REFINING THE PRODUCTION BURDEN FOR
“REGARDED AS DISABLED” CLAIMANTS

Jennifer Schechter Sharret*

INTRODUCTION

“You’re fired because you’re [insert applicable race
/ color / religion / sex / national origin / age /
disability].”

Employment discrimination statutes\(^1\) prohibit intentional
discrimination only when the discrimination is because of a statutorily
protected characteristic. A victim of intentional discrimination, also
known as disparate treatment,\(^2\) must therefore first prove membership in
a protected class. While an employee can typically discharge this
burden by simply alleging membership, the task is more difficult for the
“regarded as disabled” plaintiff under the Americans with Disabilities
Act (ADA).

Title I of the ADA prevents an employer from discriminating
against disabled individuals.\(^3\) The statute defines disability in three

---

\* Senior Notes Editor, Cardozo Law Review. J.D. Candidate (June 2007), Benjamin N.
Cardozo School of Law; B.S. Cornell University (2004). I would like to thank Professor Arthur
Jacobson for his insightful comments and suggestions; Claire Tuck and Jane Needleman for their
guidance and editing; my family for their love and support, particularly my parents, Toby and
Harold Schechter, for teaching me the value of research and taking pride in my work; and my
husband, Jonathan Sharret, for his continuous love, devotion, and patience.

\(^1\) Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, sex,
Act of 1964 prohibits discrimination on the basis of age (covering employees over the age of

\(^2\) The practice of intentionally dealing with a person because of a specified characteristic
such as race, sex, national origin, age, or disability. BLACK’S LAW DICTIONARY 483 (7th ed.
1999). This Note is limited to cases of disparate treatment, contrasted with disparate impact,
which deals with the adverse effect of a facially neutral practice that is nonetheless
discriminatory.

\(^3\) 42 U.S.C. § 12102(2)(C). “No covered entity shall discriminate against a qualified
individual with a disability because of the disability of such individual in regard to job application
procedures, the hiring, advancement, or discharge of employees, employee compensation, job
training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).
Title I of the ADA prohibits discrimination against disabled individuals in the employment
ways: An individual who (1) has a physical or mental impairment that substantially limits a major life activity; or (2) has a record of a disability; or (3) is regarded as disabled.4

The regarded as disabled plaintiff does not have a condition that fits within the first two definitions of disability under the ADA,5 yet he believes that his employer perceived him as disabled and took an adverse employment action based on that perception.6 The claimant must travel to the “farthest reaches of the ADA”7 and look to the employer’s state of mind to show that the employer viewed him as having a disability. He must prove that he is disabled because his employer thinks so.

In 1974, the Supreme Court in McDonnell Douglas v. Green8 developed a framework allocating the burdens of production and persuasion for employment discrimination claims relying solely on circumstantial evidence. The employee must prove his prima facie case,9 which includes showing that he is a member of the protected class.10 Once the employee proves his prima facie case by a
preponderance of the evidence, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. The burden then shifts back to the employee to show that this reason is mere pretext for actual discrimination. In Reeves v. Sanderson Plumbing Products, Inc., the Supreme Court held that proof that the employer lied about the stated reason for the adverse employment action plus the prima facie case is sufficient evidence for a trier of fact to find intentional discrimination.

The regarded as disabled plaintiff has a difficult time establishing his prima facie production burden. The circumstantial evidence showing that the employer regarded the employee as disabled will often come from the fact-finder’s disbelief of the employer’s legitimate nondiscriminatory reason. However, the employer is not required to articulate any reason until the employee proves membership in the protected class. Thus, proving membership in the protected class as a threshold matter becomes an insurmountable roadblock for regarded as disabled plaintiffs.

Three circuits have tackled this problem. The Sixth Circuit has taken an expansive view, applying the Reeves inference (allowing proof of pretext as evidence of discrimination) and further extending it to allow proof of pretext to show that the employee was also regarded as disabled. The Court of Appeals for the Seventh and Tenth Circuits, on the other hand, have taken a restrictive view, rejecting the use of proof of pretext to show that the employer regarded the employee as disabled, and demanding that the plaintiff meet all elements of the prima facie case in the prescribed order. As the facts tending to prove the employer’s perceptions of the employee’s condition are not typically available prior to trial, the Seventh and Tenth Circuit Courts’ approach

the ADA; (2) that he is qualified to perform the essential functions of the job with or without reasonable accommodation; (3) and that he suffered an adverse employment decision because of his disability. Pugh v. City of Attica, 259 F.3d 619, 626 (7th Cir. 2001).  
11 Burdine, 450 U.S. at 252-53.
12 Id. at 253. Examples of adverse employment action include a failure to hire or promote, terminating employment, or creating a hostile work environment.
13 Pretext is defined as a “false or weak reason or motive advanced to hide the actual or strong reason or motive.” BLACK’S LAW DICTIONARY 1206 (7th ed. 1999).
14 Burdine, 450 U.S. at 256.
16 Id. at 147-48.
18 Rakity v. Dillon Co., 302 F.3d 1152 (10th Cir. 2002) (individual with repeated shoulder surgeries was not regarded as disabled); Nese v. Nordic Constr. Co., 405 F.3d 638 (7th Cir. 2005) (individual with epilepsy was not regarded as disabled and therefore it was irrelevant if employer’s reason for termination was less than straightforward).
19 Rakity, 302 F.3d at 1165; (“The facts Mr. Rakity [employee] refers to as pretext evidence do not amount to a genuine issue of material fact concerning whether King Soopers [employer] regarded Mr. Rakity as disabled.”); Nese, 405 F.3d at 642 (“[T]o say the employer was less than perfectly frank does not prove that the employer acted as it did for discriminatory reasons.”).
bars regarded as disabled plaintiffs from overcoming a motion for summary judgment.\footnote{Summary judgment is defined as a “judgment based on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law.” \textit{BLACK’S LAW DICTIONARY} 1449 (7th ed. 1999); see \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242, 255 (1986) (holding that at the summary judgment stage, the issue is whether non-movant will be able to prevail on the merits, and as such, the evidence of the non-movant is to be believed, with all justifiable inferences being drawn in his favor). Today, summary judgment looks like a “dry run of the trial based on the affidavits.” Henry L. Chambers, Jr., \textit{Recapturing Summary Adjudication Principles in Disparate Treatment Cases}, 58 SMU L. REV. 103, 109-10 (2005).}

This Note argues that courts ought to permit a plaintiff to tweak the order of the \textit{McDonnell Douglas} framework, and use proof of pretext (through evidence of the lie), to establish the first element of the plaintiff’s prima facie case—that he is a member of the protected class, i.e., “regarded as disabled.” Whether the employer regarded the employee as disabled is a question of the employer’s state of mind and the existence of pretext raises an issue of material fact about the employer’s perceptions.\footnote{Membership in the protected class becomes a question of intent, and the employer’s motive “is one rarely susceptible to resolution at the summary judgment stage.” \textit{Ross}, 237 F.3d at 706 (acknowledging the district court’s analysis below).} Allowing the plaintiff to temporarily skip the first step of establishing the prima facie case (that he is a member of the protected class) does not in any way transfer the ultimate burdens of proof and persuasion of the \textit{McDonnell Douglas} framework.\footnote{There is also dicta that \textit{McDonnell Douglas} was “never intended to be rigid, mechanized, or ritualistic.” \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978).} The plaintiff will not be able to overcome summary judgment merely by showing that the employer’s stated reason is a lie. The pretext must also give rise to an inference that the employer regarded the employee as disabled, and that the employer took the action out of a discriminatory motive.\footnote{Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000) (“Once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”).}

Part I examines the Americans with Disabilities Act and what sets it apart from other federal anti-discrimination statutes. Part II of this Note tracks the development of the principal case, \textit{Reeves v. Sanderson Plumbing Products, Inc.} Part III examines the origin of the split among the circuits in applying \textit{Reeves} to someone who is regarded as disabled under the \textit{ADA}. Part IV analyzes attempted resolutions of the different views and proposes underlying reasons for the different outcomes. Part V proposes an alternative way of understanding the Sixth Circuit case, \textit{Ross v. Campbell Soup Co.}, and how to reconcile using proof of pretext to fulfill a prima facie case of a regarded as disabled plaintiff within the \textit{McDonnell Douglas} framework. This method allows the flexible use of
McDonnell Douglas, while imposing strict adherence to the exceptions under Reeves.

I. UNIQUE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Title I of the American with Disabilities Act was passed by Congress in 1990 in an effort to combat the disparity in job opportunities available to individuals with disabilities. Prior to the signing of the ADA, two out of three disabled individuals were not working and two out of three disabled individuals who were not working wanted to be. Congress believed that disabled individuals were not given the employment opportunities they desired as a result of employer stereotypes, capitulation to customer and co-worker prejudices, and the cost of workplace accommodations. During congressional hearings, both the House and the Senate heard testimony on how employers used application forms and pre-employment inquiries to focus on the existence of a disability rather than the individual’s ability to perform the job.

The passage of the ADA came more than twenty-five years after the enactment of Title VII of the Civil Rights Act (Title VII) in 1964, and more than twenty years after the Age Discrimination in Employment Act (ADEA) in 1967. The late passage of the ADA can be traced to the inability of proponents of disability rights to garner the support of the civil rights community or the political branches. However, after proponents of an anti-discrimination statute, intended to cover disabled individuals in both the private and public sector, finally caught the attention of Congress, the ADA passed through both houses with marked speed and unprecedented support.

Like other civil rights statutes, the ADA outlaws discrimination

24 42 U.S.C. § 12102(a) (2000) (finding individuals with disabilities are excluded from or relegated to lesser jobs, and as a group occupy an inferior vocational status in society).
26 ESTREICHER & HARPER, supra note 25, at 508-09.
28 42 U.S.C. § 2000(e) (protecting victims of discrimination because of race, color, religion, sex, or national origin).
31 Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000), had already prohibited employers or organizations receiving financial assistance from a federal department or agency from engaging in disability discrimination.
32 COLKER, supra note 30, at 5.
against a targeted group of people—in this case, disabled individuals.\textsuperscript{33} However, the ADA is unique\textsuperscript{34} in that it imposes an affirmative duty to make reasonable accommodations to enable qualified individuals to compete and succeed in the labor market.\textsuperscript{35} And despite the statute’s self-described purpose to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,”\textsuperscript{36} the definitions for a “disabled” individual provide no clear guidance, leading courts to apply varied standards of who is qualified under the Act.\textsuperscript{37}

In the Findings and Purposes of the ADA, Congress stated that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”\textsuperscript{38} Contrary to Title VII and the ADEA, the scope of the protected class under the ADA, i.e., those who are disabled, has been one of the most controversial aspects of this statute.\textsuperscript{39} While membership in a protected class is an element of a Title VII plaintiff’s prima facie case, a person of any race, gender, or national origin can state a disparate treatment claim under Title VII, whereas only

\textsuperscript{33} 42 U.S.C. § 12101(b).

