawing this analogy between the ADA's perceived disability and record of disability provisions.[85] In *Williams v. Philadelphia Housing Authority*,[86] for example, the court observed that the analysis in the perceived disability cases relied upon in *Barnes*[87] essentially compels the conclusion that an individual "cannot base a failure to accommodate claim on being regarded as having, *or having a record of*, an impairment that substantially limits a major life activity."[88]

Several other courts have held that employers need not accommodate individuals with a record of disability.[89] In *Keck v. New York State Office of Alcoholism & Substance Abuse Services*,[90] for example, the plaintiff suffered various health problems stemming from her sensitivity to tobacco smoke and perfume.[91] After allegedly being forced to take an indefinite leave of absence to avoid exposure to those irritants,[92] the plaintiff brought suit

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84. *See id.*

85. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 n.2 (3d Cir. 1999) (noting that perceived disability cases and record of disability cases involve "similar considerations"); Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998) (observing that the ADA's "record of impairment" provision "is a close sibling to the 'perceived impairment' provision"); *see also* Comman v. N.P. Dodge Mgmt. Co., 43 F. Supp. 2d 1066, 1072 (D. Minn. 1999) (concluding that an individual "may be classified as a person with a disability through an analysis which bridges the 'record of' and 'regarded as' prongs of the definition of a disabled person").

86. 230 F. Supp. 2d 631 (E.D. Pa. 2002), *aff'd in part and rev'd in part*, 380 F.3d 751 (3d Cir. 2004). For a prior discussion of the *Williams* case, see Maire E. Donovan, *How Bizarre?: The Third Circuit's Analysis of the Requirement of Reasonable Accommodation for "Regarded As" Disabled Employees Under the ADA in* Williams v. Philadelphia Housing Authority Police Department, 50 VILL. L. REV. 1213 (2005).

87. Both *Barnes* and *Williams* cited *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), *Workman v. Frito-Lay, Inc.*, 165 F.3d 460 (6th Cir. 1999), and *Newberry v. East Texas State Univ*ersity, 161 F.3d 276 (5th Cir. 1998). *See* Barnes v. Nw. Iowa Health Ctr., 238 F. Supp. 2d 1053, 1090 n.16 (N.D. Iowa 2002); *Williams*, 230 F. Supp. 2d at 645 n.14.

88. *Williams*, 230 F. Supp. 2d at 645 n.14 (emphasis added); *cf.* Fotos v. Internet Commerce Express, Inc., 154 F. Supp. 2d 212, 216 (D.N.H. 2001) (holding that the reasoning in a perceived disability case "applies equally to the . . . 'record of' prong[] of the definition").

89. *See, e.g.*, Avery v. U.S. Postal Serv., 5 Nat'l Disability L. Rep. (LRP) ¶ 456, at 1511 (6th Cir. 1994) (describing lower court's holding that "an employer has no duty to accommodate a person with a history of handicaps"); *cf.* Herschaft v. N.Y. Bd. of Elections, No. 00 CV 2748(CBA), 2001 WL 940923, at *3 n.6 (E.D.N.Y. Aug. 13, 2001) ("Plaintiff . . . assert[s] that he has a 'record' of a disability under the ADA . . . . If plaintiff is no longer disabled . . . plaintiff would not need any special accommodation.") (involving alleged discrimination in the provision of public services, rather than employment), *aff'd*, 37 F. App'x 17 (2d Cir. 2002).

90. 10 F. Supp. 2d 194 (N.D.N.Y. 1998).

91. *See id.* at 196.

92. Being placed on involuntary leave "can be seen as an adverse action" potentially actionable under federal employment discrimination law. Leeker v. Gill Studios, Inc., 21 F. Supp. 2d 1267,

against her employer for disability discrimination,[93] arguing that she was protected under all three prongs of the ADA's disability definition.[94]

However, because the plaintiff effectively was arguing only that the employer failed to accommodate her condition,[95] the court concluded that her ADA claim was cognizable, if at all,[96] only if she suffered from an actual disability.[97] The court explained:

> [W]ith regard to the definitions of disability as being "regarded" as having a disability or having a "record" of such a disability . . . plaintiff must . . . demonstrate that she was fired because of her disability . . . . [T]here clearly can be no claim of discrimination based on failure to accommodate a disability where there is no actual disability.[98]

A similar result was reached in *Sharma v. Cook County*.[99] The plaintiff in *Sharma* was a hospital anesthesiologist who took an extended leave of

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1272 (D. Kan. 1998); *see also* Waugaman v. Univ. of Chi. Hosps., No. 00 C 2581, 2002 WL 472278, at *8 (N.D. Ill. Mar. 28, 2002) (asserting that "a forced medical leave constitutes an adverse employment action").

93. *See Keck*, 10 F. Supp. 2d at 195-96.

94. *See id.* at 198; *cf.* EEOC v. Gen. Elec. Co., 17 F. Supp. 2d 824, 827 (N.D. Ind. 1998) ("To be 'disabled' under the ADA, [an individual] must fall within one of the three potential categories of disability set forth under the Act.").

95. *See Keck*, 10 F. Supp. 2d at 198 ("Plaintiff has made no showing that she was discriminated against because of how she was regarded or because of her record of disability. Rather, she was not allowed to return to work because of her unwillingness to work under certain conditions.").

96. Although the plaintiff presented sufficient evidence to create a genuine issue of fact with respect to whether she suffered from an actual disability, the court ultimately awarded summary judgment to the employer because the plaintiff was not otherwise qualified to perform her job. *See id.* at 200-02; *cf.* Ragan v. Jeffboat, LLC, 149 F. Supp. 2d 1053, 1066 (S.D. Ind. 2001) (observing that "only a 'qualified individual' with a disability is entitled to an accommodation"); Testerman v. Chrysler Corp., 12 Nat'l Disability L. Rep. (LRP) ¶ 2, at 11 (D. Del. 1998) ("The ADA requires, in order to state a claim for discrimination, an individual must demonstrate not only that he was disabled but also that he was qualified for the job at issue." (citing 42 U.S.C. § 12112(a) (2000))).

97. *See Keck*, 10 F. Supp. 2d at 198 ("[E]ven if plaintiff could establish disability under [the 'record of' and 'regarded as'] provisions . . . she would not establish the basis for an ADA [reasonable accommodation] claim."); *cf.* Godron v. Hillsborough County, 18 Nat'l Disability L. Rep. (LRP) ¶ 11, at 43 n.3 (D.N.H. 2000) ("Because [the plaintiff] argues that he requires an accommodation for his condition . . . he presumably is claiming that he presently suffers from an actual impairment that substantially limits one or more of his major life activities.").

98. *Keck*, 10 F. Supp. 2d at 198 (emphasis added) (citation omitted). *But see* Genthe v. Quebecor World Lincoln, Inc., No. 4:02CV3060, 2002 WL 31833278, at *2 (D. Neb. Dec. 17, 2002) (rejecting the contention that an individual's "demand for reasonable accommodation makes it clear that he is pursuing . . . an [actual] disability claim as opposed to a perceived or record of disability claim") (internal quotation marks and bracketing omitted).

99. No. 01 C 432, 2003 WL 22757753 (N.D. Ill. Nov. 19, 2003).

absence after being diagnosed with ovarian cancer.[100] When her cancer went into remission after nearly four years of treatment,[101] the plaintiff attempted to resume active employment.[102] Assuming, perhaps, that the ADA did not require it to hold the plaintiff's job open for such an extended period of time,[103] the hospital refused to reinstate her to her former position.[104]

The plaintiff then brought suit under the ADA,[105] alleging, among other things, that the hospital impeded her ability to demonstrate her current clinical competence as an anesthesiologist.[106] While finding that the plaintiff raised a genuine issue of fact on some of her claims,[107] the court rejected her claim that the hospital failed to provide her with a reasonable accommodation.[108] Noting that the plaintiff's cancer was in remission at the time of her attempted return to work,[109] the court held that an employer's duty to accommodate applies only to individuals with current disabilities.[110]

The issue was also recently addressed in *Kim v. Potter*.[111] The plaintiff in *Kim* was employed by the United States Postal Service.[112] After he was involved in an automobile accident that resulted in permanent physical and cognitive impairments, the Postal Service reassigned him from a window clerk position to a permanent light duty position in its mail processing department.[113] The reassignment had been requested by the plaintiff,[114] and

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100. *See id.* at *1.

101. The plaintiff's apparent inability to work while undergoing extended treatment undoubtedly was sufficient to bring her within the protection of the ADA's record of disability provision. *See* McKenzie v. Dovala, 242 F.3d 967, 972 (10th Cir. 2001) (indicating that an individual is protected under the provision if "at some point her impairment actually did substantially limit her ability to work").

102. *See Sharma*, 2003 WL 22757753, at *1.

103. *See* Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) ("[R]easonable accommodation does not require [an employer] to wait indefinitely for [an employee's] medical conditions to be corrected, especially in light of the uncertainty of cure."), *superseded by statute*, Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, Title V, § 506, 106 Stat. 4360, 4428 (1992); Turco v. Hoechst Celanese Chem. Group, Inc., 906 F. Supp. 1120, 1130 (S.D. Tex. 1995) ("The law does not impose upon employers the burden of awaiting uncertain results of a disabled employee's treatment program.").

104. *Sharma,* 2003 WL 22757753, at *1.

105. *See id.*

106. *See id.* at *2.

107. *See id.* at *1-2.

108. *See id.* at *2.

109. *See id.* at *1. The plaintiff herself admitted she had no actual disability at the time of her attempted return. *See id.* at *2.

110. *See id.*; *cf.* Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 32 n.4 (1st Cir. 2000) ("An employer's duty to accommodate relates only to existing disabilities.").

111. 460 F. Supp. 2d 1194 (D. Haw. 2006).

112. *See id.* at 1196.

113. *See id.*

114. *See id.* at 1203 (describing the plaintiff's "request for a light duty assignment" because he "was unable to perform the duties of his original . . . position as a result of his off-duty automobile accident").

reflected the Postal Service's usual treatment of employees unable to perform their original duties due to nonwork-related injuries or medical conditions.[115]

Several years later, the Postal Service's partial automation of its mail processing and distribution operations reduced the amount of work available to employees working in light duty positions.[116] When the Postal Service failed to honor the plaintiff's request to maintain a full work schedule,[117] he brought suit under the Rehabilitation Act,[118] which prohibits federal employers, including the Postal Service,[119] from discriminating against individuals with disabilities.[120]

Noting that regular employees with no physical restrictions on their ability to work[121] continued to be assigned overtime work despite the automation,[122] the plaintiff asserted that the Postal Service must have

115. *See id.* at 1196; *see also* Fields v. Bolger, 723 F.2d 1216, 1217 n.1 (6th Cir. 1984) ("In the Postal Service, 'light duty' is a status in which an employee, injured or otherwise incapable of performing his or her usual duties, is placed in a job not requiring the same work capacity as before the injury or disability.").

116. *See Kim*, 460 F. Supp. 2d at 1196. *See generally* Mail Order Ass'n of Am. v. U.S. Postal Serv., 2 F.3d 408, 423 (D.C. Cir. 1993) ("[T]he overall pace and course of extending Postal Service automation . . . generally fall[s] within the Postal Service's exclusive authority over management decisions.").

117. *See Kim*, 460 F. Supp. 2d at 1197 (discussing the plaintiff's contention that he ultimately "retired involuntarily . . . because he was not returned to a full work schedule"); *cf.* Thompson v. Runyon, 4 Am. Disabilities Cases (BNA) 188, 210 (W.D. Mo. 1994) (observing that "the postal service has no obligation to provide work" to "a light duty employee"), *aff'd*, 46 F.3d 1136 (8th Cir. 1995).

118. 29 U.S.C. §§ 701-97 (2000). The Rehabilitation Act is often referred to as the ADA's "precursor." *See, e.g.*, Rogers v. Dep't of Health & Envtl. Control, 174 F.3d 431, 433 (4th Cir. 1999), *abrogated by* Olmstead v. L.C., 527 U.S. 581 (1999); Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997). The two acts are "similar in purpose," in that both "prohibit discrimination against the disabled." McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997). The principal difference "is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance, while the ADA's reach extends to purely private entities." *Id.* at 460.

119. The Postal Service is not directly subject to the employment discrimination prohibitions of the ADA. *See* Henrickson v. Potter, 327 F.3d 444, 447 (5th Cir. 2003); Garvin v. Potter, 367 F. Supp. 2d 548, 560 (S.D.N.Y. 2005). However, the Rehabilitation Act "incorporates the substantive standards" of the ADA by reference. *Kim*, 460 F. Supp. 2d at 1198 (citing 29 U.S.C. § 791(g)).

120. *See* Mengine v. Runyon, 114 F.3d 415, 418 & n.2 (3d Cir. 1997) (noting that the Rehabilitation Act "is applicable only to federal employers, such as the Postal Service, and employers who receive federal funding," and that the Act prohibits such employers "from discriminating against persons with disabilities in matters of hiring, placement or advancement"); *see also* DiCarlo v. Potter, 358 F.3d 408, 418 (6th Cir. 2004) ("The Rehabilitation Act prohibits the United States Postal Service from discriminating against their employees on the basis of a disability.").

121. *See Kim*, 460 F. Supp. 2d at 1196.

122. *See id.* at 1197, 1203.

reduced his work hours "because of his disability,"[123] rather than due to a purported lack of available work.[124] The plaintiff also alleged that in failing to assign him to another position in which more work would be available,[125] the Postal Service unlawfully failed to accommodate his disability.[126]

The court first addressed whether the plaintiff was "disabled" for purposes of establishing a prima facie case of discrimination under the Rehabilitation Act.[127] The court held that the plaintiff did not suffer from a current disability because his impairments did not substantially limit any of his major life activities.[128] However, the plaintiff established the existence of a genuine issue of material fact with respect to whether he had a record of disability,[129] because he was hospitalized immediately after the automobile

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123. *Id.* at 1197; *cf.* Johnson v. Kmart Corp., 273 F.3d 1035, 1053 (11th Cir. 2001) ("The gravamen of a disability-based discrimination claim is that an individual has been treated less favorably because of her disability.").

124. *See Kim*, 460 F. Supp. 2d at 1197; *cf.* Walsh v. NBC, 43 Fair Empl. Prac. Cas. (BNA) 153, 155 (S.D.N.Y. 1987) (noting that the fact that some employees "continued to work overtime" while the employer was claiming there had been a "decline in the amount of . . . work available" might be "indicative of an intent by [the employer] to discriminate").