\textsuperscript{34} With the exception of the affirmative duty to provide reasonable accommodation for Title VII plaintiffs citing religious discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j).

\textsuperscript{35} 42 U.S.C. § 12112(b)(5)(A). This Note does not address whether the affirmative duty of reasonable accommodation should impact the methodology in which an employee can use circumstantial evidence to prove that he is “regarded as disabled.” It would appear on its face that such a duty should have no bearing in discovering the truth of the employer’s perceptions. For further information on the duty to provide reasonable accommodation to the successful “regarded as” plaintiff, see, e.g., Allen Dudley, Rights to Reasonable Accommodation Under the Americans with Disabilities Act for “Regarded As” Disabled Individuals, 7 GEO. MASON L. REV. 389 (1999); Timothy J. McFarlin, If They Ask for a Stool . . . Recognizing Reasonable Accommodation for Employees “Regarded As” Disabled, 49 ST. LOUIS U. L.J. 927 (2005); Frances M. Nicastro, The Americans with Disabilities Act: Determining Which Learning Disabilities Qualify for Reasonable Accommodations, 26 J. LEGIS. 355 (2000).

\textsuperscript{36} 42 U.S.C. § 12101(b)(2).

\textsuperscript{37} The flexible definition of disability, with its three categories, requires the employer, and subsequently the court, to set aside preconceived notions of disability and evaluate each person on an individualized basis. While this practice helps break down stereotypes, it also fails to provide a clear response to all situations. An ADA decision, therefore, becomes very fact-specific. See PETER BLANCK ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY § 3-2 (2004). Although the EEOC has promulgated regulations on how to define disability, it has never created an exhausting all-inclusive list of disabilities. Additionally, the Supreme Court has been reluctant to allow anyone who has an impairment to have standing as having a “per se” disability. See also Bragdon v. Abbott, 524 U.S. 624, 641 (1998).

\textsuperscript{38} 42 U.S.C. § 12101(a)(1).

\textsuperscript{39} PETER BLANCK ET AL., supra note 37, at xxxvii. Advocates lobbying for the ADA believe that the range of a disabled person should include someone with a serious illness to someone with a non-trivial impairment, while courts have focused on the limits of the protected class. However, at the time of the enactment of the statute, both proponents and opponents of the bill understood that the definition of disability was intended to have a very broad scope. See COLKER, supra note 30, at 65 (noting that efforts to narrow the definition of disability by excluding individuals with contagious diseases or those with a history of drug abuse failed).
individuals who fall under the specific definition of a disability can state an ADA claim. In fact, one of the greatest barriers to recovery for plaintiffs under the ADA has been establishing that they are individuals with a disability.

Disability is defined under the ADA as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Disability is defined under the ADA as:

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; [or]

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The Definition section of the ADA adopted the language of one of its precursors, the Rehabilitation Act of 1973, which prohibited disability discrimination in public sector employment and large federal subcontracts (contracts in excess of $2500). This adopted version of the ADA, expanding the coverage of prohibited disability discrimination to the private sector, was drafted by Robert Silverstein, aide to Senator Tom Harkin. Chai R. Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?, 21 BERKELEY J. EMP. & LAB. L. 91, 127 (2000). An earlier, (non-adopted), version drafted by Robert Burgdorf of the National Council of the Handicapped attempted to address problems that arose under the Rehabilitation Act. This proposal prohibited discrimination on the basis of handicap, defined as “a physical or mental impairment, perceived impairment or record of impairment.” These terms were further defined:

(2) Physical or Mental Impairment—The term “physical or mental impairment” means—

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body, including the following:

(i) the neurological system;

(ii) the musculoskeletal system;

(iii) the special sense organs, and respiratory organs, including speech organs;
The distinction between the ADA, on the one hand, and Title VII and the ADEA, on the other, is further highlighted by the inclusion of someone who is regarded as disabled as a member of the protected class under the ADA. For example, there is no explicit protection for an individual who is discriminated against because he looks older than his actual age under the ADEA. Yet someone who is not disabled, but is viewed as such, has all the protections of the ADA. Congress specifically included regarded as disabled as a category of the protected class of the ADA to prohibit discrimination on the basis of “myths, fears and stereotypes associated with disabilities.”

(iv) the cardiovascular system;
(v) the reproductive system;
[vi] the digestive and genitourinary systems;
(vii) the hemic and lymphatic systems;
(viii) the skin;
(ix) the endocrine system; or
(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) Perceived Impairment—The term “perceived impairment” means not having a physical or mental impairment as defined in paragraph (2), but being regarded as having or treated as having a physical or mental impairment.

(4) Record of Impairment—The term “record of impairment” means having a history of, or having been misclassified as having, a physical or mental impairment.

134 CONG. REC. S2345, §§ 3(2)-(4), at 9,379 (daily ed. Apr. 28, 1988). This definition tracks the language of the regulations found in the Department of Health and Human Services. 45 C.F.R. § 84.3(j)(2)(i) (2005). The Department of Health, Education and Welfare (the initial agency responsible for promulgating regulations) decided not to include a list of disorders of physical and mental impairment in fear that it would not be comprehensive. 45 C.F.R. § 84 app. A. Lobbyists preferred the shorter definition of disability, finding it best to stick with language that had been tried and tested for fifteen years, and with a few exceptions, had not led the majority of courts to carve out a limited scope of coverage. See Feldblum, supra, at 128, 164 (noting the disproportion of the rampant litigation of definitional issues of disability under the ADA with the scant consideration of the definition of disability during the discussion and drafting stage of the ADA).


46 But see Sanders v. Dorris, 873 F.2d 938, 942 (6th Cir. 1989) (defendant in housing case did not actually have to know that plaintiffs were members of the protected class; a mere suspicion would have been enough); Perkins v. Lake County Dep’t of Util., 860 F. Supp. 1262 (N.D. Ohio 1994) (holding defendant-employer’s belief that employee was American Indian was contributing factor in raising genuine issue of material fact as to whether plaintiff was a member of the protected class).

47 Arlene B. Mayerson, “Defining the Parameters of Coverage Under the Americans with Disabilities Act: Who Is ‘An Individual with a Disability?”’ Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent, 42 VILL. L. REV. 587, 609 (1997) (arguing that the “regarded as” prong was intended to be a catch-all provision for individuals who did not qualify under the first and second prongs of the ADA, but were subject to an adverse discriminatory employment action).

48 H.R. REP. No. 101-485 (III), at 30-31 (1990); see Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (“By amending the definition of the ‘handicapped individual’ to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”). Although never explicitly overruled, the reasoning of Arline with respect to the third prong of disability has been slowly carved away.
definition of disability focuses on the perceptions of the employer, rather than an employee’s actual disability.\textsuperscript{49}

There are three scenarios in which a person would be regarded as having such impairment.\textsuperscript{50} The first is when the plaintiff has a physical or mental impairment that does not substantially limit major life activities, but is treated as such by an employer.\textsuperscript{51} The second is when the plaintiff has a physical or mental impairment that substantially limits one or more major life activities, but only because of the attitudes of others toward the impairment.\textsuperscript{52} The third is when the plaintiff has no impairment, but is treated by the employer as having one.\textsuperscript{53} The mistaken belief is subjectively dependant on the employer’s intent\textsuperscript{54} and the perceived condition must be rooted in the objective definition of a disability.\textsuperscript{55} The Act does not require the employer’s mistaken belief to be a logical or reasonable one, but it does require that the condition imputed to the employee by the employer qualify the employee as a


\textsuperscript{50} Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1121 (5th Cir. 1998) (citing the EEOC regulations).

\textsuperscript{51} An example would be that of an employee who has controlled high blood pressure which does not substantially limit his work activities. If the employer re-assigns the individual to a less strenuous job out of an unsubstantiated fear that the employee would have a heart attack, the employer has regarded the employee as disabled. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 49, at II-9.

\textsuperscript{52} An example would be that of an experienced assistant manager of a convenience store with a facial scar. If the owner passes the individual over for promotion because he believes that customers and vendors would not want to look at him, the employer has discriminated on the basis of disability because he perceived and treated him as an individual with a substantial limitation. Id. But Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) only lists the first (“a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities”) and the third (“a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities”) as ways for an individual to fall within the statutory definition of “regarded as disabled.” This second type of impairment exists only because of attitudes of others, and is perhaps the reason for its exclusion by the Sutton court. A unique aspect of this type of claim is that it does not require the employer to believe the employee has a limiting impairment, it only requires a showing that the employer believed other people would object to the employee because of the supposed impairment.

\textsuperscript{53} An example would be if an employer fires an employee based on a rumor that the individual has HIV. The individual did not have any impairment but was treated as if he had a substantially limiting impairment (HIV would fall under the definition of a substantially limiting impairment). See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, supra note 49, at II-9.

\textsuperscript{54} The subjectivity of the employer’s intent is twofold: their perception of the employee’s condition and the reason they took the adverse employment action. However, the misperception need not be purposeful or with “intent.” Although one purpose of the ADA is to root out “myths, fears and stereotypes,” see supra text accompanying note 48, “even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual’s impairment can be sufficient to satisfy the statutory definition of a perceived disability.” Deane v. Pocono Med. Ctr., 142 F.3d 138, 144 (3d Cir. 1998); see also 29 C.F.R. § 1630.2(l)(2) (2005).

\textsuperscript{55} 29 C.F.R. § 1630.2(l)(2).
disabled individual under the ADA.56
The employee must do more than show that the employer believed he had an impairment; he must show that the employer believed this impairment substantially limited him in a major life activity. In Murphy v. United Parcel Service, Inc.,57 the employee was able to show that the employer regarded him as having an impairment due to his high blood pressure, that he was qualified to work, and the employer acknowledged that he terminated Murphy because of his high blood pressure. Notwithstanding all of this evidence, the Court granted summary judgment to the employer, finding that the employee failed to show that the employer regarded his impairment as substantially limiting in the major life activity of working.58 This adds an additional evidentiary burden for the regarded as disabled plaintiff, as the typical employer does not consider whether the employee would be objectively disabled before taking an adverse action on the basis of a perceived disability.59

II. DEVELOPMENT OF REEVES V. SANDERSON PLUMBING

The model of proof for an ADA plaintiff alleging intentional discrimination is largely based on the disparate treatment model

56 The plaintiff must establish that the impairment, if it existed as perceived, would be substantially limiting. See Deas v. River West, L.P., 152 F.3d 471, 476 (5th Cir. 1998). Substantially limited is defined as being:
   (i) Unable to perform a major life activity that the average person in the general population can perform; or
   (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
29 C.F.R. § 1630.2(j)(1) (factors to consider in defining substantially limited include nature and severity of impairment and actual or expected duration and permanency of impairment). However, if the “major life activity” in question is working, the disability is further defined as an inability to perform a broad class of jobs as compared to the average person having comparable training, skills, and abilities. 29 C.F.R. § 1630.2(j)(3)(i).
58 Id. at 525. To be substantially limited in the life activity of working, the employee must be precluded from performing a class of jobs, not the specific job in question. However, the same year as the Murphy decision, the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471, 491-92 (1999), hinted in dicta that perhaps “working” should not even qualify as a major life activity. But see Colker, supra note 30, at 114 (if this were true, then the Court will have effectively rendered the “regarded as” prong of the ADA moot because “it is hard to imagine that one could construct a ‘regarded as’ case that did not involve the major life activity of working” as an employer will not be concerned by other major life activities, such as eating or sleeping).
59 Since it “is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff’s task becomes even more difficult.” Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001).
developed under Title VII. An employee who has “smoking gun” direct evidence is able to overcome summary judgment and receive a trial where a fact-finder will evaluate the credibility of that direct evidence. If the employee proves by a preponderance of the evidence that the direct evidence is true, he will win his claim.

As employers have become more sophisticated, direct evidence is now a rarity. Absent such evidence, the plaintiff must use circumstantial evidence to show intentional discrimination. The Supreme Court refined a burden-shifting framework in which an employee could prove his disparate treatment claim in the landmark cases of *McDonnell Douglas Corp. v. Green* and *Texas v. Burdine*. First, the employee must prove a prima facie case that he was (1) a

---

60 The other cause of action (outside of disparate treatment) is a disparate impact claim where a facially neutral employment practice is unlawful if it operates to freeze the effects of prior discriminatory practice. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

61 The two available methods for proving intentional discrimination under Title VII, the ADEA, and the ADA are direct evidence and circumstantial evidence of discrimination. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572 (6th Cir. 2000). Direct evidence is the “smoking gun” or the “letter to the file” where the employer implicates himself that he took the adverse employment action because of the employee’s membership in a protected class. Miller v. N.Y. City Health & Hosp. Corp., No. 00-140, 2005 U.S. Dist. LEXIS 17975, at *13 (S.D.N.Y. Aug. 22, 2005). An example of “smoking gun” evidence is where there is a record of the employer telling a co-worker that he did not hire this specific applicant because he is black. Circumstantial evidence provides a framework of presumptions and burden shifting where an employee can prove discrimination through inferences.


63 While it was always difficult to find direct evidence, employers today are trained to be sophisticated in their employee relations to avoid the existence of direct evidence. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (“There will seldom be ‘eyewitness’ testimony as to the employer's mental processes.”); *see, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 171 n.13 (1st Cir. 1998) (direct or “smoking gun” evidence, such as an outright admission by an employer, “is rarely found in today’s sophisticated employment world”); Alder v. O’Connell’s Sons, 20 F. Supp. 2d 210 (D. Mass. 1998) (same); Andre v. Gen. Fiberglass Supply, Inc., 980 F. Supp. 975, 978 (E.D. Wis. 1997) (employers are sophisticated enough not to create direct evidence, “[t]hat is, most employers who wish to fire an employee because of the employee’s advanced years are clever enough to refrain from declaring ‘you are fired because you are old’”); Halbrook v. Reichold Chemicals, Inc., 735 F. Supp. 121, 125 (S.D.N.Y. 1990) (“employers have become sophisticated enough to shield true animus behind facially neutral documentation”).


member of the protected class; (2) that he applied for and was qualified for the position; (3) that he was rejected for the position; and (4) that the position remained open or was filled by someone else of like qualifications. Once the employee proves these four prongs by a preponderance of the evidence, there is a presumption of discrimination and the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action (the pretext stage). If the employer meets his burden, the presumption of discrimination disappears. To continue with his claim, the employee must show that the legitimate nondiscriminatory reason is a pretext for actual discrimination. The purpose of the burden-shifting framework, while always imposing the burden of persuasion on the plaintiff, is to create a regime where the employer must disclose a reason for the adverse employment action.

In Reeves v. Sanderson Plumbing Products, Inc., the Supreme Court held that evidence contesting the veracity of the employer’s legitimate nondiscriminatory reason, together with the prima facie case, is sufficient to infer pretext of intentional discrimination. The Court denied the defendant’s motion for judgment as a matter of law and sustained the jury’s finding of intentional discrimination. The fact that the employer lied to the Court in articulating his nondiscriminatory reason becomes circumstantial evidence that the employer intentionally discriminated. Although the presumption of discrimination from the

---

66 The “applied for the position” element only applies in failure to hire/promote cases.
68 Burdine, 450 U.S. at 253.
69 Id. at 255.
70 Id. at 256. Alternatively, if the employer’s reason for the adverse employment action is true, the employee may also show that unlawful discrimination was a motivating factor in the employment decision. 42 U.S.C. § 2000e-2(m) (2000).
71 Burdine, 450 U.S. at 255 (“placing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext”).
73 Id. at 147-48.
74 Judgment as a matter of law is “judgment rendered during a jury trial—either before or after the jury’s verdict—against a party on a given issue when there is no legally sufficient basis for a jury to find for that party on that issue.” BLACK’S LAW DICTIONARY 847 (7th ed. 1999). The Blow court, citing Reeves, noted that “[a]lthough Reeves concerned Rule 50 [directed verdict] rather than Rule 56 [summary judgment], the Court made clear that ‘the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that ‘the inquiry under each is the same.’” Blow v. City of San Antonio, 236 F.3d 293, 297 n.2 (5th Cir. 2001). The ruling, therefore, had the potential to save many plaintiffs from the throes of early defeat at summary judgment.
75 Reeves, 530 U.S. at 138-39.
76 Id. at 147.
prima facie case has dropped out,77 the employee can still draw upon the elements of the prima facie case as a component of his circumstantial case.78 This inference of intentional discrimination is not, however, a penalty for lying; rather, this rule is applied only in situations where evidence of pretext would lend itself to a finding of discriminatory treatment.79

If an employer moves for summary judgment, the same burden-shifting framework applies to determine if there are any triable issues of fact, with all inferences being drawn in favor of the non-moving party.80 If the employee does not prove his prima facie case, or the employer articulates a nondiscriminatory reason which is not rebutted or called into doubt by the employee, then the court will find for the employer.81 However, if the employee can prove his bare minimum prima facie case and presents evidence contesting the veracity of the employer’s articulated reason, the employee will likely be able to overcome the motion for summary judgment and proceed to trial. Summary judgment is only granted in the rare instances when, given all the evidence, no rational jury can find for the employee on the ultimate question of intentional discrimination.82

Reeves was an age discrimination case, but the same principles have been applied to Title VII plaintiffs.83 Proof that the employer lied at the pretext stage permits the trier of fact to find that the employer took the adverse action as a result of discrimination based on the individual’s race, gender, religion, ethnicity or national origin.84 Because the McDonnell Douglas framework has been widely applied to the ADA,85 it seems to follow that the Reeves inference of pretext

---

77 The presumption dropped out when the employer offered a legitimate nondiscriminatory reason. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981).
78 Reeves, 530 U.S. at 147.
79 If the trier of fact believes that the proffered reason is a lie, but also believes another nondiscriminatory reason was the motivating factor, he will not apply the inference of discrimination. For example, a minority plaintiff who exposes the employer’s reason to be a lie will not reap the benefit of the inference if the employer can subsequently show that the real reason for the adverse employment action was that the plaintiff slept with the boss’s wife. See Fisher v. Vassar Coll., 114 F.3d 1332, 1338 (2d Cir. 1997) (“On the other hand, if the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent.”).
81 Reeves, 530 U.S. at 148.
83 See Blow v. City of San Antonio, 236 F.3d 292, 298 (5th Cir. 2001) (racial discrimination claim under Title VII, “presents us with a straightforward application of Reeves”); Rubinstein v. Adm’rs of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000) (citing Reeves as the recent Supreme Court “admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext”).
84 Blow, 236 F.3d at 298.
85 See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44, 50 (2003); Pugh v. City of Attica, 259
should be extended to the ADA as well.86

III. THE CIRCUIT SPLIT RESULTING FROM APPLYING REEVES TO “REGARDED AS DISABLED” CLAIMS

The basis of the circuit split arises over whether proving membership in a protected class serves as a procedural gauntlet in regarded as disabled cases. The Seventh and the Tenth Circuit maintain that proving this element of the prima facie case is an absolute requirement, which cannot be bypassed. Failure to satisfy this prong halts the proceeding and the Reeves inference is never even triggered. The Sixth Circuit follows a more fluid application of the McDonnell Douglas framework, allowing a plaintiff to use the Reeves discriminatory pretext inference towards satisfying both the membership in the protected class prong as well as the ultimate question of discrimination.