125. The Postal Service is organized into separate postal districts, each of which "makes its own decision regarding employee transfers." Jordan v. U.S. Postal Serv., 379 F.3d 1196, 1198 (10th Cir. 2004). These districts occasionally use "Reasonable Accommodation Committees" to determine "whether an employee qualifies for accommodation under the Rehab[ilitation] Act and . . . what accommodation is required, including transfer or reassignment." Clayborne v. Potter, 448 F. Supp. 2d 185, 188 (D.D.C. 2006); *see, e.g.*, Shattuck v. Potter, 441 F. Supp. 2d 193, 197 (D. Me. 2006) ("[T]he Maine District Reasonable Accommodation Committee . . . is responsible for considering, recommending, and/or denying requests for reasonable accommodations."). In *Kim*, such a committee reviewed the plaintiff's request for reassignment "to determine whether there were other jobs . . . that [he] could perform," 460 F. Supp. 2d at 1197, but apparently concluded that there were no such positions available. *See id.* at 1205 (discussing the Postal Service's evidence that the plaintiff's "physical impairments prevent[ed] him from performing available work").

126. *See Jordan*, 379 F.3d at 1201 n.8. Both the ADA and the Rehabilitation Act "do more than merely prohibit disparate treatment; they also impose an affirmative duty on employers to offer a 'reasonable accommodation' to a disabled employee." Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19-20 (1st Cir. 2004) (quoting 42 U.S.C. § 12112(b)(5)(A) (2000)). In addition, "the Rehabilitation Act was amended effective October 29, 1992, to incorporate . . . the ADA's express provision for reassignment as a potential form of reasonable accommodation." Woodman v. Runyon, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997).

127. *Kim*, 460 F. Supp. 2d at 1199; *cf.* Thompson v. Runyon, 4 Am. Disabilities Cases (BNA) 188, 219 (W.D. Mo. 1994) ("The first element that [a] plaintiff must prove to make a prima facie case of handicap discrimination is that she is a handicapped individual within the meaning of the Rehabilitation Act."), *aff'd*, 46 F.3d 1136 (8th Cir. 1995).

128. *See Kim*, 460 F. Supp. 2d at 1202 ("[N]o reasonable finder of fact could conclude that [the plaintiff] is *currently* substantially limited in a major life activity . . . .").

129. *See id.* at 1201-03. Like the ADA, the Rehabilitation Act protects persons with a record of a substantially limiting impairment. *See* Fitzgerald v. Alleghany Corp., 904 F. Supp. 223, 229 n.12 (S.D.N.Y. 1995) (noting that "[t]he Rehabilitation Act and the ADA provide a . . . three-pronged definition of disability" similar in coverage to the New York Human Rights Law, which "covers individuals who have an actual impairment, have a record of an impairment, or are regarded as having an impairment" (citing 29 U.S.C. § 706(8)(B) (Rehabilitation Act definition) and 42 U.S.C. § 12102(2) (ADA definition))), *abrogated on other grounds by* Reeves v. Johnson Controls World

accident[130] (and presumably "could not perform one or more major life activities" during that time),[131] and the impairments he suffered in the accident were permanent in nature.[132] Thus, the Postal Service was not entitled to summary judgment on the ground that the plaintiff was "not 'disabled' within the meaning of the Rehabilitation Act."[133]

The court also held that the reduction in the plaintiff's hours "while other, non-disabled, employees continued to receive overtime hours" was sufficient circumstantial evidence to support a prima facie case of disparate treatment.[134] However, the court found that the Postal Service's partial automation of its operations constituted a legitimate nondiscriminatory reason for reducing the plaintiff's hours.[135] Because the plaintiff admitted he

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Servs., Inc., 140 F.3d 144 (2d Cir. 1998).

130. The court indicated that the plaintiff's "hospitalization, by itself, would not be enough to establish a record of a disability because, at most, [he] was substantially limited in one or more major life activities for less than two months." *Kim*, 460 F. Supp. 2d at 1202 (citations omitted); *cf.* Taylor v. U.S. Postal Serv., 946 F.2d 1214, 1217 (6th Cir. 1991) (rejecting "the nonsensical proposition that *any* hospital stay is sufficient to evidence a 'record of impairment'"); Szymanska v. Abbott Labs., 3 Am. Disabilities Cases (BNA) 748, 761 (N.D. Ill. 1994) ("[P]ast hospitalization does not, without more, indicate any impairment or history of impairment that substantially limits any of [an individual's] major life activities.").

131. *Kim*, 460 F. Supp. 2d at 1202; *see also* Sorensen v. Univ. of Utah Hosp., 1 F. Supp. 2d 1306, 1309 (D. Utah 1998) (observing that "most people who are confined to a hospital are substantially limited in their major life activities during their hospital stay"), *aff'd*, 194 F.3d 1084 (10th Cir. 1999); *see, e.g.*, Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998) ("Of course, every instance of hospitalization is disabling in the sense that one cannot go to work.").

132. *See Kim*, 460 F. Supp. 2d at 1202 ("[The plaintiff's] impairments did not completely disappear upon his discharge from the hospital . . . . Instead, [he] alleges that he continues to suffer impairments to the present day . . . ."). Because the duration of an impairment is a relevant consideration in determining whether an individual is statutorily disabled, the court concluded that it was permissible to consider the permanent nature of the plaintiff's impairments *in conjunction with his initial hospitalization* in determining whether he was protected under the Rehabilitation Act's record of disability provision. *See id.* at 1202-03 & n.9; *cf.* Thomas *ex rel.* Thomas v. Davidson Acad., 846 F. Supp. 611, 617-18 (M.D. Tenn. 1994) ("[The plaintiff's] hospitalization . . . as well as her on-going need to receive medication and weekly medical treatment, is sufficient to establish the severity of her affliction and a record of impairment of one or more of [her] major life activities.").

133. *Kim*, 460 F. Supp. 2d at 1199; *cf.* Allen v. Heckler, 780 F.2d 64, 66 (D.C. Cir. 1985) ("[T]he [Rehabilitation] Act recognizes that discrimination also occurs against those who at one time had a disabling condition.").

134. *Kim*, 460 F. Supp. 2d at 1203; *cf.* Peebles v. Potter, 354 F.3d 761, 766 (8th Cir. 2004) ("In disparate treatment cases, a similarly situated disabled individual is treated differently because of his disability than less- or non-disabled individuals.").

135. *See Kim*, 460 F. Supp. 2d at 1204 ("The USPS has proffered a non-discriminatory reason— increased automation—for the decrease in [the plaintiff's] hours."); *cf.* Hayes v. Potter, No. C-02-0437 VRW, 2005 WL 1876070, at *6 (N.D. Cal. Aug. 3, 2005) (discussing the employer's "burden of 'articulat[ing] a legitimate nondiscriminatory reason for its employment decision,' such as decreasing light duty hours" (quoting Wallis v. J R Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994))).

could not perform regular Postal Service work,[136] he was unable to show that the Postal Service's stated reason for reducing his hours was a pretext for disability discrimination.[137] The court therefore awarded summary judgment to the Postal Service on the plaintiff's disparate treatment claim.[138]

This left only the plaintiff's failure to accommodate claim,[139] which the court perceived to be the primary focus of his case in any event.[140] However, the court noted that courts in several ADA cases have held that failure to accommodate claims can only be maintained by individuals who are "currently substantially limited in a major life activity."[141] Relying primarily on those cases,[142] the *Kim* court held that even if an ADA or Rehabilitation Act plaintiff "can prove that he has a 'record of' a disability or that he is 'regarded as' being disabled, he cannot succeed on a reasonable accommodation claim."[143] Thus, without addressing the Postal Service's

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136. *See Kim*, 460 F. Supp. 2d at 1206 ("There is no doubt that the USPS believed [the plaintiff] to be incapable of performing standard USPS work because of [his] physical impairments—in fact, [he] specifically asked for Light Duty work because of these physical impairments, and . . . admits that he was unable to perform [regular] work because of his accident.").

137. The plaintiff "point[ed] to the fact that the USPS continued to give [regular] [e]mployees overtime work while claiming to have no work for Light Duty employees as evidence of pretext." *Id.* at 1205. However, the court held that "the fact that other employees received overtime hours while sufficient to establish a prima facie case of discrimination—[was] insufficient to demonstrate that the USPS's proferred nondiscriminatory reason for reducing [the plaintiff's] hours was pretextual." *Id.* at 1204. The court explained:

> [T]he fact that other employees received overtime hours does not help [the plaintiff], because there is no evidence to suggest that [he] was capable of performing [that] work . . . . Because [he] cannot perform the work of [those other] employees, he is not similarly situated to them; therefore, the fact that [they] were given overtime work is not probative of pretext.

Id. at 1206 (citations omitted).

138. *See id.* at 1206-07; *cf.* Thompson v. Runyon, 4 Am. Disabilities Cases (BNA) 188, 229 (W.D. Mo. 1994) ("Plaintiff failed to prove by a preponderance of the evidence that the defendant's proferred reason for giving a limited duty employee available work rather than a light duty employee is pretextual."), *aff'd*, 46 F.3d 1136 (8th Cir. 1995).

139. The court noted that the plaintiff's disparate treatment claim was "separate from his claim for failure to accommodate." *Kim*, 460 F. Supp. 2d at 1201 n.8; *see also Peebles*, 354 F.3d at 766 ("The failure to make reasonable accommodations in the employment of a disabled employee is a separate form of prohibited discrimination.").

140. *See Kim*, 460 F. Supp. 2d at 1201 n.8 ("[The plaintiff's] First Amended Complaint seems to center on the USPS's alleged failure to provide him with a reasonable accommodation. Whether his First Amended Complaint also sets forth a claim for discrimination is not entirely clear, but the court assumes for purposes of this order that the Complaint does, in fact, allege a claim for discrimination (based on the reduction of his hours) separate from his claim for failure to accommodate.").

141. *Id.* (citations omitted).

142. *See generally* Ellis v. England, 432 F.3d 1321, 1326 (11th Cir. 2005) ("[C]ases involving the ADA are precedent for those involving the Rehabilitation Act."); Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004) ("[T]he case law construing the ADA generally pertains equally to claims under the Rehabilitation Act.").

143. *Kim*, 460 F. Supp. 2d at 1201 n.8; *cf.* Smith v. Tangipahoa Parish Sch. Bd., 33 Nat'l Disability L. Rep. (LRP) ¶ 224, at 1042 n.8 (E.D. La. 2006) ("If an individual is not actually disabled but only has a history of a disability or is regarded as disabled, they may be unable to assert

ability to accommodate the plaintiff's limitations,[144] the court awarded summary judgment to the Postal Service on his failure to accommodate claim.[145]

IV. THE VIEW THAT EMPLOYERS MUST ACCOMMODATE INDIVIDUALS WITH A RECORD OF DISABILITY

In *Davidson v. Midelfort Clinic, Ltd.*,[146] the Seventh Circuit observed that ADA protection may extend to individuals who need some type of accommodation despite having no present impairment substantial enough to constitute a disability within the meaning of the ADA.[147] The court cited as an example an individual with a recurring condition[148] who might be able to claim ADA protection based (in part) on a prior hospitalization[149] and, in turn, be entitled to reasonable accommodation for any limitations resulting from a recurrence of the condition.[150]

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a claim based on a failure to accommodate.").

144. Ordinarily, "[i]f the issue of reasonable accommodation is raised, the [employer] must then be prepared to make a . . . showing that accommodation cannot reasonably be made . . . ." Prewitt v. U.S. Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981); *cf. Calero-Cerezo*, 355 F.3d at 20 ("To assert a claim for failure to accommodate under the Rehabilitation Act, [the plaintiff] would have to establish . . . that, despite her employer's knowledge of her disability, the employer did not offer a reasonable accommodation for the disability.").

145. *See Kim*, 460 F. Supp. 2d at 1207 ("The USPS need not offer [the plaintiff] a reasonable accommodation because he is not presently substantially limited in a major life activity."); *cf.* Thompson v. Potter, 32 Nat'l Disability L. Rep. (LRP) ¶ 80, at 356 (S.D. Ohio 2006) ("Even assuming there was any reasonable accommodation that the Postal Service could have made for [the plaintiff], because he was not *actually* disabled, he was not entitled to it.") (emphasis added).

146. 133 F.3d 499 (7th Cir. 1998).

147. *See id.* at 509; *cf.* Arnold v. County of Cook, 220 F. Supp. 2d 893, 896 (N.D. Ill. 2002) ("The reasonable accommodation provision includes nothing to suggest that it applies only to 'substantial' limitations . . . ."). *But see* Friedland, *supra* note 12, at 186 (asserting that "accommodation should only be required for those impairments that qualify as disabilities in their own right").

148. *See generally* Machamer v. Hosp. of Univ. of Pa., 10 Am. Disabilities Cases (BNA) 1498, 1500 (E.D. Pa. 2000) ("A 'record of [a substantially limiting] impairment' means a 'history' of the condition such as a chronic recurrence of an ailment." (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987))).

149. *See* EEOC v. Automatic Sys. Co., 169 F. Supp. 2d 1001, 1006 (D. Minn. 2001) ("[T]he law is clear that mere hospitalization is insufficient to establish a record of disability.").

150. *See Davidson*, 133 F.3d at 509 n.6; *see also* Radimecky v. Mercy Healthcare & Rehab. Ctr., 21 Nat'l Disability L. Rep. (LRP) ¶ 217, at 1168 (N.D. Ill. 2001) ("[E]vidence of a history of a substantially limiting impairment could . . . permit[] the plaintiff to demand reasonable accommodations to ongoing or recurrent limitations."). *See generally* Cramer v. Florida., 885 F. Supp. 1545, 1551 (M.D. Fla. 1995) (indicating that "the purpose of the ADA is to protect those individuals who have some permanent *or chronic* disability") (emphasis added), *aff'd*, 117 F.3d 1258 (11th Cir. 1997).

While the Seventh Circuit did not actually decide the issue,[151] other courts have cited *Davidson* for the proposition that employers have a duty to provide reasonable accommodations "not only to a qualified individual with an actual disability, but also to a qualified individual with *a record of disability.*"[152] In *Mack v. Great Dane Trailers*,[153] for example, a federal district court in the Seventh Circuit relied on *Davidson* in concluding that the ADA not only prohibits intentional discrimination against individuals with a record of a substantially limiting impairment,[154] but also may require employers to accommodate such individuals' work-related limitations,[155] even if their impairments are no longer severe enough to constitute actual disabilities within the meaning of the Act.[156]

The analysis in these cases suggests that the contrary conclusion reached in cases such as *Barnes v. Northwest Iowa Health Center*[157] may have been based on the implicit but mistaken assumption that the ADA's record of disability provision only protects individuals who have fully recovered from

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151. *See Davidson*, 133 F.3d at 509 n.6 ("The extent to which [an employer] may [be] obligated to accommodate [an individual] based solely on any record of impairment is not before us. That and any other questions raised by this provision of the statute are open for exploration on remand.").