The crux of the debate lies in the difficulty of proving membership in the protected class. Whereas that question is easily determined in Title VII and ADEA cases,87 membership in the protected class often becomes the central debate in ADA regarded as disabled cases.88 Even for classic ADA plaintiffs, the question of whether the individual has a disability is separate from the ultimate question of intentional discrimination.89 Just as an employer can take an adverse employment

F.3d 619, 625 (7th Cir. 2001); Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998); (applied to regarded as disabled); EEOC v. Amego, Inc., 110 F.3d 135, 145 n.7 (1st Cir. 1997) (“The ADA is interpreted in a manner similar to Title VII, and courts have frequently invoked the familiar burden-shifting analysis of McDonnell Douglas in ADA cases.”); Ennis v. Nat’l Ass’n of Bus. & Educ. Radio, 53 F.3d 55, 58 (4th Cir. 1995).

86 Courts have adopted many Title VII precedents and extended them to ADA cases. Additionally, the legislative history of the ADA cites to the success of Title VII and their common ground in eradicating unequal treatment. S. Elizabeth Wilborn Malloy, Something Borrowed, Something Blue: Why Disability Law Claims Are Different, 33 CONN. L. REV. 603, 618-19 (2001).

87 While “membership in the protected class” is rarely a question for classic Title VII plaintiffs, it is not always an automatic assumption. See Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (finding that a transsexual was a member of the protected class and was discharged for failing to conform to gender stereotypes); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (holding that it is error to find that transsexuals as a class are not entitled to protection under Title VII).

88 See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Servs., Inc., 527 U.S. 516 (1999). In each of these cases, the employer treated the employee adversely because of an impairment, but the Court ultimately dismissed the case because the employee could not prove that his condition satisfied the definition of disability under the statute. Colker, supra note 30, at 103.

89 Colker, supra note 30, at 103 (most ADA plaintiffs cite all three prongs of disability in the pleadings); Michael P. Reisman, Note, Traveling “to the Farthest Reaches of the ADA,” or Taking Aim at Employment Discrimination on the Basis of Perceived Disability?, 26 CARDOZO L. REV. 2121, 2134 (2005). “Many cases run aground on the shoals of this threshold requirement
action against an African American, having nothing to do with his racial status, so too, can an employer take an adverse employment action against an individual in a wheelchair or someone with a history of cancer, having nothing to do with his current or past handicap. However, an employer’s misperceptions about an individual whom he regards as disabled is directly linked to the reasons for the employer’s actions, as both involve the employer’s subjective intent.90

In Ross v. Campbell Soup Co.,91 the Sixth Circuit extended the Reeves application to a regarded as disabled plaintiff under the ADA.92 Ross was a sales representative who received several on-the-job back injuries from lifting heavy objects.93 During his 1993 performance evaluation, his supervisor commented that we “can’t have any more of this back thing.”94 After a fifth injury, Ross received a disability certificate but his doctor noted that he could return to regular work in a month.95 Ross told his supervisors that he was still in pain, and obtained a second opinion from another physician who recommended that he avoid heavy lifting and bending at work.96 Ross did not relay this information to his employer because he was fearful of losing his job.97 Shortly thereafter, his supervisors circulated a memo about Ross’s back problems.98 One of his supervisors told Ross that if he did not return to work immediately, it would be considered job abandonment.99

[proving membership in the protected class] and are dismissed before consideration of the merits of the claim.” Id.; see also Mary Crossley, The Disability Kaleidoscope, 74 NOTRE DAME L. REV. 621, 623 (1999) (reporting estimate that “disability” status is challenged in more than half of ADA cases).

90 Although it is possible for an employer to incorrectly perceive an employee as disabled and yet treat the same employee adversely for a reason distinct from his perceived condition (e.g., employee slept with boss’s wife, see text accompanying supra note 79 and accompanying text), such a possibility cuts against the basic premise of a regarded as disabled claim. Because it is hard to imagine a regarded as claim not involving the major life activity of working, see COLKER, supra note 30, at 114, it is similarly difficult to understand why an employer would entertain such a misperception unless they intended to take an employment action as a result of the misperception. Furthermore, the fact that the same evidence can be used to prove both that the employee is regarded as disabled and that the employer discriminated based on that misperception is probative of this logical link. See Ross v. Campbell Soup Co., 237 F.3d 701, 708 (6th Cir. 2001); see also discussion infra Part V.E.

91 Ross, 237 F.3d 701.
92 Id. at 708.
93 Id. at 702.
94 Id. at 703.
95 Id. at 702-03.
96 Id. at 703.
97 Id.
98 Id. The memo was entitled “Dale Ross Back Injury History” and listed the date of each of Ross’s injuries, the cause, the medical diagnosis, and the date Ross returned to work after each injury.
99 Id. Ross was called into the office shortly after the memo detailing his back injuries was circulated through the department. First he was told that the company had experts who could help polish Ross’s resume and find him a new job. Ross asked if he was being fired. Only then
Ross reluctantly returned to work\textsuperscript{100} and received a negative performance evaluation three months later.\textsuperscript{101} Up until this point, Ross had only received marks of “meets” or “exceeds expectations.”\textsuperscript{102} Ross was put on probation while his supervisors simultaneously increased his performance goals.\textsuperscript{103} Ross expressed in writing that due to his back condition, he was having difficulty meeting these new goals.\textsuperscript{104} In several inter-office memoranda, Ross was referred to as the “back case.”\textsuperscript{105} When Ross did not meet his quota, he was terminated.\textsuperscript{106}

Ross brought an action under the ADA.\textsuperscript{107} The district court granted summary judgment for the employer, finding that Ross did not present sufficient evidence that he was disabled or regarded as disabled.\textsuperscript{108} The Sixth Circuit Court of Appeals reversed, finding that, “[u]nder the ‘regarded as’ prong of the ADA, membership in the protected class becomes a question of intent. And, as the district court correctly noted, ‘that question—i.e. the employer’s motive—is one rarely susceptible to resolution at the summary judgment stage.’”\textsuperscript{109} Evidence of the employer’s state of mind is used to show both motive of discriminatory intent and that the employer regarded the employee as disabled.\textsuperscript{110} Therefore, the same proof of pretext that can be used to

\textsuperscript{100} Although Ross protested this “return to work” ultimatum, the physician who gave the second opinion, and ordered Ross not to return to work, was out of the office and Ross could therefore not obtain authorization to remain on disability leave. \textit{Id.}

\textsuperscript{101} \textit{Id.} at 703-04. The negative comments said that Ross “needed to increase communication with his supervisors” and “needed to improve his style of dress.”

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} \textit{Id.} at 704. Ross’s sales product goals were increased by sixty-six percent and the number of displays he was required to market tripled. One supervisor stated that his goals were increased to create incentives for Ross to “go after his potential and be able to deliver what he was capable of doing” while a second supervisor could not recall why Ross’s target goals were increased.

\textsuperscript{104} \textit{Id.} One supervisor admitted that Ross’ new territory was less productive than other employees’ territories. Ross believes that they increased his performance goals in a discriminatory attempt to cause him to fail.

\textsuperscript{105} \textit{Id.} One such memo, circulated at the beginning of Ross’s probationary period, had a note on top which said, “When can we bring this problem person to a termination status. P.S.—Back Case.” The writer of this note later testified that he was not in a position at that time to fire Ross but that the note indicated that “the process was well along.”

\textsuperscript{106} \textit{Id.} at 705.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} The court found that Campbell Soup fired Ross because they believed he did not have a disability, and “was malingering in his time off work.” \textit{Id.}

\textsuperscript{109} \textit{Id.} at 706. The district court noted the likelihood of the plaintiff’s ability to show pretext, based on timing of unsatisfactory performance reviews, increase in probation status, nature of criticisms when the employer received a COBRA disability letter, and comments on internal memos. However, the lower court ultimately concluded this to be an irrelevant argument since he was unable to show his prima facie case.

\textsuperscript{110} \textit{Id.} at 708. The crux of the argument is as follows:

Because, under the “regarded as” prong, Ross’s prima facie showing that he is disabled turns upon the employer’s state of mind and how it thought Ross’s back condition affected his performance as an employee, evidence of the employer’s state of mind that
show discriminatory motive can also be used to show that the plaintiff is a member of the protected class under the ADA.\textsuperscript{111}

The Tenth Circuit did not provide the same favorable inferences to the plaintiff in \textit{Rakity v. Dillon Co.}\textsuperscript{112} Rakity worked for King Scoopers as a general grocery clerk and was promoted to an all-purpose grocery clerk,\textsuperscript{113} which required a substantial amount of heavy lifting.\textsuperscript{114} After several illnesses and injuries (several of them job-related) and shoulder surgery, Rakity was moved back to a general grocery clerk, where he could perform desk-service work.\textsuperscript{115} When Rakity’s condition improved, he repeatedly asked to be promoted back to an all-purpose clerk and was repeatedly denied.\textsuperscript{116} After Rakity filed a claim under the ADA, the district court granted the defendant’s motion for summary judgment, finding that Rakity did not present sufficient evidence of being disabled under the ADA.\textsuperscript{117}

The Tenth Circuit affirmed and rejected Rakity’s contention that evidence of regarded as disabled should be treated at the pretext stage of the \textit{McDonnell Douglas} framework.\textsuperscript{118} The Court frowned upon the extension of \textit{McDonnell Douglas} beyond proving the ultimate question of disparate treatment.\textsuperscript{119} Interpreting \textit{Ross} as requiring that these two different tests be treated as one would, according to the court, open up the protected class to “individuals who neither have an actual disability nor can even present triable evidence their employer believed they have a disability.”\textsuperscript{120}
The Seventh Circuit adopted the position of the Tenth Circuit in *Nese v. Julian Nordic Construction Co.* The defendant hired Nese, (knowing that he suffered from seizures) as a carpenter for his construction company. His pay was lowered due to his slow work pace. The employee status change form was submitted without comments about Nese’s work and was only later amended to reflect that his work pace was not up to standard. A subsequent performance evaluation had a whiteout—with the new comments reflecting that Nese needed to pick up the pace. After a transfer to a different department and a six month temporary layoff, Nese considered himself terminated and brought an action under the ADA.

The district court granted summary judgment in favor of the defendant. The Seventh Circuit Court of Appeals affirmed and found that the defendant did not regard Nese as disabled. Even if the company’s reason for the employment action was less than straightforward, the court refused to draw the conclusion that the company must have necessarily been acting out a perception that Nese was disabled. The court held that membership in the protected class is a crucial step in the framework and must be satisfied before examining the employer’s real or pretextual reasons.