152. Ragan v. Jeffboat, LLC, 149 F. Supp. 2d 1053, 1069 n.11 (S.D. Ind. 2001) (citing *Davidson*, 133 F.3d at 509); *see also* Hawkins v. Trs. of Ind. Univ., 83 F. Supp. 2d 987, 998 (S.D. Ind. 1999) ("The court in *Davidson* stated that [the record of disability provision] may extend the definition of disabled 'to those who may require some sort of accommodation from their employer, notwithstanding their inability to demonstrate a present impairment that is substantial enough to qualify as disabling under the ADA.'" (quoting *Davidson*, 133 F.3d at 509)).

153. 12 Am. Disabilities Cases (BNA) 86 (S.D. Ind. 2000), *aff'd in part and rev'd in part*, 308 F.3d 776 (7th Cir. 2002).

154. *See* Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 775 (E.D. Tex. 1996) ("[W]hen an employer knows an employee has a record of past disability or when an employer thinks an employee has a record of past disability, and the employer treats the employee adversely because of this record, the ADA is violated."); *see also* Cribs v. City of Altamonte Springs, 11 Am. Disabilities Cases (BNA) 1462, 1465 (M.D. Fla. 2000) ("The intent of [the record of disability] provision is to ensure that people are not discriminated against because of a history of a disability.").

155. The Seventh Circuit has observed that "[t]o 'accommodate' a disability is to make some change that will enable the disabled person to work." Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995). Thus, an employer's duty to accommodate "only extends to job-related adjustments or modifications." Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 1003 (S.D. Ind. 2000); *see also* Burnett v. W. Res., Inc., 929 F. Supp. 1349, 1358 (D. Kan. 1996) ("Only job-related adjustments or modifications, which enable an individual to perform the duties of a particular job, are required as reasonable accommodations.").

156. *See Mack*, 12 Am. Disabilities Cases (BNA) at 93 (citing *Davidson*, 133 F.3d at 509); *cf.* Zwygart v. Bd. of County Comm'rs, 412 F. Supp. 2d 1193, 1197 n.2 (D. Kan. 2006) (describing the plaintiff's assertion that he had a "record of disability" for which his employer failed "to make an accommodation" as "elements one and two of a cognizable claim under the ADA").

157. 238 F. Supp. 2d 1053 (N.D. Iowa 2002). Like the Seventh Circuit in *Davidson*, the *Barnes* court concluded that an employer may be required to accommodate subsequent limitations that "arise out of" a disabling impairment, even if those limitations "are not themselves substantially limiting." *Id.* at 1091 n.17. However, unlike the Seventh Circuit, the *Barnes* court implied that such a duty would exist only if the impairment is otherwise substantially limiting—that is, only if the impairment constituted an actual disability. *See id.*

a substantially limiting impairment.[158] Those individuals arguably would need no accommodation from their employers because they presumably have no impairment for an employer to accommodate.[159]

The principal difficulty with this reasoning is that the ADA's record of disability provision also protects individuals with previously disabling impairments from which they have only partially recovered.[160] The provision thus reflects the fact that impairments that are no longer sufficiently severe to constitute actual disabilities within the meaning of the ADA[161] may nevertheless have long term effects on the individuals suffering from them.[162]

For example, an individual may experience a substantially limiting episode of major depression from which he or she recovers completely. Another individual may recover from such an episode only partially, but enough that his or her depression is no longer substantially limiting. Both of

158. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 498-99 (1999) (Stevens, J., dissenting) (stating that the record of disability provision "plainly covers a person who previously had a serious . . . impairment that has since been completely cured"); Hannah v. County of Cook, 30 Nat'l Disability L. Rep. (LRP) ¶ 117, at 539 (N.D. Ill. 2005) (noting that the record of disability provision "protects individuals who previously had impairments that qualified as disabilities, but no longer have the impairment"); Med. Soc'y of N.J. v. Jacobs, 2 Am. Disabilities Cases (BNA) 1318, 1322 (D.N.J. 1993) (observing that the record of disability provision "protects those individuals who have recovered from a disability.").

159. *See* Gilday v. Mecosta County, 124 F.3d 760, 764 (6th Cir. 1997) ("A person whose condition is *entirely* controlled will not need any . . . accommodation under the Act: there is no problem to accommodate."); *cf.* Jacobs v. Potter, No. 99-T-1357-N, 2005 WL 3690546, at *4 (M.D. Ala. Mar. 16, 2005) ("The [statutory] language presumes that the employee has an actual limitation that requires some type of accommodation.").

160. *See* Bailey v. Ga.-Pac. Corp., 306 F.3d 1162, 1169 (1st Cir. 2002) (observing that the record of disability provision protects "those who have recovered *or are recovering* from substantially limiting impairments") (emphasis added); Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130, 139 (D. Mass. 1998) ("The implementing regulations establish that an employee who has previously had a disabling impairment from which he has recovered in whole or in part has a record of a disability." (citing 29 C.F.R. § 1630.2(k) (2005))).

161. *See generally* Thompson v. Eaton Corp., 25 Nat'l Disability L. Rep. (LRP) ¶ 39, at 180 (W.D. Wis. 2002) (indicating that the ADA's record of disability provision protects individuals who are "no longer [actually disabled] because their impairment has become less severe or no longer exists"); Sweet v. Elec. Data Sys., Inc., 5 Am. Disabilities Cases (BNA) 853, 859 (S.D.N.Y. 1996) (observing that the record of disability provision protects an individual who "had once been disabled, but is no longer").

162. *See Downs*, 13 F. Supp. 2d at 139. Indeed, some courts have held that in order to constitute a record of disability, the impairment of which an individual has a record "*must* be 'permanent or long-term.'" Lloyd v. City of E. Cleveland City Sch. Dist., 232 F. Supp. 2d 806, 812 (N.D. Ohio 2002) (emphasis added) (quoting Gutridge v. Clure, 153 F.3d 898, 901 (8th Cir. 1998)); *cf.* McWilliams v. AT&T Info. Sys., Inc., 728 F. Supp. 1186, 1191 (W.D. Pa. 1990) (concluding that an individual claiming protection on the basis of a record of disability must have "an impairment of a continuing nature").

these individuals would have a record of a substantially limiting impairment—major depression.[163]

In this regard, individuals with a record of disability may have certain lingering or recurring impairments that are not substantially limiting within the meaning of the ADA,[164] but that nevertheless require accommodation in order for them to be productive employees.[165] In *Vendetta v. Bell Atlantic Corp.*,[166] for example, the plaintiff's cancer was in remission during the time period at issue in the litigation,[167] and thus may not have constituted an actual disability under the ADA.[168] However, the plaintiff continued to suffer fatigue and other residual side effects from the treatment she received.[169] She sought an accommodation of those residual limitations[170] in the form of a transfer to a facility located closer to her home because the "shorter commute would allow her to sleep longer."[171] As an individual with

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163. Peggy R. Mastroianni & Carol R. Miaskoff, *Coverage of Psychiatric Disorders Under the Americans With Disabilities Act*, 42 VILL. L. REV. 723, 736 n.51 (1997).

164. *See* Gilbert, *supra* note 24, at 674 (noting that "the individual with a 'record of' substantial limitations may . . . have limitations which wax and wane or remit and reoccur"); *cf.* Henry v. Gardner, 381 F.2d 191, 195 (6th Cir. 1967) (observing that a "person who has recovered from a prior disability [may] subsequently suffer[] a relapse").

165. *See* Gilbert, *supra* note 24, at 674-75 ("Many [employees with a record of disability] may require [a reasonable accommodation] for a productive return to work. For example, an individual with a history of carpal tunnel which substantially limited performance of manual tasks may require accommodation to prevent the recurrence of the condition.").

166. 13 Nat'l Disability L. Rep. (LRP) ¶ 189, at 819 (E.D. Pa. 1998).

167. *See id.* at 819, 823.

168. *See, e.g.*, Alderdice v. Am. Health Holding, Inc., 118 F. Supp. 2d 856, 863-64 (S.D. Ohio 2000) (holding that cancer in remission at the time of the plaintiff's termination was not "substantially limiting," as was required in order for her to establish a claim under the actual disability prong of the ADA).

169. *See Vendetta*, 13 Nat'l Disability L. Rep. at 819, 823. *See generally* Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 153 n.2 (3d Cir. 1999) ("Medical treatments for many chronic conditions can in some instances themselves create limitations.").

170. Because employers are only required to accommodate the *known* limitations of an individual claiming protection under the ADA, such an individual ordinarily "must request reasonable accommodation from an employer in order for the employer's duty to reasonably accommodate to be triggered." Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1436 (N.D. Cal. 1996); *see also* Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995) ("[E]mployers are obligated to make reasonable accommodations only to the 'known' physical or mental limitations of an otherwise qualified individual with a disability. Thus, the duty to accommodate is generally triggered by a request from the applicant for employment or an employee." (quoting H.R. Rep. No. 101-485(II), at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347)).

171. *Vendetta*, 13 Nat'l Disability L. Rep. at 820; *cf.* Salmon v. Dade County Sch. Bd., 4 F. Supp. 2d 1157, 1163 (S.D. Fla. 1998) (discussing another employee's contention that her employer "failed to accommodate her disability by transferring her to a [facility] which afforded her a shorter commute"). *But see* Laresca v. AT&T, 161 F. Supp. 2d 323, 333-34 (D.N.J. 2001) ("A number of courts have held that commuting to and from work is not part of the work environment that an employer is required to reasonably accommodate." (citing *Salmon*, 4 F. Supp. 2d at 1157 and other cases).

a record of disability,[172] the plaintiff may have been entitled to such an accommodation[173] under the reasoning of *Davidson* and its progeny.[174]

In *Mark v. Burke Rehabilitation Hospital*,[175] another federal district court reached essentially the same conclusion under somewhat similar circumstances. The plaintiff in *Mark* was diagnosed with cancer not long after being hired as a part-time attending physician at the defendant's hospital.[176] The plaintiff's treatment regimen involved a combination of surgery and chemotherapy[177]—a common means of treating the disease[178] that often can (and arguably must)[179] be accommodated by an employer through the provision of temporary or intermittent leave.[180]

The dispute in *Mark* arose when the plaintiff refused the hospital's request that he postpone one of his chemotherapy treatments in order to fill

172. *See* Eshelman v. Agere Sys., Inc., 397 F. Supp. 2d 557, 573 (E.D. Pa. 2005) ("Congress unequivocally stated its intention to protect individuals with a record of cancer. Interpretive guidelines to the ADA confirm the "record of" provision is intended to protect 'former cancer patients from discrimination based on their prior medical history.' Further, the EEOC's Technical Assistance Manual for the ADA confirms that the ADA 'protects people with a history of cancer' even when their 'illnesses are either cured, controlled or in remission.'") (citations omitted).

173. *See generally* Lyons v. Heritage House Rests., Inc., 432 N.E.2d 270, 273 (Ill. 1982) (observing that "recovered cancer victims . . . sometimes have experienced trouble readjusting to employment because of their record of handicap"), *superseded by statute*, Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. 5/1-101 (West 2007); Gilbert, *supra* note 24, at 675 ("[T]he individual recovering from cancer may need reasonable accommodation to transition back to work."). Although the *Vendetta* court itself found that the plaintiff had established the existence of "a fact issue . . . as to whether [the] failure to transfer her . . . constituted a failure to accommodate her disability," the court analyzed the case as one involving either an actual or a perceived disability, rather than a record of disability. *Vendetta*, 13 Nat'l Disability L. Rep. at 823.

174. *See* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998) ("[E]vidence of a *history* of a substantially limiting impairment *could* constitute a disability under the statute, permitting the plaintiff to demand reasonable accommodations to ongoing or recurrent limitations."); *see also* Radimecky v. Mercy Health Care & Rehab. Ctr., 21 Nat'l Disability L. Rep. ¶ 217, at 1168 (N.D. Ill. 2001) (applying *Davidson*, 133 F.3d 499).

175. 6 Am. Disabilities Cases (BNA) 1156 (S.D.N.Y. 1997).

176. *See id.* at 1157.

177. *See id.*

178. *See* Schuster v. U.S. News & World Report, Inc., 602 F.2d 850, 852 n.2 (8th Cir. 1979) (referring to "the standard treatment for cancer—surgery, radiation and chemotherapy." (quoting *What the Health Quacks Are Peddling Now*, U.S. NEWS & WORLD REP., June 21, 1976, at 45)).

179. *See, e.g.*, Velente-Hook v. E. Plumas Health Care, 368 F. Supp. 2d 1084, 1094 (E.D. Cal. 2005) (rejecting the contention that an employer "'was not legally required' to grant [an employee] a personal leave 'while she completed her chemotherapy.'").

180. *See, e.g.*, EEOC v. Mid-Continent Sec. Agency, 11 Am. Disabilities Cases (BNA) 448, 451 (N.D. Ill. 2000) (describing an employee who "was able to perform the functions of his job so long as he received time off to attend his weekly chemotherapy session"); *cf.* Willis v. U.S. Postal Serv., No. 03 C 9185, 2004 WL 2033318, at *6 (N.D. Ill. Sept. 10, 2004) ("[A]n employee with cancer may need intermittent leave for chemotherapy.").

in for another physician during her absence from work due to a vacation.[181] Although other hospital physicians were ultimately able to cover for the vacationing doctor,[182] the hospital director terminated the plaintiff's employment upon being apprised of his unwillingness to postpone his medical treatment.[183]

The plaintiff subsequently brought suit under the ADA,[184] arguing that the hospital unlawfully failed to accommodate his treatment schedule when it instead terminated his employment.[185] The hospital moved for summary judgment.[186] Relying on the plaintiff's admission that his cancer was in remission at the time of his termination, the hospital argued that the plaintiff was not disabled.[187] Further, the hospital argued that it had no duty to accommodate the plaintiff's treatment schedule because it was his duty to "request an accommodation and to work with the [hospital] in finding an accommodation that was reasonable to both parties."[188]

The court agreed that the plaintiff did not suffer from an existing disability.[189] However, the court concluded that as a former cancer patient, the plaintiff was nevertheless disabled within the meaning of the ADA because he had a record of a substantially limiting physical impairment,[190]

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181. *See Mark*, 6 Am. Disabilities Cas. (BNA) at 1157-58.

182. *See id.* at 1158, 1161 n.10.

183. *See id.* at 1158, 1162. In this regard, the director testified that once the plaintiff refused to postpone his treatment, there was "no point in continuing his employment." *Id.* at 1162 (bracketing omitted).

184. *See id.* at 1157.

185. *See id.* at 1158; *cf.* Hudson v. MCI Telecomms. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996) (holding that "a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation").

186. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1158.

187. *See id.* at 1159.