The circuit split emerges from different procedural views on when and how an ADA plaintiff must show that he was regarded as disabled. The Seventh and the Tenth Circuit take a restrictive view and make

121 405 F.3d 638 (7th Cir. 2005).
122 The court noted that the same person who hired Nese (and knew he had a medical condition) also fired him. In those situations, the court makes the assumption that discrimination is not involved. *Id.* at 643.
123 *Id.* at 640.
124 *Id.* There is a dispute as to the reason for the lower pay; either it was because Nese was working at a slower pace or because the other employees were earning less and Nese’s pay had to be adjusted to avoid a disparity.
125 *Id.*
126 *Id.* Nese denies that the white-out was there when he first saw the evaluation. His supervisor stated that there was an inappropriate comment written by one of his co-workers which stated Nese “has worked for himself for a long time and has apparently never had to shift gears.” This was subsequently covered by a new comment that “[Nese] needs to complete assigned task within acceptable time frame, also needs to learn new tasks and methods.”
127 *Id.*
128 *Id.* at 643.
129 *Id.* at 642 (“Even though we could wish such shenanigans [the employer making up a reason for the adverse employment action] never happened, we suspect they do, and they do not violate the employment laws unless, for instance, the real reason the supervisor dislikes the employee is based on some protected characteristic.”).
130 *Id.* In refusing to adopt *Ross*, the court also highlighted another Sixth Circuit case to reveal its limitations. In *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 600 (6th Cir. 2002), the court affirmed summary judgment for the employer, distinguishing *Ross* where there was “substantial evidence that the plaintiff’s medical status significantly influenced his employer’s decision to terminate him.”
membership in the protected class a strict threshold question. Under this view, the only evidence available to a plaintiff to meet this aspect of his prima facie case are hints of the employer’s intent based on comments in the workplace or previous incidents of incorrect perceptions. If the employee cannot show that the employer regarded him as disabled, then he is barred from presenting the overall question of intentional discrimination.

In contrast, the Sixth Circuit takes a more aggressive and expansive view, allowing the plaintiff to use proof that the employer lied about why he took the employment action as evidence that the employer also regarded the employee as disabled. Failure to initially prove membership in the protected class is not an absolute bar to proceeding. The plaintiff will still be required to prove all the elements of the prima facie case under the circumstantial evidence framework, but the Sixth Circuit view is more flexible about the order of meeting the various shifting burdens.

IV. ATTEMPTED RESOLUTIONS OF THE CIRCUIT SPLIT: FAILURE TO ANSWER WHETHER PRETEXT CAN BE USED TO PROVE THE PRIMA FACIE CASE

The language of the opinion in Reeves clearly states that both the prima facie case and proof of pretext are necessary to apply the inference of discrimination. While this reading tends to support the Seventh and Tenth Circuit view, the Supreme Court opinion does not explicitly say that a plaintiff cannot use the pretext to help prove his prima facie case. This was not at issue in Reeves, and there is nothing in the opinion to indicate that the Court would not have allowed the sharing of probative evidence—to use proof of pretext to show that the plaintiff was both a member of the protected class and that he was discriminated against. Since both sides of the split have plausible readings, this Note attempts to reconcile them below.

A. Strong Facts Drove Outcome in Split

One way of explaining the circuit split is to hinge the outcome in Ross on the strong factors present in the record in favor of the plaintiff. The employer created a file on Ross after his return from

---

131 See Rakity v. Dillon Co., 302 F.3d 1152, 1165 (10th Cir. 2002); Nese, 405 F.3d at 642.
134 This resolution was the first proposal endorsed by the court in Rakity, explaining, “[w]e do
disability and referred to him as the “back case.” 135 Subsequent Sixth
Circuit opinions have distinguished Ross in this fashion, highlighting
the substantial evidence of the employee’s medical status as playing a
major role in the employer’s decision. 136 Within the Ross opinion itself,
the court emphasized the abundance of evidence lending itself to the
finding that the employer regarded the employee as disabled. 137

The heavy presence of discriminatory facts in Ross must also be
juxtaposed with the paucity of evidence of discrimination present in
Nese. 138 The Court was “at a loss” to understand how any of the
comments or facts on the record showed that Nese’s inability to keep up
with standards, (and any subsequent employment action as a result of
this performance) showed that he was disabled. 139 While the spectrum
of supporting facts may support a given outcome, it does not answer the
underlying question: If an employee has only circumstantial evidence
that he was regarded as disabled, how can he prove his case?

Furthermore, because the facts tipped so heavily in favor of the
plaintiff in Ross, it has been viewed as a case of direct evidence of
discrimination, 140 possibly outside the McDonnell Douglas framework
altogether. 141 If premised on direct evidence, Ross may not even be a
proper test case for extending Reeves to the ADA. The Rakity and Nese
courts could have no complaint with using proof of pretext to prove that

not think the Sixth Circuit intended such an interpretation . . . [that the issue of pretextually
concealed discrimination and the issue of regarded as disabled should be treated synonymously].”
Rakity, 302 F.3d at 1165. However, one must always look at the source—the emphasis on the
strong facts present in Ross must be read in tandem with the negative facts present in Rakity
lending itself to the interpretation that the plaintiff was trying to cheat the system. One doctor
noted that Rakity “is somewhat habituated to the workers’ compensation system,” asking for job
changes and time off. Id. at 1154. Before the case at hand, Rakity had already attempted to get
benefits while working from Social Security Disability Insurance and had filed several EEOC
complaints. Id. at 1155-57.

135 Ross, 237 F.3d at 704.
136 See Cotter v. Ajilon Servs., Inc., 287 F.3d 593, 600 (6th Cir. 2002) (“However, the facts in
Ross sharply contrast with those in this case.”); Hedrick v. W. Reserve Care Sys., 355 F.3d 444,
454 (6th Cir. 2004) (“When viewed in the entire context of the case and of the court’s opinion, it
is clear that the back memorandum was but one event in a series of comments and reports which,
when taken cumulatively, was sufficient to create a genuine issue of material fact precluding
summary judgment. Here, Hedrick has tendered no series of comments or reports which would
indicate WRC’s discriminatory animus.”); Cannon v. Levi Strauss & Co., 29 F. App’x. 331, 336
(6th Cir. 2002) (“Ross is distinguishable because in that case there were a series of comments and
reports from the employer indicating that it thought the plaintiff was disabled, as well as a memo
that referred to the plaintiff as a ‘back case.’”).
137 Ross, 237 F.3d at 709.
138 Nese v. Julian Nordic Constr. Co., 405 F.3d 638, 643 (7th Cir. 2005) (finding that the
“evidence of pretext is itself thin”).
139 Id.
140 The Hedrick court noted that “Ross v. Campbell Soup. . . establishes that isolated
comments may constitute direct evidence of disability discrimination sufficient to defeat a
defendant’s summary judgment motion.” 355 F.3d at 454.
141 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973) (discussing that this
framework is only triggered when the plaintiff uses circumstantial evidence to prove his case).
the employer regarded the employee as disabled in a direct evidence case, because there is no step that is being “passed over.” Because the direct evidence model does not require the circumstantial evidence burden-shifting framework, the plaintiff is free to allege any information he has available to him.

The flaw in resolving the split on the direct/circumstantial evidence distinction, however, is twofold. First, despite the seemingly direct evidence present in the facts of Ross, the Sixth Circuit continues to analyze the case under a pretext analysis,142 which is indicative of a circumstantial evidence framework. Second, the Ross court imagined a scenario where, absent direct evidence, the court would still allow a finding of pretext to show that the employee is regarded as disabled.143

B. Summary Judgment vs. Judgment as a Matter of Law

A notable distinction between Ross and Reeves is that the Supreme Court in Reeves was reviewing a directed verdict (judgment as a matter of law),144 whereas the Sixth Circuit in Ross was deciding on summary judgment grounds. The standard for burdens of proof and persuasion for judgment as a matter of law mirrors the standard for summary judgment.145 The two summary adjudication devices are essentially asking the same question: Given the facts, is there only one way, as a matter of law, that this case can be decided? Yet, the timing of the procedural mechanisms is of great import to plaintiffs who are relying on subjective circumstantial evidence to prove their case.

The facts available at the summary judgment and the judgment as a matter of law stage are drastically disparate.146 At the summary

---

142 Ross, 237 F.3d at 709.
143 Id.
144 A “directed verdict” is defined as “a judgment entered on the order of a trial judge who takes over the fact-finding role of the jury because the evidence is so compelling that only one decision can reasonably follow or because it fails to establish a prima facie case.” BLACK’S LAW DICTIONARY 1555 (7th ed. 1999). The term “judgment as a matter of law” has replaced the term “directed verdict” in federal practice. Id. at 847.
145 Chambers, Jr., supra note 20, at 111. The question posed at summary judgment is whether there is no genuine issue of material fact. FED. R. CIV. P. 56(c). The issue at judgment as a matter of law stage is whether no reasonable jury could find for the non-movant based on the evidence presented at trial. FED. R. CIV. P. 50(a)(1); see supra note 74 and accompanying text.
146 Since the question is being decided based on the law and not facts, it would appear on its face that the timing of the procedure would be irrelevant. Compare the discussion in note 145 with that of the court in Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir. 2005), which explained, “[w]hen reviewing the facts of a discrimination claim after there has been a full trial on the merits, we must focus on the ultimate question of discrimination rather than on whether a plaintiff made out a prima facie case”) and Gray v. Toshiba Am. Consumer Prods., Inc., 263 F.3d 595, 599 (6th Cir. 2001) (“we cannot simply hold that the plaintiff’s failure to provide evidence of an essential element of her prima facie case is dispositive here. Rather, we must look to the ultimate question—whether the plaintiff has proven that her discharge was intentionally
judgment stage, all that the parties have before them are the pleadings and some discovery materials. There has been no opportunity for witness testimony in front of a jury or an opportunity for cross examination, as is available at the judgment as a matter of law stage.\textsuperscript{147} Moreover, the liberal rules for amending a complaint, allowing all the newly discovered relevant facts to be presented a trial, is an indication of the judicial system’s desire to accommodate the limited fact development available at the summary judgment stage.\textsuperscript{148}

In \textit{Reeves}, which has been widely applied to cases at the summary judgment juncture of litigation,\textsuperscript{149} the Supreme Court examined whether there were sufficient facts in the record at trial to support a finding of an inference of discrimination.\textsuperscript{150} The only question was whether there was a causal connection between the plaintiff’s age and the adverse employment action. In \textit{Ross}, \textit{Rakity}, and \textit{Nese}, there was an additional\textsuperscript{151} question of whether the employer regarded the employee as disabled. This question, so heavily dependant on the employer’s intent, is best answered after the plaintiff has had an opportunity to present his case at trial, not at summary judgment.\textsuperscript{152} There is nothing

\textsuperscript{147} See Chambers, Jr., \textit{supra} note 20, at 111 (discussing the degree of uncertainty inherent in summary judgment as to the evidence the non-movant can or cannot produce at trial).

\textsuperscript{148} \textit{Fed. R. Civ. P.} 15(a). After the one opportunity to amend the complaint before a responsive pleading is served (or if no responsive pleading is required, within twenty days after the complaint is served), a party may amend its pleading “only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” \textit{See} Foman v. Davis, 371 U.S. 178, 182 (1962) (“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason . . . the leave sought should . . . be ‘freely given.’”); \textit{see also} Mitsui Foods, Inc. v. United States, 867 F.2d 1401, 1403 (Fed. Cir. 1989) (holding that the grant or denial of an opportunity to amend pleadings should be exercised liberally to permit such amendments).

\textsuperscript{149} See, e.g., Waterhouse v. Dist. of Columbia, 298 F.3d 989 (D.C. Cir. 2002); EEOC v. Sears Roebuck & Co., 243 F.3d 846 (4th Cir. 2001); Toshiba, 263 F.3d 595; Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000); Vadic v. Miss. State Univ., 218 F.3d 365 (5th Cir. 2000).


\textsuperscript{151} One which \textit{Nese} and \textit{Rakity} would argue is a “primary” question.

\textsuperscript{152} Ross v. Campbell Soup Co., 237 F.3d 701, 706 (6th Cir. 2001); \textit{see also} Johnson v. Am. Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819-20 (7th Cir. 1997) (remanding to lower court on the issue of whether defendant was regarded as having disability); Best v. Shell Oil Co., 107 F.3d 544, 548 (7th Cir. 1997) (“[A] trier of fact could find that [defendant] perceived [plaintiff] as having a disability that prevented him from working . . . .”); Harris v. H & W Contracting Co., 102 F.3d 516, 524 (11th Cir. 1996) (finding question of fact still exists with respect to the “regarded as” prong); Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 955 (3d Cir. 1996) (noting “it is clear that a reasonable fact-finder could infer that [defendant] perceived [plaintiff] to be disabled”); Katz v. City Metal Co., 87 F.3d 26, 33-34 (1st Cir. 1996) (finding error of lower court to grant judgment as a matter of law because evidence could support finding that defendant regarded plaintiff as disabled); Pritchard v. S. Co. Servs., 92 F.3d 1130, 1134 (11th Cir. 1996) (finding evidence that created a genuine issue of material fact with respect to the “regarded as” prong); EEOC v. Joslyn Mfg. Co., No. 95 C 4956, 1996 WL 400037, at *7 (N.D. Ill. July 15, 1996) (noting that to survive summary judgment, plaintiff only has to raise genuine issue of material facts if the perceived impairment substantially limited his ability to work).
in the Reeves opinion to suggest that a contested point of the plaintiff’s prima facie case should not be judged under the same summary adjudication standard as the ultimate finding of discrimination. Therefore, Ross took the next step in extending Reeves to the question of whether the employee was regarded as disabled, allowing the trier of fact to adjudicate whether the employee was a member of the protected class.153

C. Ross as an Outlier

Another explanation is that Ross is simply an outlier, and that its strong facts drove the principle. However, the court in Moorer v. Baptist Memorial Health Care Services154 dispels this notion by affirming the Ross court’s reliance on pretextual evidence to show that the employer regarded the plaintiff as disabled.155 The Moorer court, like Ross court, relied on the same evidence of pretext to show both that the employer regarded the employee as disabled and that there was a causal discriminatory connection between the perceived disability and the adverse employment action.156

The Sixth Circuit is not, however, the lone circuit in allowing pretext evidence to be used to support the inference that the plaintiff is a member of the protected group. In a Seventh Circuit opinion, the court entertained in dicta the argument that pretext could be used to show that the employer regarded the employee as disabled.157 An employee can satisfy the first element of his prima facie case, that he is a member of the protected class, through both circumstantial and direct evidence.158 The pretext would be just one element of the plaintiff’s circumstantial case.

153 If anything, Ross could have applied a more deferential standard to the non-movant plaintiff at summary judgment, given the subjectivity of the question.
154 398 F.3d 469 (6th Cir. 2005) (holding that when an employer believed his employee had a physical impairment of alcoholism, the purported reasons for termination were pretextual and there was substantial evidence that his alcoholism played a significant role in his discharge).
155 As Moorer is also a Sixth Circuit case, this could lead to the possibility that the Sixth Circuit is simply an outlier. However, since the Sixth Circuit has decided both ways on the issue, see supra text accompanying note 136, this is an unlikely distinction.
156 398 F.3d at 484-85.
157 Mack v. Great Dane Trailers, 308 F.3d 776, 783 (7th Cir. 2002) (The court found that the inference was “illogical on the particular comparison offered by Mack,” and that the pretext evidence was too weak to support the inference here, but did not close off the opportunity for a stronger case of pretext “to show that an employer regarded an employee as disabled.”) (emphasis added); see also Smith v. Quikrete Cos., 204 F. Supp. 2d 1003 (W.D. Ky. 2002) (evidence that worker overheard manager discussing expense company would incur as a result of plaintiff’s condition used to infer employer’s true motivation in discharging him and that employer regarded employee as substantially limited in major life activity of working).
158 Pugh v. City of Attica, 259 F.3d 619, 625 (7th Cir. 2001).
There is no hard and fast rule as to how to prove that the employer regarded the plaintiff as disabled. An offer of accommodation, by itself, does not mean that the employer regarded an employee as disabled. Nor does knowledge of employee’s medical condition mean that the employer regarded the employee as disabled. The crucial question is whether the employer regarded the employee as having a disability (as defined under the Act), and therefore that the employer regarded him as being substantially limited in a major life activity.

D. Reluctance of Lower Courts to Embrace Reeves

Another explanation for the divergent views on applying Reeves to a regarded as disabled plaintiff could stem from the reluctance of several circuits to completely accept the holding of Reeves in any context. While some courts have endorsed the holding that a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated, other courts have been more hesitant. Because Reeves did not lay down a clear ruling universally accepted by the circuit courts, it is not surprising

---

160 Walker v. Town of Greeneville, 347 F. Supp. 2d 566 (E.D. Tenn. 2004); see also Lorenzen v. GKN Armstrong Wheels, Inc., 345 F. Supp. 2d 977 (N.D. Iowa 2004) (relying on restrictions imposed by physician does not mean that employer regarded employee as disabled). Imposing work restrictions, modifying employee’s job duties, referring the employee to an employee assistance program, requiring a medical evaluation, or recommending that employee take a leave of absence, may not by themselves be interpreted to mean that the employer regarded the employee as disabled. But any combination of these factors, or one of these factors combined with other incriminating statements by supervisors reflecting the belief that the employee was substantially limited in a range of jobs, could lead to ADA liability. Holihan v. Lucky Stores, Inc., 87 F.3d 362 (9th Cir. 1996) (denying employer’s motion for summary judgment with respect to employee’s “regarded as” claim where the employer, who was aware that the employee had been diagnosed as suffering from depression, anxiety and stress, asked the employee whether he was having any problems and encouraged the employee to seek counseling through the employer’s employee assistance program); cf. Risha Mish, “Regarded as Disabled” Claims Under the ADA: Safety Net or Catch-All?, 1 U. PA. J. LAB. & EMP. L. 159, 175 (1998) (arguing that Holihan is an example of how regarded as disabled is being read too broadly).
161 To be substantially limited in the major life activity of working, the plaintiff must show significant restrictions in the ability to perform a class of jobs or a broad range of jobs. McMullin v. Ashcroft, 337 F. Supp. 2d 1281, 1296 (D. Wyo. 2004).
163 See Rubinstein v. Adm’rs of Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000) (expressing reluctance to accept combination of pretext and prima facie case as evidence of discrimination); Smith v. First Union Nat’l Bank, 202 F.3d 234, 249 (4th Cir. 2000) (explaining plaintiff needs to do more than raise question on truthfulness of employer’s articulated reason).
164 Ryan Vantrease, The Aftermath of St. Mary’s Honor Center v. Hicks and Reeves v. Sanderson Plumbing Products, Inc.: A Call for Clarification, 39 BRANDEIS L.J. 747, 768-71 (2001) (finding the Reeves holding to be ambiguous and calling on the Supreme Court to “review and revise its holding in Hicks and Reeves”).
that the Seventh and the Tenth Circuits take issue with an even further extension of the Reeves holding. But such an explanation only notes a further dichotomy among the circuits. It fails to answer the underlying question of whether, assuming a circuit does embrace the holding of Reeves, the court should go further and allow proof of pretext to prove the prima facie case.

The above attempted resolutions of the circuit split only emphasize the caveats in endorsing the Ross court, rather than delving into an analytical answer to the question of whether pretext and the prima facie case can be folded in together or demand separation. While Ross may have been a strong case with persuasive facts, the question still remains how to prove that an employee is regarded as disabled relying on pure circumstantial evidence.

V. THE DOUBLE USE OF PRETEXT: AND WHY IT CAN BE USED TO FULFILL THE PRIMA FACIE CASE

There would be no teeth to the regarded as disabled prong of the ADA if an employee is required to show that he was regarded as disabled before his employer is forced to evince any hint of his intent. Without access to the employer’s subjective perceptions, regarded as disabled cases would be permanently stalled at summary judgment. The procedural requirement of proving membership in the protected class must be relaxed. The employee should be able to draw upon evidence of pretext to prove both that he is regarded as disabled and that he was discriminated against.