188. *Id.* at 1162; *cf.* Powers v. Tweco Prods., Inc., 206 F. Supp. 2d 1097, 1114 (D. Kan. 2002) ("Plaintiff, by conceding she was not disabled, has essentially waived any claim that [the employer] was required to accommodate her."). The hospital's argument undoubtedly was premised on the proposition that an employer has "no duty to accommodate an employee if the employee is not disabled under the ADA." Swain v. Hillsborough County Sch. Bd., 146 F.3d 855, 858 (11th Cir. 1998); *see, e.g.*, Proctor v. United Parcel Serv., No. 04-2388-RDR, 2006 WL 980741, at *7 (D. Kan. Mar. 1, 2006) ("We do not believe the record in this case presents a genuine issue of fact as to whether plaintiff had a record of disability as that term is defined for purposes of the ADA . . . . Therefore, plaintiff's claim for failure to accommodate on the basis of a record of disability may be dismissed.").

189. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1159; *cf.* EEOC v. R.J. Gallagher Co., 181 F.3d 645, 654-55 (5th Cir. 1999) (concluding that an employee receiving monthly chemotherapy treatments that required him "to be away from the job for one to three days . . . each month" did not suffer from the type of "substantial limitation necessary to invoke 'disability' status under § 12102(2)(A)"); Kutka v. DMC Auto Transfer of Chi., Inc., 15 Am. Disabilities Cases (BNA) 96, 102 (N.D. Ill. 2003) (rejecting the plaintiff's assertion that "his immune deficiency condition caused by his treatment for lymphoma qualif[ied] him as having a disability under the ADA" because he apparently had "no limitations, other than hospitalization and monthly treatments, which substantially limit[ed] activities central to his daily life").

190. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1159; *cf. R.J. Gallagher Co.*, 181 F.3d at

and the Act's record of disability provision is intended to protect individuals who have recovered from such impairments.[191]

The court also rejected the hospital's argument that it had no obligation to accommodate the plaintiff's chemotherapy treatments.[192] The court noted that the hospital's management representatives were aware of the temporary physical limitations the plaintiff experienced after each of those treatments.[193] Because an employer has an affirmative obligation to accommodate the known physical or mental limitations of a qualified individual with a disability[194]—including limitations that arise from treatment of the disability[195]—the court held that the hospital was required to accommodate the plaintiff's treatments,[196] even though his resulting limitations were not sufficiently severe to support a finding that he was currently disabled.[197]

A similar result was reached in *Booth v. University Interscholastic*

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655 ("[I]t is not enough for an ADA plaintiff to simply show that he has a record of a cancer diagnosis; . . . there must be a record of an impairment that substantially limits one or more of the ADA plaintiff's major life activities.").

191. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1159 n.4 (citing 29 C.F.R. pt. 1630 app. § 1630.2(k) (2005)); *cf.* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998) (observing that the record of disability provision extends protection to individuals "who have recovered from previously disabling conditions (cancer or coronary disease, for example)"); Cornman v. N.P. Dodge Mgmt. Co., 43 F. Supp. 2d 1066, 1072-73 (D. Minn. 1999) ("[P]eople with a history of cancer are precisely the type of individuals the 'record of' provision is meant to protect.").

192. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1162.

193. *See id.* In particular, the hospital's director and associate director both knew the plaintiff's "white blood cell count usually dropped to low levels for three to four days following each chemotherapy treatment," and that during this period the plaintiff was required to take certain precautions "in order to avoid contracting an infection." *Id.* at 1157.

194. *See id.* at 1162 (citing 42 U.S.C. § 12112(b)(5)(A) (2000) and 29 C.F.R. § 1630.9(a) (2005)).

195. *See* Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003) (concluding that "side effects from the medical treatment of disabilities arise 'because of the disability,'" and therefore must be accommodated by an employer (quoting 42 U.S.C. § 12112(a))). *But cf.* Oswalt v. Sara Lee Corp., 889 F. Supp. 253, 258 (N.D. Miss. 1995) ("Temporary absence from work due to side effects of or adjustment to medication does not give an employee a record of impairment.").

196. *See Mark*, 6 Am. Disabilities Cases (BNA) at 1162; *cf.* Opsteen v. Keller Structures, Inc., 408 F.3d 390, 392 (7th Cir. 2005) ("Employers may be required to accommodate short-term medical limitations . . . by permitting people to work reduced hours for a few weeks or months until recuperation is complete.").

197. *Cf.* Gordon v. E.L. Hamm & Assocs., Inc., 100 F.3d 907, 911 (11th Cir. 1996) (rejecting the plaintiff's contention that "the side effects that he suffered as the result of his chemotherapy treatments . . . substantially limited his major life activities"); Madjlessi v. Macy's W., Inc., 993 F. Supp. 736, 742 (N.D. Cal. 1997) ("[T]he mere fact that [an employee] had cancer and was utterly incapacitated for brief periods of time after chemotherapy does not mean she was 'substantially limited' for purposes of the ADA.").

League.[198] The plaintiff in *Booth* invoked Section 504 of the Rehabilitation Act of 1973,[199] which prevents an otherwise qualified individual from being excluded from a federally assisted program because of a disability,[200] to challenge an athletic league rule that prevented him from participating in football during his senior year of high school because he had reached the age of nineteen before the season began.[201]

In support of his claim, the plaintiff presented evidence that he was hospitalized with meningococcal meningitis, a potentially fatal illness, at the age of three.[202] Although the plaintiff eventually recovered, he suffered lingering learning impairments that prevented his enrollment in kindergarten and forced him to repeat first grade.[203] Crediting this evidence,[204] the court concluded that the plaintiff had a record of an impairment that substantially limited the major life activity of learning,[205] and that he therefore was protected under the Rehabilitation Act.[206]

The court found no evidence that the plaintiff was subjected to intentional discrimination because of his record of disability.[207] However, the court did find that but for the residual effects of the plaintiff's childhood illness on his subsequent progression through school,[208] the league rule he

198. No. Civ. A-90-CA-764, 1990 WL 484414 (W.D. Tex. Oct. 4, 1990).

199. 29 U.S.C. § 794 (2000).

200. *See* Byrne v. Bd. of Educ., 979 F.2d 560, 563 (7th Cir. 1992) ("Section 504 of the Rehabilitation Act of 1973 makes it unlawful for a federal grant recipient to discriminate against an otherwise qualified handicapped individual."); N.M. Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 852 (10th Cir. 1982) (noting that Section 504 "constitutes an across-the-board requirement of nondiscrimination in all federally assisted programs").

201. *See Booth*, 1990 WL 484414, at *1. Like the ADA, "the Rehabilitation Act provides a broader prohibition than one limited to discrimination that takes place in the employment setting[.]" Johnson v. N.Y. Hosp., 897 F. Supp. 83, 86 (S.D.N.Y. 1995); *see also* Freed v. Consol. Rail Corp., 201 F.3d 188, 191 (3d Cir. 2000) ("[Section 504 of the Rehabilitation Act] bars both federal agencies and private entities that receive federal funding from discriminating on the basis of disability and is not limited to the employment context.").

202. *See Booth*, 1990 WL 484414, at *2.

203. *See id.* at *2, *4 n.4.

204. *See id.* at *3. Some of the evidence before the court was conflicting:

> Medical experts for the respective parties disagree over whether the Plaintiff's learning disabilities were caused by his illness. However, even the [league's] expert concedes that a residual symptom of meningitis can be difficulty in learning, difficulty in comprehension, and delay in maturation. Based on all the evidence presented by both parties, the Court is persuaded that the Plaintiff repeated the first grade as a result of his childhood illness.

Id. at *2-3.

205. *See id.*

206. *See* 29 U.S.C. § 705(20)(B)(ii) (2000); *see also* Thompson v. Rice, 422 F. Supp. 2d 158, 174 (D.D.C. 2006) ("Under the Rehabilitation Act, a person is . . . disabled if he has a record of an impairment.").

207. *See Booth*, 1990 WL 484414, at *3 ("The Court agrees that the Plaintiff is not being excluded from interscholastic athletics . . . *because* he has a history of being handicapped . . . .") (emphasis added).

208. *Id.* at *5.

was challenging would not have prevented him from playing football in his senior season.[209] Thus, the critical issue was whether the league had a duty to accommodate an individual seeking special treatment based on a prior mental or physical impairment.[210]

The court held that the league had such an obligation.[211] Because federally assisted programs are required to accommodate the limitations of individuals protected under the Rehabilitation Act,[212] including specifically those with a record of disability,[213] the court held that the league was required to give special consideration to the plaintiff due to his disability history.[214] More specifically, the court held that the league was required to make a reasonable accommodation for the residual effects of the plaintiff's illness[215] in the form of a waiver of its age eligibility rule in his case.[216]

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209. In this regard, the court noted that the plaintiff turned nineteen just two days too early to be eligible under the league's rule, while the learning impairment resulting from his illness "operated to delay his early education for at least one year." *Id.* at *1.

210. *Id.* at *3 n.3. Unlike the ADA, the Rehabilitation Act originally contained no reasonable accommodation provision. Pedigo v. P.A.M. Transp., Inc., 891 F. Supp. 482, 486 (W.D. Ark. 1994), *vacated*, 60 F.3d 1300 (8th Cir. 1995), *rev'd on other grounds*, 98 F.3d 396 (8th Cir. 1996). However, the "concept of reasonable accommodation, developed by regulation under Section 504," Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 n.3 (2d Cir. 1995), and that Rehabilitation Act provision now effectively incorporates the ADA's reasonable accommodation obligation by reference. Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997) (citing 29 U.S.C. § 794(d) (2000)).

211. *Booth*, 1990 WL 484414, at *5 ("[The league] is compelled to make a reasonable accommodation for the Plaintiff's special circumstances . . . .").

212. *See id.* at *4 ("[T]he Rehabilitation Act *requires* that federally assisted programs do more [than strictly enforce their rules] for those who fall within its ambit."); *cf.* Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004) ("[T]he Rehabilitation Act . . . prohibit[s] discrimination against qualified disabled individuals by requiring that they receive 'reasonable accommodations' that permit them to have access to and take a meaningful part in public services and public accommodations."); Onishea v. Hopper, 171 F.3d 1289, 1311 n.4 (11th Cir. 1999) (Barkett, J., dissenting) ("[Section] 504 requires covered recipients to make reasonable accommodations to permit individuals with disabilities to participate in programs offered by a recipient of federal financial assistance.").

213. *See* Pridemore v. Rural Legal Aid Soc'y of W. Cent. Ohio, 625 F. Supp. 1180, 1186 n.4 (S.D. Ohio 1985) (observing that Congress intended that "the protection of Section 504 be extended to those individuals with a record of a substantially limiting impairment, even if the individual could be shown to have recovered in whole or in part from that handicapping condition"); Davis v. Bucher, 451 F. Supp. 791, 796 n.3 (E.D. Pa. 1978) ("[P]ersons who have a history of a handicapping condition but no longer have the condition . . . are protected from discrimination under section 504.").

214. *Booth*, 1990 WL 484414, at *4; *cf.* Rogers v. CH2M Hill, Inc., 18 F. Supp. 2d 1328, 1334 (M.D. Ala. 1998) ("[T]he 'cure' for ADA discrimination is somewhat different from the 'cure' in other discrimination cases. In cases dealing with other forms of discrimination, the baseline is that the protected characteristic should be ignored . . . . The baseline is different in ADA cases, however. Under the ADA, the protected characteristic (disability) must not be ignored, but rather should specifically be taken consideration of, and the employer *must* act on the basis of that characteristic.").

215. *Booth*, 1990 WL 484414, at *4 n.4, *5.

Although *Booth* arose under the Rehabilitation Act,[217] the court's reasoning is equally applicable in ADA cases[218] because claims arising under the two acts are typically analyzed in the same manner.[219] Indeed, Congress borrowed liberally from Section 504's substantive provisions when it enacted the ADA provisions protecting disabled persons from discrimination by private employers,[220] and Congress, therefore, also simultaneously indicated that the case law developed under the Rehabilitation Act is applicable in ADA cases as well.[221]

V. REQUIRING ACCOMMODATIONS IN RECORD OF DISABILITY CASES WILL NOT SIGNIFICANTLY EXPAND THE SCOPE OF THE ADA

Contrary to the suggestion in *Barnes v. Northwest Iowa Health Center*[222] and other cases holding that employers have no duty to accommodate individuals with a record of disability,[223] imposing such a duty in cases

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216. *See* Dennin v. Conn. Interscholastic Athletic Conference, 913 F. Supp. 663, 668 (D. Conn. 1996) (observing that the *Booth* court "found an age requirement waiver to be a reasonable accommodation"), *judgment vacated and appeal dismissed*, 94 F.3d 96 (2d Cir. 1996). *See generally* Ham v. Nevada, 788 F. Supp. 455, 460 (D. Nev. 1992) ("Since § 504 defendants must make reasonable accommodations, there will be cases where plaintiffs do not meet all of a program[']s requirements, but could with reasonable accommodations.").

217. *See* Jonathan R. Cook, *The Americans With Disabilities Act and its Application to High School, Collegiate and Professional Athletics*, 6 VILL. SPORTS & ENT. L.J. 243, 252 (1999) ("[T]he court in *Booth* . . . held that a waiver of the age-eligibility requirement was a reasonable accommodation under the Rehabilitation Act." (citing *Booth*, 1990 WL 484414, at *4)).

218. *See* Jason L. Thomas, Comment, *Through the ADA and the Rehabilitation Act, High School Athletes Are Saying "Put Me in Coach"*: Sandison v. Michigan High School Athletic Ass'n, 65 U. CIN. L. REV. 727, 758 n.208 (1997) ("The court in *Booth* did not address the ADA because the plaintiff's sole claim was under the Rehabilitation Act. However, the *Booth* court's reasoning and analysis applie[s] to the ADA and the Rehabilitation Act." (citing *Booth*, 1990 WL 484414, at *1, 4)).

219. *See* Oliveras-Sifre v. P.R. Dep't of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir. 1996).

220. *See* Woodman v. Runyon, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997) ("The ADA, effective July 26, 1992, extended to private employees many of the protections afforded the employees of federal grantees under section 504 of the Rehabilitation Act of 1973."); Nelson v. Ryan, 860 F. Supp. 76, 82 (W.D.N.Y. 1994) (noting that "the ADA borrows much of its substantive framework from § 504 of the Rehabilitative Act [sic]") (internal quotation marks and citation omitted); *cf.* Dubois v. Alderson-Broaddus Coll., Inc., 950 F. Supp. 754, 757 (N.D. W. Va. 1997) ("Many provisions of the ADA were based on the Rehabilitation Act.").

221. *See Woodman*, 132 F.3d at 1339 n.8; Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994) (citing 29 C.F.R. app. § 1630.2(g) (2005)); *cf.* Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("Although the plaintiffs here brought their claim under the ADA, cases involving claims under the Rehabilitation Act are instructive. The ADA defines a disability in substantially the same terms as the Rehabilitation Act defined a handicap (now disability) . . . . The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

222. 238 F. Supp. 2d 1053 (N.D. Iowa 2002).

223. *See, e.g.*, Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002) ("[A]s in *Barnes*, the court grants the defendants' motion for summary judgment as to [the plaintiff's] claim of failure to accommodate her disability to the extent that such claim is based on a

involving lingering or recurring impairments would *not* "significantly broaden the sweep of the ADA."[224] In *Vande Zande v. Wisconsin Department of Administration*,[225] for example, the Seventh Circuit held that "an intermittent impairment that is a characteristic manifestation" of a disability is "part of the underlying disability and hence a condition that the employer must reasonably accommodate."[226] Other courts have reached essentially the same conclusion.[227]

Because in many cases "the disabling aspect of a disability is, precisely, an intermittent manifestation of the disability, rather than the underlying impairment,"[228] there is no persuasive reason for refusing to extend the *Vande Zande* analysis to record of disability cases involving lingering or recurring impairments.[229] Even where such chronic impairments are not

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purported failure to accommodate her 'record of disability.'").

224. *Barnes*, 238 F. Supp. 2d at 1091 n.17; *see also* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 n.6 (7th Cir. 1998) ("[D]oes the employer incur a duty to accommodate an employee based on her history of a substantially limiting impairment, even if her current limitations are not substantial? If so, the 'record of impairment' provision grants the ADA a significantly broader sweep than it would otherwise have.").

225. 44 F.3d 538 (7th Cir. 1995).

226. *Id.* at 544; *see, e.g.*, Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003) ("Time off may be an apt accommodation for intermittent conditions."). *See generally* EEOC v. Sara Lee Corp., 237 F.3d 349, 352 (4th Cir. 2001) ("An intermittent manifestation of a disease must be judged the same way as all other potential disabilities.").

227. *See, e.g.*, Harris v. H & W Contracting Co., 102 F.3d 516, 520 (11th Cir. 1996) ("[T]he manifested symptoms of an underlying disability may be episodic or temporary in nature while the impairment itself is both chronic and permanent.") (internal quotation marks omitted); Cehrs v. Ne. Ohio Alzheimer Research Ctr., 959 F. Supp. 441, 447 n.6 (N.D. Ohio 1997) (discussing "flare-ups [that] are merely one aspect of [an] underlying disability"), *aff'd in part and rev'd in part*, 155 F.3d 775 (6th Cir. 1998).

228. *Vande Zande*, 44 F.3d at 544; *see, e.g.*, Rosato v. Barnhart, 352 F. Supp. 2d 386, 397 (E.D.N.Y. 2005) ("[A]n integral part of [the plaintiff's] alleged disability involves the unpredictable and intermittent nature of her attacks."); *cf.* Schluter v. Indus. Coils, Inc., 928 F. Supp. 1437, 1446 (W.D. Wis. 1996) (observing that "sporadic impairments . . . may create a substantial limitation when viewed cumulatively"); Boeltz v. Bowen, 648 F. Supp. 753, 756 (W.D. Pa. 1986) (finding that the "episodic nature" of an impairment made it "no less disabling").

229. In such cases, there may be relatively little difference between an actual disability and a record of disability. *See, e.g.*, Brown v. BKW Drywall Supply, Inc., 305 F. Supp. 2d 814, 826-27 (S.D. Ohio 2004) ("Episodic, impairing manifestations or flare-ups caused by an underlying chronic condition may constitute a disability if they occur with sufficient frequency and are of sufficient duration and severity to substantially limit a major life activity."); Carruth v. Cont'l Gen. Tire, Inc., 12 Am. Disabilities Cases (BNA) 1244, 1251 (S.D. Ill. 2001) ("[A] temporary, episodic impairment that recurs periodically as a result of some underlying, chronic condition from which the individual suffers (i.e., a manifestation of or a flare-up caused by the underlying condition) *may* constitute a disability . . . ."); *cf.* Sweeney v. Bert Bell NFL Player Ret. Plan, 961 F. Supp. 1381, 1393 (S.D. Cal. 1997) ("Where there are no new intervening causes, and there is a reoccurrence or a relapse of the prior disability, it is the same disability."), *aff'd in part and rev'd in part*, 156 F.3d 1238 (9th Cir. 1998).

themselves sufficiently severe to constitute a disability,[230] individuals protected under the ADA's record of disability provision,[231] like those protected under its actual disability provision,[232] should not be denied reasonable accommodations that might enable them to overcome any limitations resulting from those impairments.[233]

V. THE TEXT OF THE ADA APPEARS TO REQUIRE ACCOMMODATIONS IN RECORD OF DISABILITY CASES

The view that individuals with a record of disability are entitled to reasonable accommodations also finds support in the text of the ADA itself.[234] In *D'Angelo v. ConAgra Foods, Inc.*,[235] for example, the Eleventh Circuit observed that the ADA "plainly prohibits 'not making reasonable accommodations' for any qualified individual with a disability, including . . . one who is disabled in the actual-impairment or the record-of-such-an-impairment sense."[236] Several commentators have also noted that the language of the Act logically leads to this conclusion.[237]

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230. *See Vande Zande*, 44 F.3d at 544 ("Intermittent, episodic impairments are not disabilities . . . ."). *But cf.* London v. Kateri Residence, No. 95 Civ. 3116 (RLE), 1998 WL 644745, at *8 n.6 (S.D.N.Y. Sept. 21, 1998) ("There are no doubt some temporary impairments which are linked to, or caused by, permanent disabilities."), *aff'd*, 182 F.3d 900 (2d Cir. 1999).

231. *See, e.g.*, White v. Coyne Int'l Enters. Corp., 15 Am. Disabilities Cases (BNA) 403, 405 (N.D. Ohio 2003) ("Plaintiff claims . . . he has a record of a disability because his diabetes causes intermittent episodes of hyper or hypoglycemia.") (internal quotation marks and citation omitted); Machamer v. Hosp. of Univ. of Pa., 10 Am. Disabilities Cases (BNA) 1498, 1500 (E.D. Pa. 2000) (indicating that a record of disability "means a 'history' of [a] condition such as a chronic reoccurrence of an ailment").

232. *See Schluter*, 928 F. Supp. at 1446 ("[M]any diseases . . . may create intermittent problems that might not be considered a disability under the [ADA] if viewed in isolation, but would show a substantial limitation of a major life activity if viewed over an extended period of time. Put another way . . . when an impairment creates smaller intermittent impairments, the disability focus should be on the effects of the overall impairment.").

233. *See* Felix v. N.Y. City Transit Auth., 324 F.3d 102, 107 (2d Cir. 2003) (holding that the "[a]dverse effects of disabilities . . . arise 'because of the disability,'" and therefore must be accommodated (quoting 42 U.S.C. § 12112(a) (2000))); *cf.* Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 154 n.2 (3d Cir. 1999) (rejecting an interpretation of the ADA that would deny employees accommodations "when modest accommodations could help them surmount significant although not substantially limiting symptoms"); Raffaele v. City of N.Y., 16 Am. Disabilities Cases (BNA) 62, 73 (E.D.N.Y. 2004) ("The ADA should not be construed to discourage employers from accommodating less substantial impairments.").

234. *See* Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997) (noting that as defined in the ADA, "'[d]iscrimination' includes 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,'" and "[a] 'disability' includes . . . a record of [a substantially limiting] impairment" (quoting 42 U.S.C. §§ 12112(b)(5)(A), 12102(2) (2000))).

235. 422 F.3d 1220 (11th Cir. 2005).

236. *Id.* at 1236 (quoting 42 U.S.C. § 12112(b)); *cf.* S.E. Phillips, *Assessment Accommodations*, 1997 DET. C.L. REV. 917, 931 ("The ADA states that persons are disabled if they have a physical or cognitive impairment, a history of such impairment or are regarded as having such an impairment. This suggests that . . . someone with a history of disability who no longer is disabled may qualify. If

The *D'Angelo* court based its observation primarily on the fact that the text of the ADA does not differentiate between the three types of covered disabilities in imposing the duty to accommodate.[238] The court was critical of courts in some perceived disability cases that have been willing to ignore this aspect of the text on policy grounds,[239] asserting that courts are not free to disregard clear statutory language simply because its literal application could produce anomalous results.[240]

Despite the seemingly clear statutory language upon which the *D'Angelo* court relied,[241] the view that employers have no duty to

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so, it may be difficult to deny accommodations even when the evidence suggests they are not warranted.").

237. *See, e.g.*, Friedland, *supra* note 12, at 186 ("If someone qualifies as an individual with a disability because she has a record of a substantially limiting impairment, such as leukemia that has been cured, the plain language of the Act seems to require that her employer make reasonable accommodations for any of her known physical limitations."); Randal I. Goldstein, Note, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927, 960 (2001) ("The statute forbids 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.' Because an individual who . . . has a 'record of' a substantially limiting impairment is an individual with a disability, the statute seems to demand reasonable accommodations for that individual's current limitations." (quoting 42 U.S.C. §§ 12112(b)(5)(A), 12102(2))).

238. *See D'Angelo*, 422 F.3d at 1236; *see also* Gelfo v. Lockheed Martin Corp., 43 Cal. Rptr. 3d 874, 894 (Ct. App. 2006) (finding "no statutory basis for differentiating among the three types of plaintiffs in determining which individuals are entitled to a reasonable accommodation"); Gilbert, *supra* note 24, at 673 ("The ADA prohibits employers from refusing to make reasonable accommodations for 'the known physical or mental limitations of an otherwise qualified individual with a disability.' No distinction is made among the actual, 'record of', or 'regarded as' prongs of the ADA." (quoting 42 U.S.C. § 12112(b)(5)(A) (1994))).

239. In *Kaplan v. City of North Las Vegas*, 323 F.3d 1226 (9th Cir. 2003), for example, the Ninth Circuit acknowledged that in imposing a duty to accommodate, the ADA "does not differentiate between the three alternative prongs of the 'disability' definition." *Id.* at 1232. However, "because a formalistic reading of the ADA in this context [might] lead to bizarre results," the court looked "beyond the literal language of the ADA," and held that employers have "no duty to accommodate an employee in an 'as regarded' case." *Id.* at 1232-33. The *D'Angelo* court asserted that this reasoning "wholly disregards the plain meaning of the statute's language." 422 F.3d at 1238; *see also Gelfo*, 43 Cal. Rptr. 3d at 894 ("[N]umerous . . . courts [have] rejected the argument that courts are free to ignore a statute's plain language and conclude an employer has no duty under the ADA to provide an accommodation unless an employee is actually disabled.").

240. *See D'Angelo*, 422 F.3d at 1238; *cf.* Badger-Powhatan, A Div. of Figgie Int'l, Inc. v. United States, 633 F. Supp. 1364, 1373 n.13 (Ct. Int'l Trade 1986) ("[T]he court . . . will not rewrite the statute to avoid hypothetical anomalies . . . . Congress may choose to amend the statute if it finds untenable the remote chance of such anomalous results occurring."). *See generally* Tri-Bio Labs., Inc. v. United States, 836 F.2d 135, 143 (3d Cir. 1987) ("[T]he process of effectuating congressional intent at times may yield anomalies, and the explicit language of a statute in application may produce a curious result. Nevertheless . . . nothing prohibit[s] Congress from passing unwise legislation . . . .") (internal quotation marks and citation omitted).

241. Finding the statutory language to be less clear than other courts have claimed, the Ninth Circuit asserted in *Kaplan* that the "absence of a stated distinction" between the ADA's three alternative definitions of disability "is not tantamount to an explicit instruction by Congress that [all

accommodate individuals with a record of disability has found support among some commentators.[242] The principal rationale for this view does indeed appear to be that the imposition of such a duty occasionally would lead to bizarre results.[243] Relying on the fact that the ADA purports to require an employer to accommodate the "known physical or mental limitations" of any individual with a statutorily defined disability,[244] one commentator posited the following hypothetical example of the anomalies a literal reading of the ADA could produce:

> If someone qualifies as an individual with a disability because she has a record of a substantially limiting impairment, such as leukemia that has been cured, the plain language of the Act seems to require that her employer make reasonable accommodations for any of her known physical limitations. This implies that even if employers are not generally required to accommodate carpal tunnel syndrome because it does not substantially limit any recognized major life activity, the leukemia survivor's employer would have to accommodate her carpal tunnel syndrome; her record of leukemia would entitle her to accommodation for any known physical limitation.[245]

While this hypothetical serves to illustrate an ambiguity in the statutory text,[246] it provides no basis for refusing to recognize a duty to accommodate in record of disability cases.[247] Because the duty to accommodate is merely

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statutorily disabled] individuals are entitled to reasonable accommodations." *Kaplan*, 323 F.3d at 1232.

242. *See, e.g.*, Friedland, *supra* note 12, at 186 ("Although it makes sense to protect people with a record of a severe impairment . . . from discrimination on that basis, the definition of disability for purposes of requiring accommodation should include only actual, current impairments."); Goldstein, *supra* note 237, at 960 ("As a practical matter, . . . it makes little sense to offer [a reasonable accommodation] remedy to anyone who is not 'actually disabled.'").

243. *See, e.g.*, Friedland, *supra* note 12, at 186.

244. 42 U.S.C. § 12112(b)(5)(A) (2000).

245. Friedland, *supra* note 12, at 186; *cf.* Martin v. Kansas, 978 F. Supp. 992, 998-99 (D. Kan. 1997) (concluding that an employer's duty to accommodate a disabled individual's impairment "is not affected by the particular medical cause of the impairment").

246. *See* Deane v. Pocono Med. Ctr., 7 Am. Disabilities Cases (BNA) 198, 207 ("On its face, . . . [the ADA's reasonable accommodation provision] leaves open the question of *which* limitations the employer must accommodate."), *vacated*, 7 Am. Disabilities Cases (BNA) 555 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998); Fontanilla v. City & County of S.F., 11 Am. Disabilities Cases (BNA) 1207, 1220-21 (N.D. Cal. 2001) (noting that the ADA does not specifically address "whether an employer must accommodate *any* limitations that burden a worker whom the ADA classifies as 'disabled' or whether the employer need only accommodate those limitations that arise *as a result* of the worker's statutorily defined 'disability'"); 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, 935 (2000) ("[T]he statute does not indicate whether an employer must accommodate any performance limitation of a protected employee or only those limitations that are caused by the disability itself.").