A. Legislative History

Expanding the scope of individuals who can find relief under the “regarded as” prong of the ADA is consistent with its legislative history. The ADA was intended to be a “broad remedial statute.”

---

165 If a court does not accept as true that evidence of pretext plus the prima facie case can lead to an inference of discrimination, it will be less likely to accept the proposition of using pretext to prove the prima facie case.
167 Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998); see also Nat’l Council on the Handicapped, Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities—With Legislative Recommendations 18 (1986) (recommending that “Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage”). 136 CONG. REC. H2599, 2634 (statement of Rep. Stokes) (“We now have before us a bill that takes
By granting summary judgment to the employer, which effectively limits the ability of an individual with a disability claim to find relief, courts work contrary to that goal. Compared to Title VII litigation, there appears to be a pro-defendant bias in the outcome of ADA claims. Use of the regarded as disabled prong has proven particularly ineffective for ADA plaintiffs. Therefore, the circuit courts should adopt a mechanism enabling regarded as disabled plaintiffs to press forward with their disparate treatment claims without being short-circuited at summary judgment.

B. Misuse of Summary Judgment

Summary judgment should only be entered when there is no genuine issue of material fact. Courts are in danger of abusing the summary judgment process in refusing to send the question of whether an individual is regarded as disabled to the jury. Whether the employer regarded the employee as disabled is an inherently factual question which cannot, and should not, be decided as a matter of law. Just as a plaintiff is not forced to prove the ultimate question of discrimination at summary judgment (a question of intent), so too, a question based on the same type of subjective evidence is ill suited for summary judgment.

C. Evidentiary Justification

As stated earlier, proof that the employer regarded the employee as disabled hinges on the employer’s intent. This fits squarely within the classic Title VII cases of disparate treatment where proof of discriminatory motive is critical. However, most evidence indicating the subjective nature of the discrimination is not available to the
plaintiff. The Supreme Court sought to lessen the burden placed on plaintiffs to produce direct evidence by broadening the reach of circumstantial evidence with the McDonnell Douglas burden shifting framework. This model has been widely applied to ADA cases and is doubly crucial to proof of a regarded as disabled claim. A regarded as disabled plaintiff must almost always rely on circumstantial evidence as his case hinges primarily on the subjective intent of his employer.

Courts should therefore apply a McDonnell Douglas-type flexible standard of proof to the threshold question of whether the employee is a member of the protected class—whether he is regarded as disabled. The underlying purpose of the McDonnell Douglas scheme is to sharpen the inquiry into the ultimate factual question as to whether intentional discrimination occurred. The function of the prima facie case is to compel the employer to produce evidence that the adverse employment action was taken for legitimate nondiscriminatory reasons. It would be near impossible for a plaintiff to ever show on the available bare facts that he was regarded as disabled. Therefore, it is critical to allow the plaintiff to temporarily bypass the first element of the prima facie case in order to serve the ultimate purpose of forcing the employer to put forth his reasons for the adverse employment actions against him. This was never an issue in Title VII and ADEA claims because the threshold burden of establishing a prima facie case under

---


177 “Indeed, given the structure of the ADA, it seems impossible to present ‘direct’ evidence of prong C [regarded as disabled] discrimination, because the court must determine whether the plaintiff is a member of the protected class before determining whether discrimination has occurred.” Reisman, supra note 89, at 2167 n.261.


179 While it might seem odd to apply the McDonnell Douglas flexible framework to a prong of the first step of the McDonnell Douglas framework (being a member of the protected class) it is important to remember that the burden shifting analysis is merely a construct, providing a method of approaching a difficult evidentiary problem. The McDonnell Douglas framework is a “way to evaluate the evidence.” See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). “McDonnell Douglas can be seen as a ‘transformative’ legal rule, i.e., a rule that operates to counter the application of typical approaches that, if applied, would undermine the purpose of antidiscrimination law.” Michael J. Zimmer, The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?, 53 EMORY L.J. 1887, 1888 n.14 (2004). In classic discrimination cases, the evidentiary problem is typically proving that the employer took the action because he was discriminating. Here, the evidentiary problem is how to prove that the employer regarded the employee as disabled.


those statutes is very low.\footnote{182}

Allowing this modification of the \textit{McDonnell Douglas} framework does not tip the hand in favor of the plaintiff because he must still fulfill the other elements of the prima facie case (that he was qualified for and applied for the position). After the employer gives his legitimate non-discriminatory reason, the employee still must show there is an issue of material fact on whether he was regarded as disabled. The burdens of production may shift from plaintiff to defendant and then back to the plaintiff, but the burden of persuasion rests at all times with the plaintiff.\footnote{183} While the \textit{Rakity} and \textit{Nese} courts decry \textit{Ross} as ignoring the burden shifting framework central to \textit{McDonnell Douglas}, they fail to recognize that the \textit{Ross} court requires that the employee must not only prove that the employer regarded him as disabled, but also that this perception was discriminatory and led to the adverse action.

Furthermore, the very purpose of including a “regarded as” prong under the ADA is to root out stereotypes.\footnote{184} The statute, under a regarded as disabled claim, assumes a rule to thwart a double threat: the misperception of the disability and the action taken as a result of that misperception.\footnote{185} Since the misperception itself is part of the liability

\footnote{182 The prima facie case and the defendant’s rebuttal are “not onerous.” \textit{Patterson v. McLean Credit Union}, 491 U.S. 164, 186 (1989). The only element that would potentially be problematic in establishing a Title VII prima facie case is whether the employee was qualified for the position. Proving membership in the protected class is not so simple in the ADA context:

Unlike other federal laws against discrimination, the ADA does not conveniently set forth clear lines of demarcation separating persons who are covered from those who are not. The applicable parameters are not rigid or concrete, and there is no facile test that can be universally applied to determine whether a given impairment or condition is serious enough to qualify for protection from discrimination. In short, the protected class is not clearly identifiable. As a result, courts have become increasingly familiar with the peculiar tasks of determining whether a particular individual falls within a class of persons to whom the statute is intended to apply . . . . The task can be difficult, largely because the drafter of the statute—whether by design or neglect—imbued this key term with ambiguity as well as complexity.


\footnote{183 Compare this with \textit{Marcia L. McCormick}, \textit{The Allure and Danger of Practicing Law as Taxonomy}, 58 \textit{Ark. L. Rev.} 159, 191-93 (2005), arguing that under the current \textit{McDonnell Douglas} framework, the courts “get so caught up in boxing the evidence into separate categories that it loses sight of the permissible inferences from that evidence” and courts should instead shift to a more holistic approach where the court will look at all the evidence as a whole with the ultimate trial issue in mind.}

\footnote{184} \textit{29 C.F.R. § 1630.2(l).}

\footnote{185 John M. Vande Walle, \textit{Note, In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA’s Employment Protection for Persons Regarded as Disabled}, 73 \textit{Chi.-Kent. L. Rev.} 897, 932-33 (1998), argues that there are two reasons that the ADA has a “regarded as” provision: (1) The first rest on moral equivalence—it would be fundamentally unfair to allow an employer to escape liability after taking discriminatory employment actions against the person simply because the individual is not a member of the protected class; and (2) As a prophylactic measure to prevent discrimination against individuals who are actually...}


under the statute, it becomes necessary to treat the regarded as disabled element as distinct from the causation question of discrimination. This separate legal question, of whether the individual is regarded as disabled, should therefore be afforded all the presumptions and inferences that the ultimate question of disparate treatment has.

D. Consistent with Regulations

The logic of allowing the same evidence to answer both legal questions is consistent with the Equal Employment Opportunity Commission (EEOC)\textsuperscript{186} regulations, which provide guidance on how to determine whether an employee is regarded as an individual with an impairment that substantially limits major life activities.\textsuperscript{187} The EEOC investigator must examine the employer’s perception and treatment of the charging party.\textsuperscript{188} A typical investigation includes taking a statement from the employer, examining any information the employer had with regard to the employee’s medical status, and recovering statements from co-workers about the employer’s attitude towards the individual or others with a certain medical condition.\textsuperscript{189} The investigator is directed to look closely at the way the employer treats the employee, noting that “actions may speak louder than words.”\textsuperscript{190} Finally, a finding that the employer regarded the employee as disabled does not automatically mean that the employer discriminated against the employee because of that misperception. The two inquiries require

\textsuperscript{186} The EEOC is the administrative body in charge of regulating the enforcement of the ADA, as well as other federal anti-discrimination statutes. Within 180 days after the alleged discriminatory conduct, the employee must file a charge with the EEOC (the deadline can be extended dependant on state and local practices). The EEOC then sends written notification to the parties of the charge and may begin an investigation. The EEOC will try to mediate the dispute to avoid litigation. The EEOC has the authority to dismiss the complaint at any time. After its investigation, the agency releases its findings to both parties. If the EEOC finds reasonable cause for the complaint, it may take an active role in further conciliation attempts or assist in litigation. If the EEOC finds no reasonable cause, it still issues a “right to sue” letter which gives the plaintiff the right to file a private civil suit. If the agency is unable to fully investigate the claim within the required time limits, the plaintiff is still entitled to his “right to sue” letter. See FERSH & THOMAS, supra note 67, at 204-07.


\textsuperscript{188} Id.

\textsuperscript{189} Id. All these statements should focus on both the type of condition the employer believes the employee has and the extent to which the employer believes the condition to limit the employee’s major life activities.

\textsuperscript{190} Id. “An employer may claim that it does not perceive an individual as having an impairment that substantially limits a major life activity, but nonetheless may treat the individual as having such an impairment.” Id.
independent determinations, although both may utilize the same facts.\textsuperscript{191}

The Ross court adopted a variation of the EEOC regulations by using the same facts, proof of pretext, to show both that the employer regarded the employee as disabled and that the employer discriminated against the employee. This is consistent with the regulations which provide for double use of evidence to answer these same two questions.\textsuperscript{192} This is not to say that evidence that the employer lied about the legitimate nondiscriminatory reason is sufficient to prove the employee’s membership in the protected class. However, if the employee can show that the lie is pretext for discrimination (the employer is only lying to cover up the true discriminatory reason),\textsuperscript{193} then the court will back-end into the statute and consider pretext as part of the permissible evidence to show that the employee was regarded as disabled. Following Reeves, a court will only find an ultimate inference of discrimination after combining proof of pretext and the prima facie case.\textsuperscript{194} The double use of pretext in the regarded as disabled claim is juxtaposed with requiring that, at the end of the inquiry, both elements of the Reeves inference (the prima facie case and proof of pretext) are present.