247. The hypothetical actually does not illustrate a problem unique to the ADA's record of

a component of the ADA's broader prohibition of discrimination "because of" an individual's disability,[248] courts have generally rejected the view that an employer is required to accommodate limitations unrelated to a disability giving rise to protection under the Act.[249]

In *Felix v. New York City Transit Authority*,[250] for example, the plaintiff sought accommodation for a condition that, as in the foregoing hypothetical,[251] did not arise from her disability.[252] The plaintiff argued that the limitation an employer must accommodate need not be the disabling impairment giving rise to protection under the ADA.[253] While this technically may be correct,[254] the district court in *Felix* held that an employer has no obligation to accommodate limitations that have *no relationship* to

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disability provision. It instead reflects the fact that, if read literally, the Act would require employers to accommodate *any* known physical or mental limitations of *any* statutorily disabled individual, and not merely individuals with a record of disability. *See* Jacobs v. Potter, No. 99-T-1357-N, 2005 WL 3690546, at *4 (M.D. Ala. Mar. 16, 2005) (noting that the ADA "does not simply require an employer to provide reasonable accommodation to an employee's disability, it requires an employer to accommodate *the known physical or mental limitations* of an employee with a disability").

248. *See* Conrad v. Eaton Corp., 303 F. Supp. 2d 987, 1002 (N.D. Iowa 2004) ("The ADA prohibits employers from discriminating against a qualified employee who is disabled because of his disability. Under the ADA, discrimination is defined to include the failure to make a reasonable accommodation . . . ." (citing 42 U.S.C. §§ 12112(a), 12112(b)(5)(A) (2000))); *cf.* Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 207 F.3d 945, 960 (7th Cir. 2000) (Wood, J., dissenting) ("There is no duty to accommodate that is separate from the general obligation to avoid discrimination against the disabled."); Brookins v. Indianapolis Power & Light Co., 90 F. Supp. 2d 993, 1003 (S.D. Ind. 2000) ("The obligation to make reasonable accommodation is a form of non-discrimination." (quoting 29 C.F.R. app. § 1630.9 (2005))).

249. *See, e.g.*, Coleman-Adebayo v. Leavitt, 326 F. Supp. 2d 132, 143 (D.D.C. 2004) ("The Act only proscribes the failure to provide reasonable accommodations . . . when that failure occurs 'against a qualified individual with a disability *because of the disability* . . . .' 42 U.S.C. § 12112(a) (emphasis added). It follows . . . that the accommodation must be tied to a specific disability raised by a plaintiff in his or her request for accommodation.").

250. 324 F.3d 102 (2d Cir. 2003). For a more thorough academic discussion of *Felix*, see Kelly Cahill Timmons, *Limiting "Limitations": The Scope of the Duty of Reasonable Accommodation Under the Americans With Disabilities Act*, 57 S.C. L. REV. 313 *passim* (2005).

251. *See supra* notes 245-49 and accompanying text.

252. *See Felix*, 324 F.3d at 106 ("[The plaintiff] seeks a workplace accommodation for a mental condition which does not flow directly from her disability . . . .").

253. *See* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 661 (S.D.N.Y. 2001) ("Plaintiffs are asking this Court to . . . find that the limitation that defines an ADA disability does not necessarily need to be the subject of the requested accommodation."), *aff'd*, 324 F.3d 102 (2d Cir. 2003).

254. *See generally* Seaman v. CSPH, Inc., 179 F.3d 297, 300 (5th Cir. 1999) (observing that "the ADA requires employers to accommodate the limitations arising from a disability, and not the disability itself"); Hypes v. First Commerce Corp., 3 F. Supp. 2d 712, 717 (E.D. La. 1996) ("It is important . . . to distinguish between a disability and a limitation. The employer must accommodate limitations, not disabilities."), *aff'd*, 134 F.3d 721 (5th Cir. 1998).

the condition that constitutes a statutorily protected disability.[255] In affirming this ruling,[256] the Second Circuit refused to interpret the ADA to require employers to accommodate impairments that do not themselves substantially limit an individual's major life activities merely because the individual also happens to have an unrelated disability.[257]

Other courts have also held that an individual seeking an ADA accommodation must show that it would alleviate an impairment arising from a covered disability[258] because the Act does not require accommodations "not causally related to the alleged disability."[259] These courts (and some commentators)[260] base this conclusion primarily on the text of the Act itself:

> [W]hat the ADA forbids is discrimination "because of the disability of" the qualified individual, and discrimination "on the basis of disability" . . . . Thus, the language of the Act, in defining discrimination to include the failure to make reasonable accommodation for an otherwise qualified employee's known disability, does not require an employer to make accommodation for

255. *See Felix*, 154 F. Supp. 2d at 660 ("[B]ecause there was no nexus or causal connection between [the employee's] ADA-qualifying limitation and the reasonable accommodation sought, [the employee] cannot invoke the protections of the ADA.").

256. *See Felix*, 324 F.3d at 104.

257. *See id.* at 106; *cf.* Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 110 (1st Cir. 2005) (Howard, J., concurring in part) ("The ADA's purpose is to provide a disabled employee with a reasonable accommodation that will help the employee overcome the limitation caused by his or her particular disability; it is not a statute intended to provide benefits to an employee simply because the employee happens to be disabled.").

258. *See, e.g.*, Rodal v. Anesthesia Group of Onodaga, P.C., 250 F. Supp. 2d 78, 82 (N.D.N.Y. 2003) ("The ADA obligates an employer to provide a reasonable accommodation for the limitations arising from an employee's disability."), *rev'd on other grounds*, 369 F.3d 113 (2d Cir. 2004); Gruber v. Entergy Corp., 6 Am. Disabilities Cases (BNA) 1028, 1031 (E.D. La. 1997) ("Employers are obligated to make reasonable accommodations only to those limitations *resulting from the disability* that are known to the employer.") (emphasis added).

259. A. v. N.Y. Bd. of Elections, 99 F. Supp. 2d 258, 260 (E.D.N.Y. 2000) (citing Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2d Cir. 1998) (en banc)); *see also* Hines v. Chrysler Corp., 231 F. Supp. 2d 1027, 1037 (D. Colo. 2002) ("Under the ADA, when an individual has a disability, her employer must accommodate the limitations *which the disability causes* to the extent that the accommodation is 'reasonable.'") (emphasis added); Arnold v. County of Cook, 220 F. Supp. 2d 893, 896 (N.D. Ill. 2002) ("Failure to accommodate a limitation constitutes discrimination 'because of the disability' only if the limitation is caused by the disability.").

260. *See, e.g.*, Travis, *supra* note 246, at 935-36 ("The ADA's general antidiscrimination rule prohibits employers from discriminat[ing] against a qualified individual with a disability *because of the disability*. One form of discrimination is not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . . [T]hese two provisions arguably limit the employer's accommodation duty to only those limitations that are *caused* by the disability . . . ." (internal punctuation and footnotes omitted)).

> an impairment that is not a disability within the meaning of the Act or that does not result from such a disability.[261]

Because a record of disability claim is generally subject to the same analysis as other disability discrimination claims,[262] interpreting the ADA to require reasonable accommodations in record of disability cases will not force employers to accommodate limitations unrelated to the disability of which an individual has a record[263] any more than they are required to accommodate limitations unrelated to actual disabilities[264] (or, for that matter, perceived disabilities).[265] Employers instead would merely be required to accommodate those lingering or recurring impairments that, while perhaps not themselves substantially limiting,[266] clearly arise from a past disability.[267] Thus, the policy argument most often advanced in opposition to this interpretation of the ADA—the fact that it may lead to

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261. Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2d Cir. 1998) (quoting 42 U.S.C. § 12112(a), (b)(3)(A) (1990)); *see also* Huberty v. Wash. County Hous. & Redevelopment. Auth., 374 F. Supp. 2d 768, 773 (D. Minn. 2005) (holding that a Rehabilitation Act plaintiff was required to show that her requested accommodation was "linked to . . . disability-related needs").

262. *See* Edwards v. Ford Motor Co., 218 F. Supp. 2d 846, 851 n.4 (W.D. Ky. 2002) (perceiving no reason why the analysis in actual disability cases "would not apply also to claims brought under the companion [record of disability provision]"); Hannah v. County of Cook, 30 Nat'l Disability L. Rep. (LRP) ¶ 117, at 539 (N.D. Ill. 2005) (observing that "the analysis under [the record of disability provision] is the same as the analysis under [the actual disability provision]"); *cf.* Taylor v. Gearan, 979 F. Supp. 1, 7 (D.D.C. 1997) (stating that "the tests for having a record of or being perceived as disabled mirror the test for having an actual disability").

263. *See, e.g.*, Herschaft v. N.Y. Bd. of Elections, No. 00 CV 2748 (CBA), 2001 WL 940923, at *3 n.6 (E.D.N.Y. Aug. 13, 2001) (rejecting a record of disability claim where there was "no nexus between plaintiff's past disability and the accommodation that he [was] seeking"), *aff'd*, 37 F. App'x 17 (2d Cir. 2002).

264. *See generally* Amariglio v. Nat'l R.R. Passenger Corp., 941 F. Supp. 173, 179 (D.D.C. 1996) ("Although employers cannot discriminate due to a person's disability, the ADA does not require employers to provide assistance unrelated to such disability . . . .").

265. *See* Travis, *supra* note 246, at 936 ("Even if 'disability' includes perceived disabilities, [the ADA] arguably limit[s] the employer's accommodation duty to only those limitations that are *caused by* the disability -- either actual or perceived.").

266. *See* Crock v. Sears, Roebuck & Co., 261 F. Supp. 2d 1101, 1117 (S.D. Iowa 2003) ("[E]ven severe symptoms which are episodic do not constitute a substantial limitation on a major life activity."); White v. Coyne Int'l Enters. Corp., 15 Am. Disabilities Cases (BNA) 403, 406 (N.D. Ohio 2003) ("[E]ven if [a] plaintiff suffers from chronic episodic conditions, short-term restrictions on major life activities are not disabilities.") (internal quotation marks omitted).

267. *See, e.g.*, Doebele v. Sprint/United Mgmt. Co., 342 F.3d 1117, 1132 (10th Cir. 2003) (discussing the "permanent or long term impact or expected impact resulting from the impairment" of an individual with a record of disability); Gilbert, *supra* note 24, at 674 (noting that individuals covered under the record of disability provision "may presently experience some type of limitations from an impairment").

nonsensical results[268]—does not provide a persuasive reason for rejecting it.[269]

VII. IMPOSING A DUTY TO ACCOMMODATE MAY HELP CORRECT ERRONEOUS PERCEPTIONS OF INDIVIDUALS WITH A RECORD OF DISABILITY

There is yet another persuasive argument for interpreting the ADA's reasonable accommodation requirement to encompass individuals with a record of disability.[270] This argument reflects the ADA's intended purpose of redressing the unfounded "prejudices and biases of employers and co-workers"[271] that limit the employment opportunities of individuals with past disabilities,[272] and not merely the opportunities of those who suffer from actual (*i.e.*, current) disabilities.[273]

In this regard, Congress was influenced by the Supreme Court's analysis in *School Board of Nassau County v. Arline*,[274] a Rehabilitation Act case decided shortly before the ADA was enacted.[275] The *Arline* Court discussed

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268. *See, e.g.*, Friedland, *supra* note 12, at 185 (asserting that the ADA's extension of protection to individuals with a record of disability does "not make sense in relation to the accommodation requirement").

269. *See generally* D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1238 (11th Cir. 2005) ("[B]ecause we could craft a hypothetical that produces a result we might find anomalous is insufficient reason for disregarding the terms of the statute.").

270. In this regard, one court has observed that "the ADA's broad imposition of a duty to accommodate" extends to "any form of disability." Kilcullen v. N.Y. State Dep't of Transp., 33 F. Supp. 2d 133, 152 (N.D.N.Y. 1999), *vacated and remanded*, 205 F.3d 77 (2d Cir. 2000).

271. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 167 (E.D.N.Y. 2002); *see also* Mayers v. Wash. Adventist Hosp., 131 F. Supp. 2d 743, 750 (D. Md. 2001) ("The ADA protects claimants from adverse employment decisions based upon unfounded perceptions, stereotypes, and myths concerning the abilities of disabled individuals."), *aff'd*, 22 F. App'x 158 (4th Cir. 2001); Hirsch v. Nat'l Mall & Serv., Inc., 989 F. Supp. 977, 980 (N.D. Ill. 1997) ("Congress' purpose in passing the ADA was to prevent employers from making employment decisions on the basis of unfounded stereotypes about the capabilities of disabled persons in the workforce.").

272. *See* Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 21 (1st Cir. 2002) (observing that "a person is considered disabled [under the ADA] if she . . . is stigmatized by 'a record of [a substantially limiting] impairment'" (quoting 42 U.S.C. § 12102(2)(B) (1990))); Francis v. City of Meriden, 129 F.3d 281, 287 (2d Cir. 1997) (discussing individuals protected under the ADA because their "history of impairment . . . is stigmatizing").

273. *See* Benoit v. Technical Mfg. Corp., 331 F.3d 166, 176 (1st Cir. 2003) ("[W]hether actually impaired or not, [an individual] may be the victim of stereotypic assumptions, myths, and fears regarding [the] limitations [of individuals with disabilities].") (internal punctuation and citation omitted). *But cf.* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1460 (7th Cir. 1995) (observing that the ADA seeks "to ensure that the *truly disabled* will not face discrimination because of stereotypes") (emphasis added).

274. 480 U.S. 273 (1987), *superseded by statute on other grounds*, 29 U.S.C. § 794(d) (1992).

275. One federal appellate court has asserted that Congress actually "codified *Arline* in the ADA." EEOC v. Exxon Corp., 203 F.3d 871, 874 (5th Cir. 2000). While this may be a modest overstatement, Congress clearly "had *Arline* in mind when it enacted the ADA." Rizzo v. Children's World Learning Ctrs., Inc., 213 F.3d 209, 221 (5th Cir. 2000); *see also Jacques*, 200 F. Supp. 2d at 167 (discussing "Congress's explicit recall of *Arline* in the legislative history of the ADA"). By embracing the Supreme Court's reasoning in *Arline*, "employer speculation and stereotyping [is]

at some length the employment obstacles faced by those with a record of disability,[276] noting that even individuals who have recovered from noninfectious diseases such as epilepsy or cancer may be subjected to employment discrimination based upon irrational fears that they could be contagious.[277] Other courts have also noted the biased and irrational treatment occasionally experienced by individuals with a disability history,[278] including specifically those with a record of mental disability.[279]

Ironically, the erroneous perceptions and irrational prejudices that can unfairly stigmatize an individual with a record of disability may not even reflect the views of the employer itself.[280] Impermissible employment decisions may simply be based on the employer's concerns about the potential reactions of others,[281] such as the individual's coworkers,[282] the

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precisely what the authors of the ADA's legislative history . . . sought to prevent." EEOC v. Exxon Corp., 1 F. Supp. 2d 635, 644 (N.D. Tex. 1998), *aff'd*, 202 F.3d 755 (5th Cir. 2000).

276. *See* Lawrence D. Rosenthal, *Reasonable Accommodations for Individuals Regarded as Having Disabilities Under The Americans With Disabilities Act? Why "No" Should Not Be The Answer*, 36 SETON HALL L. REV. 895, 902-03 (2006) ("In its *Arline* opinion, the Court discussed individuals with records of handicaps . . . and how employers' and co-workers' perceptions about these issues can be just as debilitating as actual handicaps.").

277. *See Arline*, 480 U.S. at 284; *cf.* Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682, 684 (N.J. 1988) ("Despite recent advances in knowledge and treatment of epilepsy, it remains a misunderstood handicap. The term 'epilepsy' itself evokes stereotypical fears that perpetuate discrimination against its victims in all aspects of life, including employment.") (footnote omitted).

278. *See, e.g.*, Shaver v. Indep. Stave Co., 350 F.3d 716, 720-21 (8th Cir. 2003) (describing an individual with a record of disability who was regarded by his coworkers "as 'stupid' and 'not playing with a full deck' because of his epilepsy and [a] resulting operation" that alleviated his seizures, and who "was routinely referred to as 'platehead'" because he had a metal plate in his skull as a result of the operation); *see also* Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002) (discussing a hypothetical employee who "has a 'record of disability,' and is harassed on that basis"); Blanck, *supra* note 23, at 896 n.97 (observing that individuals with a record of disability are occasionally "denied employment opportunity on the basis that their employer believes an accommodation may be required in the future").

279. *See* Allen v. Heckler, 780 F.2d 64, 66 (D.C. Cir. 1985) (discussing "the continuing stigma of being a former psychiatric patient"); Godwin v. Florida, 593 So. 2d 211, 214 (Fla. 1992) (Kogan, J., concurring in part and dissenting in part) (discussing the "debilitating stigma . . . attached to people who have histories of mental disability"); Long, *supra* note 20, at 682 ("[A]n individual who was once institutionalized with a mental impairment carries that stigma with her when she applies for a job and is vulnerable to any fears or discomfort her employer may have about mental illness."). *See generally* Vislisel v. Turnage, 759 F. Supp. 1366, 1367 (N.D. Iowa 1990) (discussing "former mentally ill (but now cured) persons who, although they are not mentally impaired, remain mentally handicapped for employment purposes because of their prior mental illness"), *aff'd*, 930 F.2d 9 (8th Cir. 1991).

280. *See, e.g.*, Doe v. Denny's, Inc., 963 P.2d 650, 655 (Or. 1998) (observing that an "[e]mployer was not, by informing plaintiff about adverse customer perceptions of her disability, making its own evaluation of her ability to perform"); *see also* Cornman v. N.P. Dodge Mgmt. Co., 43 F. Supp. 2d 1066, 1072 (D. Minn. 1999) (discussing "the possible negative reactions or stereotypes of third-parties to the impairment of which the employee has a record").

281. *See* Francis v. City of Meriden, 129 F.3d 281, 287 (2d Cir. 1997) ("An employer

employer's customers,[283] clients,[284] or vendors,[285] and occasionally even the public at large.[286]

Recognizing that such erroneous perceptions can be as disabling as the physical or mental limitations that arise from actual impairments,[287] Congress extended the ADA's protection to individuals with past disabilities in order to shield them—no less than those with existing disabilities[288]—from just such unfounded attitudes.[289] In doing so,[290]

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may . . . refus[e] to hire an individual because of the fear that others may react negatively to the fact that the individual . . . once had a disease, even if the disease poses no danger to others."); Johnson v. Evangelical Lutheran Good Samaritan Soc'y, Inc., No. 4:98CV3225, 1999 WL 33445683, at *1 (D. Neb. Oct. 1, 1999) ("The second and third prongs of the [ADA] definition [of disability]—record of an impairment or regarded as having an impairment—relate . . . to the perceptions and fears of third persons who come into contact with an individual with a disability." (quoting William J. McDevitt, *Defining the Term "Disability" Under the Americans With Disabilities Act*, 10 ST. THOMAS L. REV. 281, 285 (1998))). *See generally* Fink v. Kitzman, 881 F. Supp. 1347, 1369-70 (N.D. Iowa 1995) (describing the pervasive discrimination disabled persons have experienced on the purported ground that "others would [feel] uncomfortable around them").

282. *See* 29 C.F.R. app. § 1630.2(*l*) (2005) (noting that a lack of "acceptance by coworkers" is one of the "common attitudinal barriers that frequently result in employers excluding individuals with disabilities"); *Arline*, 480 U.S. at 284 n.13 (discussing "irrational fears or prejudice on the part of . . . fellow workers" that can make it difficult for individuals with a disability history to secure employment) (internal quotation marks and citation omitted).

283. *See* 29 C.F.R. app. § 1630.2(*l*) (observing that statutory protection exists where an employer "discriminates against . . . an individual because of the negative reactions of customers"); Wilson v. Ga.-Pac. Corp., 4 F. Supp. 2d 1164, 1171 n.6 (N.D. Ga. 1998) (discussing "the situation in which an employer allows the actual, negative attitudes of its customers . . . to affect the employer's treatment of [an] employee").

284. *See Cornman*, 43 F. Supp. 2d at 1072 (noting that an employer might discriminate against an employee with a record of disability "out of fear of the reaction of clients"); Meisser v. Hove, 872 F. Supp. 507, 522 n.10 (N.D. Ill. 1994) ("An employer's concern about a client's reaction to an employee's handicap can be a powerful means of perpetuating stereotypes and holding back qualified workers.").

285. *See, e.g.*, Chico Dairy Co. v. W. Va. Human Rights Comm'n, 382 S.E.2d 75, 84 (W. Va. 1989) (discussing an individual who was denied a promotion due to the employer's concern that her disability would be "unsavory and unacceptable for [an employee] who dealt with vendors and customers") (internal quotation marks omitted).

286. *See* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947, 958 (E.D. Cal. 1990) (discussing the possibility of "discrimination based on public perception of a person's handicap"); *cf.* Serrano v. County of Arlington, 986 F. Supp. 992, 999 (E.D. Va. 1997) ("[I]t is . . . societal prejudices about disabled persons and disabilities that are at the heart of the ADA."); Saladin v. Turner, 936 F. Supp. 1571, 1581 (N.D. Okla. 1996) ("Under the ADA, effect may not be given to the public's fears or stereotypes.").

287. *See Arline*, 480 U.S. at 284; *see also Serrano*, 986 F. Supp. at 999 ("[T]he 'myths and fears' surrounding disabilities are just as limiting in an individual's search for meaningful work as are the constraints imposed by actual disabilities."); McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489, 1498 (N.D. Ga. 1996) ("[T]he perception [of] others that one is substantially limited in a major life activity can be just as disabling as actually being disabled." (citing *Arline*, 480 U.S. at 283)); Ammons-Lewis v. Metro. Water Reclamation Dist., 16 Am. Disabilities Cases (BNA) 386, 390 (N.D. Ill. 2004) (noting that "people with impairments can be more limited by the attitudes of their employers towards the impairment as [sic] by the actual impairment").

288. *See generally* Eric A. Besner, *Employment Legislation for Disabled Individuals: What Can France Learn From the Americans With Disabilities Act?*, 16 COMP. LAB. L.J. 399, 413 (1995) (observing that under the ADA, "someone discriminated against due to a record of

Congress clearly intended to protect those individuals who are so stigmatized by their past disabilities that they are substantially limited in their ability to find or retain employment.[291]

The ADA's reasonable accommodation provision,[292] in turn, imposes on employers an affirmative obligation to explore ways to remove barriers to the employment of persons protected by the Act.[293] Those barriers include the unfounded fears and stereotypes that motivated Congress to extend the Act's protection to individuals with a record of disability.[294] Thus,

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impairment . . . receives the same protections as an individual who possesses the impairment").

289. *See* MX Group, Inc. v. City of Covington, 106 F. Supp. 2d 914, 919 (E.D. Ky. 2000) ("[A]n individual who has recovered from a disabling condition but faces discrimination because of fears and stereotypes is protected under the ADA and Rehabilitation Act."); Gribben v. United Parcel Serv., Inc., 10 Lab. Rel. Rep. (BNA) (18 Am. Disabilities Cases) 91, 94 (D. Ariz. March 8, 2006) ("The ADA . . . covers people who have a history of disability . . . 'but who remain vulnerable to the fears and stereotypes of their employers.'" (quoting Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998))); Parikh, *supra* note 65, at 752 ("The ADA drafters designed the 'record of' prong of disability to protect individuals who have overcome their disability from an employer's residual hostility or stereotyping.").

290. The ADA's protection of individuals with a record of disability mirrors an earlier amendment of the Rehabilitation Act. *See* Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C. § 705(20)(B)(ii) (2000)). These amendments "added [a] record of impairment section to the Rehabilitation Act in order to prevent 'society's accumulated myths and fears about disability and disease' from being the basis of denying employment." Taylor v. U.S. Postal Serv., 771 F. Supp. 882, 889 (S.D. Ohio 1990) (quoting *Arline*, 480 U.S. at 284), *rev'd on other grounds*, 946 F.2d 1214 (6th Cir. 1991). By extending the protection of both acts to individuals with a record of disability, "Congress sought to protect [them] against discrimination 'stemming not only from simple prejudice, but also from archaic attitudes and laws and from the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.'" Rollf v. Interim Pers., Inc., 10 Am. Disabilities Cases (BNA) 1656, 1659 (E.D. Mo. 1999) (quoting *Arline*, 480 U.S. at 279) (internal quotation marks omitted).

291. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 633 (1999) ("[The record of disability provision] applies to persons who have recovered, either totally or partially, from a condition that constituted an impairment substantially limiting a major life activity. These individuals are included in the [statutory] definition [of disability] because Congress recognized the potential stigma that attaches once an individual is labeled as handicapped and the detrimental effects of that stigma on an individual's opportunities for employment and services.") (footnote omitted).

292. 42 U.S.C. § 12112(b)(5)(A) (2000).

293. *See* 29 C.F.R. app. § 1630.9 (2005) ("The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."); McAlindin v. County of San Diego, 192 F.3d 1226, 1237 (9th Cir. 1999) ("The ADA places a 'duty to accommodate' on employers in order to remove barriers that could impede the ability of qualified individuals with disabilities to perform their jobs.").

294. *See* Patrick v. S. Co. Servs., 910 F. Supp. 566, 568 (N.D. Ala. 1996) (observing that the record of disability provision reflects "a recognition by Congress that stereotyped assumptions about what constitutes a disability and unfounded concerns about the limitations of individuals with disabilities form major discriminatory barriers . . . to those persons either previously disabled, [or]

"Congress provided for reasonable accommodations" in part "to counter the prejudices of employers and co-workers who, in the absence of an accommodation, may otherwise erroneously perpetuate a disabling view of [an] employee's nondisabling impairment."[295]

This interpretation of the ADA's reasonable accommodation provision is reflected in the employer's obligation to engage in an interactive process with employees and applicants who request accommodations.[296] An employer participating in this process may acquire information about the medical history of an individual with a record of disability[297] that can be used in making an informed decision with respect to whether an accommodation might assist the individual in performing the essential functions of a particular job.[298]

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misclassified as previously disabled" (quoting 2 EEOC COMPLIANCE MANUAL § 902.1 (1995)), *aff'd*, 103 F.3d 149 (11th Cir. 1996); Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534, 1542 (S.D. Fla. 1995) ("[T]he overarching purpose of the ADA [is] to eliminate the stigma and stereotypes associated with disability and to eradicate discrimination on the basis of such stereotypes . . . . The point of the [Act] is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability." (quoting Carol J. Banta, Note, *The Impact of the Americans With Disabilities Act on State Bar Examiners' Inquiries into the Psychological History of Bar Applicants*, 94 MICH. L. REV. 167, 177-78 (1995))).

295. Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 168 (E.D.N.Y. 2002) (supplemental decision); *cf.* Guzman-Rosario v. United Parcel Serv., Inc., 397 F.3d 6, 9 (1st Cir. 2005) ("Where a worker is disabled an employer may not assume stereotypically an inability to work and (beyond this) must provide 'reasonable accommodation' unless undue hardship is shown." (quoting 42 U.S.C. § 12112(b)(5))); Tumlinson v. Tyson Foods, Inc., 15 Am. Disabilities Cases (BNA) 193, 199 (W.D. Tex. 2003) (indicating that an employer may be obligated to accommodate an individual despite "nonacceptance of the accommodation . . . by [his] coworkers," where the "nonacceptance reflects myths, fears or stereotypes regarding the impact of [his] medical condition"). *See generally* Giebeler v. M & B Assocs., 343 F.3d 1143, 1150 (9th Cir. 2003) ("[A]ccommodations may adjust for the practical impact of a disability, not only for the immediate manifestations of the physical or mental impairment giving rise to the disability.").

296. *See* Emerson v. N. States Power Co., 256 F.3d 506, 515 (7th Cir. 2001) ("As part of the reasonable accommodation duty, the ADA requires employers to engage in an interactive process with disabled employees needing accommodation so that together they can identify the employee's needs and discuss accommodation options."). For a discussion of the ADA's interactive process, see PollyBeth Proctor, *Determining 'Reasonable Accommodation' Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 SW. U. L. REV. 51 (2003).

297. *See* Mudra v. Sch. City of Hammond, 16 Am. Disabilities Cases (BNA) 1095, 1100 (N.D. Ind. 2004) ("[A]sking for more information regarding the nature of an illness is part of the interactive process that is part of finding reasonable accommodations for a disabled employee.") (citations omitted); *see, e.g.*, Mercado Rivera v. Loctite P.R., Inc., 222 F. Supp. 2d 136, 141 (D.P.R. 2002) (discussing an employer's request, made during the interactive process, that its employee "fill out an authorization form to obtain a release of her medical records in an effort to accommodate her").

298. *See* Mendez v. Gearan, 956 F. Supp. 1520, 1528 (N.D. Cal. 1997) (discussing an employer's need "to gather all the relevant information regarding [an employee's] history" in order "to determine what accommodations were necessary to allow [her] to perform her job"). *See generally* 29 C.F.R. app. § 1630.9 (2006) ("[A]scertain[ing] the precise barrier to the employment opportunity . . . will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.").

More specifically, the interactive process may enable an employer to identify potential accommodations, such as workplace educational programs,[299] that could assist in correcting its own misperceptions[300] or—difficult as this may be[301]—the misperceptions of its employees[302] about the impact of an individual's medical history on his or her ability to perform the job.[303] "In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice."[304]

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299. *See, e.g.*, Kent v. Derwinski, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (describing an employer's attempt to accommodate a disabled employee "by requiring all of [her co-workers] to attend sensitivity training sessions that focused on working well with other employees, especially those with handicaps"); *cf.* EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248 (10th Cir. 1999) ("[T]he extent to which an employer has adopted antidiscrimination policies and educated its employees about the requirements of the ADA is important . . . .").