E. A Flexible Framework Must Adhere to the Strict Exceptions

In a Title VII or ADEA case, the fact that an employee is a minority or above the age of forty does not necessarily mean that the employer took the adverse employment action out of discriminatory animus. The fact that an individual is disabled would also not require a finding that any adverse action was taken as a result of a discriminatory

\textsuperscript{191} Id.

\textsuperscript{192} The persuasive effect of regulations is known as Chevron deference. Chevron USA Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) (if the plain language and legislative history of a statute leave open questions of interpretations, the court will defer to the interpretations of the agency charged with enforcement of the statute). The ADA authorizes the EEOC to issue regulations to enforce the statute. 42 U.S.C. § 12116 (2000). However, courts apply a lesser degree of deference for interpretive guidelines, such as the EEOC guidelines, that have not undergone an extensive promulgation process under the Administrative Procedure Act. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

\textsuperscript{193} Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000) (once the employer’s stated justification has been eliminated, because the employer is in the best position to set forth the actual reason for his decision, discrimination is the most likely alternative explanation); see Reisman, supra note 89, at 2163.

\textsuperscript{194} Reeves, 530 U.S. at 147.
motive. However, the fact that an employer regarded the employee as disabled, and thrust upon him a limitation he did not have, is a strong indication\textsuperscript{195} that the employer took the action because he perceived the individual to have a disability. Both findings—that the employer regarded the employee as disabled and that he intentionally discriminated on that basis—are dependant on the employer’s intent. Proving that the employer (incorrectly) considered the employee to be disabled demonstrates that the employer was at least conscious of the employee’s (misperceived) “disability” when taking the adverse employment action.

While the \textit{Ross} court held that a plaintiff can use proof of pretext to show that the employee was a member of the protected class, the Sixth Circuit opinion does not fully flesh out the reasoning why it is allowed to use a double dose of pretext to fulfill both its burdens.\textsuperscript{196} Raising an inference of pretext alone is insufficient to show that the employer regarded the employee as disabled or that the employer engaged in unlawful discrimination. The plaintiff still must show that there is a solid triable issue of fact that he is a member of the protected class before either burden can be discharged.

To prove membership in the protected class, the regarded as disabled plaintiff must avail himself of the affirmative inference laid out in \textit{Reeves},\textsuperscript{197} but be allowed to temporarily skip over the required step of proving his prima facie case. However, because the plaintiff is given a temporary pass for a required element of the Court’s holding, he must strictly adhere to the qualifications laid out in the Supreme Court opinion.\textsuperscript{198} The \textit{Reeves} inference will not apply if no rational factfinder could conclude that the action was discriminatory, if the record revealed some other nondiscriminatory reason for the decision, or if the plaintiff creates only a weak issue of fact as to the veracity of the employer’s legitimate nondiscriminatory reason.\textsuperscript{199} Any attack on the truth of the employer’s proffered reason must be strong and have adequate basis on the record.

Furthermore, there should be an additional requirement that a finding of pretext would lead to the logical inference that the employee

\textsuperscript{195} This does not, however, preclude any of the employer’s defenses—he can have an erroneous belief about the employee’s ability to work and still have a legitimate reason for the adverse employment action. 2 EEOC COMPLIANCE MANUAL, supra note 187.

\textsuperscript{196} Ross v. Campbell Soup Co., 237 F.3d 701, 708 (6th Cir. 2001); see supra note 110 and discussion of Ross supra Part III.

\textsuperscript{197} Reeves, 530 U.S. at 147 (instead of it being “permissible for a trier of fact to infer ultimate fact of discrimination from the falsity of the employer’s explanation,” it becomes permissible for the trier of fact to infer that the employee was regarded as disabled from the falsity of the employer’s explanation).

\textsuperscript{198} \textit{Id}. at 148 (“This is not to say that such a showing by the plaintiff will \textit{always} be adequate to sustain a jury’s finding of liability.”).

\textsuperscript{199} \textit{Id}. 
was regarded as disabled. Some other circumstantial evidence\textsuperscript{200} must be presented to link the employer’s lie about the legitimate nondiscriminatory reason to his misperceptions about the employee’s medical condition or ability to perform major life activities. While this requirement seems to contradict the Court’s holding that the plaintiff need not always introduce additional, independent evidence of discrimination, it is necessary to ensure a fair balance of the employer’s and employee’s interests.\textsuperscript{201}

Once the employee can use proof of pretext and other circumstantial evidence to show that he was regarded as disabled, the analysis should shift back to the original \textit{McDonnell Douglas} framework, except now the employee has proven the first element of his prima facie case—that he is a member of the protected class. To go forward, he must still prove that he was qualified for and applied for the position. Only then should the court look again at the employer’s proffered reason. While it may seem a waste of judicial resources to make a duplicative inquiry into the employers’ proffered reasons, once it has already been proven as pretext, this second look is necessary to underscore the differences between the two separate inquiries. Using proof of the employer’s lie to show that he regarded the employee as disabled is not synonymous with proof that the employer lied as to why he took to the adverse employment action or that his actions were unlawful.\textsuperscript{202} Under this revised framework, the employee will be armed

\textsuperscript{200} Examples of acceptable circumstantial evidence would be: complaints by the employee of a non-debilitating medical condition (such as in the \textit{Ross} case), requests by the employee for lighter work duty (and recommendations by physicians), referrals for medical examinations not routinely required of every employee, comments made by the employer about people with certain conditions, or about the specific individual, a record of customer preferences with regard to an employee’s physical or physiological attributes, etc. While no one piece of circumstantial evidence is indicative of the employer’s subjective intent, the court should look at the totality of the circumstances and see whether the employer’s actions and attitudes give rise to his true intent. Furthermore, a reason proffered by the employer that centers on the employee’s failure to conform to a physical or mental requirement may serve as probative circumstantial evidence in itself of the employer’s perceptions. For example, if an employer says that he fired the employee because he could not lift more than twenty pounds, that would tend to those that he believed the employee to have a condition that substantially limited his ability to lift a certain weight, and consequently, regard him as disabled. Of course, the employer will have an opportunity to show at the next stage that his reason was a legitimate reason and that it was unduly burdensome to make reasonable accommodations to the employee.

\textsuperscript{201} Furthermore, this is not in exact contradiction with \textit{Reeves}, where the Court rejected the premise that the plaintiff must always introduce independent evidence of discrimination. \textit{Reeves}, 530 U.S. at 149. The Court did not foreclose the possibility that there would be some instances where additional evidence would be required.

\textsuperscript{202} For example, an employer may say that he fired the employee because he never got to work on time. For the regarded as disabled element, this is shown to be pretext that the employer perceived the employee’s tardiness as a result of lethargy or mono (which the employee does not have). The employee has just shown that he is a member of the protected class. However, this same reason (that the employee is always late) may be a truthful legitimate nondiscriminatory reason. \textit{See FERSH \& THOMAS, supra note 67, at 190-91} (explaining what constitutes a legitimate
with a prima facie case, and if the employer’s articulated reason for discriminating is found to be pretext, the employee can now avail himself of the full protections of Reeves where the trier of fact is permitted to find an inference of discrimination.203

CONCLUSION

The Americans with Disabilities Act grants protection to those individuals who are discriminated against as a result of myths, fears, and stereotypes. Such an individual is regarded as disabled and is considered an “individual with a disability” for purposes of the statute and recovery under the Act. As such, the regarded as disabled plaintiff is free to utilize all the enforcement mechanisms available to someone who is disabled or has a record of a disability. Given the similarity of purposes and overall structure between Title VII, the ADEA, and the ADA, plaintiffs under any of these statutes are free to use the evidentiary model of proof in proving disparate treatment cases. Whereas an employee with direct evidence is able to present all his factual allegations of discrimination to the fact-finder, the average employee must use circumstantial evidence to show that the employer unlawfully discriminated against him.

The Supreme Court developed the McDonnell Douglas burden shifting framework to accommodate instances where a plaintiff can only show discrimination through the use of inferences and presumptions. The plaintiff must satisfy a prima facie case to then shift the burden of production onto the employer to articulate a legitimate non-discriminatory reason, as the employer is in the best position to explain his actions. A plaintiff can then continue with his case if he can show that the employer’s articulated nondiscriminatory reason is pretext. It will be up to the fact-finder to decide, based on the merits of the case, whether the circumstantial evidence is enough to create a cause of action and relief. Reeves provides the extra benefit of permitting a trier of fact to find an inference of discrimination after the prima facie case and pretext are proven. Procedurally, this will allow the claim to survive a motion for summary judgment or judgment as a matter of law and be decided on the merits of the case.

203 Reeves, 530 U.S. at 147.
Ross went one step further and allowed “double-dipping” into proof of pretext to fulfill both an element of the plaintiff’s prima facie case and to show intentional discrimination. While this double-use of pretext tweaks the order of the *McDonnell Douglas* formula by conducting an analysis of the employer’s legitimate nondiscriminatory reason before the plaintiff has proven his prima facie case, this is still in line with the purposes of the *McDonnell Douglas* framework as applied to regarded as disabled claims. Regarded as disabled claims share a common feature with a showing of intentional discrimination in that both are dependant on the employer’s subjective intent. Both require a methodology to force the employer to articulate his reason, giving the plaintiff a fair opportunity to rebut the articulated reason and show if it is pretext.

The survival of regarded as disabled claims demands the application of the Sixth Circuit analysis. The conventional burden-shifting framework must be relaxed to allow a plaintiff the opportunity to raise an issue of fact as to whether he is a member of the protected class. This must be tempered with a strict requirement that any and all evidence of pretext have strong foundation in the record, and that all elements of the framework are ultimately satisfied before denying a motion for summary judgment. Such a methodology will allow a plaintiff to prove his case at trial, in effect the only way to show that he was regarded as disabled and discriminated against as a result of this perception, while remaining consistent with the evolution of disparate treatment cases, from *McDonnell Douglas* to *Reeves*. 