300. *See* Kelly v. Metallics W. Inc., 410 F.3d 670, 676 (10th Cir. 2005) ("[A]n employer . . . must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions."); Ellen M. Saideman, *The ADA as a Tool for Advocacy: A Strategy for Fighting Employment Discrimination Against People With Disabilities*, 8 J.L. & HEALTH 47, 56 (1993-94) (observing that "[i]n some circumstances, reasonable accommodation may be required to correct the perception" an employer has of "an individual with a record of disability"). *See generally* Erickson v. Bd. of Governors of Colls. & Univs. for Ne. Ill. Univ., 207 F.3d 945, 960 (7th Cir. 2000) (Wood, J., dissenting) (observing that "[e]mployers must affirmatively act to alter any practices they have in place that discriminate against the disabled").

301. *See* Mitchell v. Crowell, 966 F. Supp. 1071, 1080 n.9 (N.D. Ala. 1996) ("In most cases, . . . it will be practically impossible for an employer to accommodate an individual who is disabled based upon the perceptions of others."), *reconsideration denied*, 975 F. Supp. 1440 (N.D. Ala. 1997); Travis, *supra* note 246, at 999 n.411 ("Of course, there may be limits to what an employer can do with respect to third parties.").

302. *See, e.g.*, Morgan v. City & County of S.F., 11 Nat'l Disability L. Rep. (LRP) ¶ 303, at 1262 (N.D. Cal. 1998) (discussing an employee's request for accommodation in the form of "periodic seminars and meetings to provide education to coworkers, and specifically requiring attendance of [her] superiors, regarding mental health disabilities and unfounded stereotypes, myths and stigmas"), *aff'd*, 202 F.3d 278 (9th Cir. 1999); *cf.* Mawson v. U.S. W. Bus. Res., Inc., 23 F. Supp. 2d 1204, 1206 (D. Colo. 1998) ("Plaintiff claims the harassment of coworkers intensified his physical and mental disabilities which [the employer], by failing to put an end to the harassment, failed reasonably to accommodate.").

303. *See* Deane v. Pocono Med. Ctr., 7 Am. Disabilities Cases (BNA) 198, 208 n.22 (3d Cir. 1997) ("After an employee requests accommodation, a meaningful interactive exchange could well rectify any misperceptions regarding the employee's impairments."), *vacated*, 7 Am. Disabilities Cases (BNA) 555 (3d Cir. 1997), *rev'd*, 142 F.3d 138 (3d Cir. 1998); Gilbert, *supra* note 24, at 670 ("Where the employee does have a *history* of substantial limitations, and the employer's adverse action turns upon unfounded stereotyping, 'record of' liability is appropriate . . . . In many cases, however, the employee's limitations are vocationally relevant; therefore, the employer must make judgments about those limitations in its workplace . . . . Ideally, those judgments should be formed through an interactive process with the employee, individualized assessment of the effect of any limitations upon the essential job functions, a thorough discussion of any reasonable accommodations, and accurate medical input.").

304. *Kelly*, 410 F.3d at 676; *see also* Travis, *supra* note 246, at 999 ("If there is a risk that the employer's prior misperception will continue to color future employment interactions,

If, on the other hand, there is no duty to accommodate in record of disability cases,[305] the employer would have no corresponding obligation—and thus relatively little incentive[306]—to engage in the interactive process.[307] Because an employer who does not "engage in the interactive process" may overlook a potential means of accommodating a statutorily disabled employee,[308] this interpretation of the ADA is contrary to the spirit of the Act,[309] even if the employer could not be held accountable in a strictly legal sense for its oversight.[310] As one court explained:

'accommodation' might require additional education in the workplace. If the employer's misperception stemmed from coworkers' assumptions or prejudices, 'accommodation' might require mandatory sensitivity training. If the employer's misperception resulted from customers' erroneous beliefs, 'accommodation' might require a creative marketing plan to reduce irrational consumer tastes.") (footnotes omitted).

305. *See, e.g.*, Martinez v. Cole Sewell Corp., 233 F. Supp. 2d 1097, 1132 (N.D. Iowa 2002) (asserting that an employee "cannot, as a matter of law, assert a failure-to-accommodate claim based on a record of disability").

306. An employer under no specific obligation to participate in the interactive process nevertheless would have some incentive to do so because its participation may be "probative as to whether it acted in good faith in disqualifying [an employee] from various jobs." Ragan v. Jeffboat, LLC, 149 F. Supp. 2d 1053, 1069 (S.D. Ind. 2001); *see also* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 171 n.2 (E.D.N.Y. 2002) (supplemental decision) ("The ADA provides an incentive for employers to engage in the interactive process in good faith by precluding compensatory and punitive damages against employers that make 'good faith efforts, in consultation with the person with the disability . . . to identify and make a reasonable accommodation . . . .'" (quoting 42 U.S.C. § 1981a (3) (2000))).

307. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000) ("Without the possibility of liability . . . employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations."), *vacated on other grounds sub nom.* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); *cf.* Bishop v. Nu-Way Serv. Stations, Inc., 340 F. Supp. 2d 1008, 1014 n.5 (E.D. Mo. 2004) ("[B]ecause Defendant was not required to make reasonable accommodations for Plaintiff's perceived disability, it was not required to engage in the interactive process of determining such an accommodation either.").

308. *See* Deane v. Pocono Med. Ctr., 142 F.3d 138, 149 (3d Cir. 1998); Mengine v. Runyon, 114 F.3d 415, 420-21 (3d Cir. 1997); *cf.* Vanderpool v. Sysco Food Servs., 177 F. Supp. 2d 1135, 1141 (D. Or. 2001) ("If the interactive process did not occur, it is difficult to tell whether accommodation would have been possible[.]").

309. *See, e.g.*, Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003) (observing that the "failure to accommodate the needs of qualified persons with disabilities may result directly from . . . impermissible stereotypes"), *aff'd*, 541 U.S. 509 (2004). *See generally* EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 804-05 (7th Cir. 2005) ("[The ADA] obligates an employer to engage in the interactive process precisely for the purpose of allowing both parties to act upon information instead of assumptions."); *Kelly*, 410 F.3d at 676 ("The ADA is concerned with safeguarding the employee's livelihood from adverse actions taken on the basis of 'stereotypic assumptions not truly indicative of the individual ability' of the employee." (quoting 42 U.S.C. § 12101(a)(7) (2000))).

310. *See* Battle v. United Parcel Serv., Inc., 438 F.3d 856, 864 (8th Cir. 2006) ("Under the ADA, if no reasonable accommodation is available, an employer is not liable for failing to engage in a good-faith interactive process."); *cf.* Stephenson v. United Air Lines, Inc., 23 Nat'l Disability L. Rep. (LRP) ¶ 104, at 487 (N.D. Cal. 2002) ("Employers who fail to engage in the interactive process in good faith face liability, but only if a reasonable accommodation would actually have been possible."); Mojica v. Sw. Airlines Co., 15 Nat'l Disability L. Rep. (LRP) ¶ 138, at 662 (N.D. Ill. 1999) ("An employer has a duty to engage in the interactive process to determine an appropriate accommodation only if the employee has a disability which can be accommodated."), *appeal dismissed*, 210 F.3d 375 (7th Cir. 2000).

> The interactive process is the key mechanism for facilitating the integration of disabled employees into the workplace . . . . Without the interactive process, many employees [and employers] will be unable to identify effective reasonable accommodations . . . . This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended.[311]

In short, the ADA's emphasis on encouraging employers to engage in an interactive process with their employees in order to identify effective accommodations[312] provides a persuasive reason for rejecting the view that the right to reasonable accommodations only extends to those individuals who are actually disabled.[313] If the employer chooses to ignore this critical aspect of the statutory scheme in a record of disability case,[314] "it is hardly a 'bizarre' result to hold the employer accountable."[315]

VIII. CONCLUSION

Some individuals with a disability history undoubtedly do not need accommodations in order to be productive employees.[316] In addition,

311. *Barnett*, 228 F.3d at 1116; *cf.* Calef v. Gillette Co., 322 F.3d 75, 97 (1st Cir. 2003) (Bownes, J., concurring in part and dissenting in part) (criticizing employer behavior that "conflicts with the purpose of the ADA, which places emphasis on encouraging *the employer* to engage in an interactive process with the individual to determine an effective reasonable accommodation") (internal punctuation and citation omitted).

312. *See* Jewell v. Reid's Confectionary Co., 172 F. Supp. 2d 212, 219 (D. Me. 2001) (discussing Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996)).

313. *See id.* at 218 (rejecting this view despite its "support in [other] circuits"); *cf.* Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 170 (E.D.N.Y. 2002) (asserting that "the interactive process . . . is a prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled").

314. *See generally* Smith v. Midland Brake Co., 180 F.3d 1154, 1172 (10th Cir. 1999) ("The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee. The interactive process is typically an essential component of the process by which a reasonable accommodation can be determined.").

315. *Jewell*, 172 F. Supp. 2d at 219; *see also* McClean v. Case Corp., 314 F. Supp. 2d 911, 918 (D.N.D. 2004) ("An employer's failure to engage in the interactive process is prima facie evidence that it may be acting in bad faith."); *cf.* Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998) (observing that providing "potentially debatable accommodations" to individuals with a record of impairment is "a sensible way to avoid litigation, liability, and confrontation").

316. *See* McGowan, *supra* note 36, at 112 ("[M]any [persons] with a record of a disability do not need or seek reasonable accommodations." (footnotes omitted)); Saideman, *supra* note 300, at 56 ("In many cases, an individual with a record of disability . . . who does not have a current disability does not need reasonable accommodation, but rather needs non-discrimination.").

employers may have difficulty providing such persons with accommodations even when they are needed.[317] However, the same issues often arise in "actual disability" cases,[318] which is why the duty to accommodate is typically analyzed on a case-by-case basis,[319] balancing the needs of the employee or applicant requesting an accommodation against the employer's burden in providing an accommodation.[320]

Extending this analysis to the present context,[321] neither the fact that some individuals may not need accommodations, nor the potential difficulty of providing accommodations, should preclude individuals with a record of disability from asserting that their own disability-related limitations must be accommodated.[322] Indeed, relieving employers of any duty to accommodate such individuals' lingering or recurring impairments,[323] or any limitations on their ability to work caused by stereotypical assumptions about their conditions,[324] would be inconsistent with Congress' intent that disability-

317. *See* Friedland, *supra* note 12, at 186 ("For purposes of requiring accommodation . . . it is unclear what the [ADA's record of disability provision] could mean. How would an employer accommodate a record of a disability?").

318. *See* Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) ("[W]hile a given disability may limit one employee (and therefore necessitate a reasonable accommodation), it may not limit another."); Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 725 (N.D. Ill. 2003) (discussing "a disabled employee who does not need an accommodation to perform his essential [job] duties"); Pavone v. Brown, 10 Nat'l Disability L. Rep. (LRP) ¶ 251, at 876 (N.D. Ill. 1997) (noting "the difficulties of trying to accommodate an employee whose disability is aggravated by job-related stress"), *aff'd*, 165 F.3d 32 (7th Cir. 1998); Mark DeLoach, Note, *Can't We All Just Get Along? The Treatment of "Interacting With Others" as a Major Life Activity in the Americans With Disabilities Act*, 57 VAND. L. REV. 1313, 1343 (2004) ("Many times, employees with mental disabilities do not need tangible accommodations.").

319. *See* Hypes v. First Commerce Corp., 3 F. Supp. 2d 712, 717-18 (E.D. La. 1996) ("Not all disabilities limit people in the same way. The ADA is designed to account for these differences by allowing an employer to fashion an accommodation based on one's particular limitation.") (citation omitted), *aff'd*, 134 F.3d 721 (5th Cir. 1998); *cf.* Wong v. Regents of Univ. of Cal., 410 F.3d 1052, 1071 (9th Cir. 2005) (Thomas, J., dissenting) (criticizing an interpretation of the ADA that "effectively bars [an] entire class of . . . disabled [persons] from receiving ADA accommodations").

320. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000) ("[T]he ADA . . . grounds accommodation in the individualized needs of the disabled employee and the specific burdens which such accommodation places on an employer."), *vacated on other grounds sub nom.* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); *cf.* Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002) ("Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties.").

321. *See generally* Gilbert, *supra* note 24, at 674 (asserting that "the same individualized assessment should be accorded in . . . 'record of' cases" as is typically utilized in cases involving "actual disabilities").

322. *See, e.g.*, Gaddy v. Four B Corp., 953 F. Supp. 331, 338 (D. Kan. 1997) (rejecting an interpretation of the ADA that would discourage employers "from attempting to work with people who, though not actually disabled, feel themselves in need of some special treatment from their employer to help them obtain or keep their jobs").

323. *See* Gilbert, *supra* note 24, at 674-75 ("[C]ourts should refrain from disavowing reasonable accommodations under the 'record of' prong [of the ADA] . . . . Bright line rules preventing accommodation in 'record of' cases would fail to address the residual effects of an impairment upon a particular individual.").

324. *See* Dalton v. Suburu-Isuzu Auto., Inc., 141 F.3d 667, 676 (7th Cir. 1998) (indicating that the

related limitations be accommodated "wherever possible."[325] The extent to which employers must accommodate individuals with a record of disability instead should be resolved on a case-by-case basis,[326] just as it is in actual disability cases.[327]

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employment opportunities of individuals with a record of disability may be limited by an "employer's preconceived notions of disability"); Duran v. City of Tampa, 430 F. Supp. 75, 78 (M.D. Fla. 1977) (discussing "individuals whose past handicap[s] continue to effect their present ability to find and retain employment"). *See generally* Allen v. Heckler, 780 F.2d 64, 66 (D.C. Cir. 1985) (observing that "those who at one time had a disabling condition" may face a "continuing stigma").

325. Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985) (construing Rehabilitation Act); *see also* EEOC v. Newport News Shipbuilding & Drydock Co., 949 F. Supp. 403, 409 (E.D. Va. 1996) ("One of the principal purposes of the ADA is to encourage employers to accommodate legitimately disabled employees.").

326. *See* Abell et al., *supra* note 22, at 793 ("[E]mployers should be aware that a record of a substantially limiting impairment may, *under certain circumstances*, give rise to an employer's duty to provide reasonable accommodation.") (emphasis added).

327. *See generally* D'Amico v. N.Y. State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) ("An individual analysis must be made with *every request for accommodations* and the determination of reasonableness must be made on a case by case basis.") (emphasis added).