

Striking the Labor-Management Balance in the Americans with Disabilities Act:

THE “INTERACTIVE PROCESS” AND BUSINESS AUTONOMY PROVISIONS AS EMPLOYMENT ENLIGHTENMENT

By Mark Eskenazi

Introduction

Disagreement among federal circuit courts over the interpretation of the Americans with Disabilities Act (ADA)¹ has left employees with disabilities, who already have fewer employment opportunities than non-disabled individuals,² in an even more precarious situation. The disagreement is ironic since it only indirectly involves people with disabilities. While some courts have ruled that employees whom an employer “regards as”³ being disabled deserve reasonable accommodation, other courts have ruled that similar claimants are not entitled to any such rights.⁴ Adequate judicial, statutory, and policy support for reasonable accommodation under these circumstances is available for those employees “regarded as” disabled by their employers.⁵

D’Angelo v. ConAgra Foods, Inc. Demonstrates Courts Have Differing Interpretations of Rights Under the ADA

Examining the latest case on the issue, *D’Angelo v. ConAgra Foods, Inc.*,⁶ may shed further light on the paradox. In 2002, Cris D’Angelo⁷ filed suit against ConAgra Foods, Inc.⁸ in the United States District Court for the Middle District of Florida.⁹ D’Angelo, an employee of ConAgra Foods, alleged that the employer terminated her job as a product transporter in violation of the ADA.¹⁰ In addition to her other claims, D’Angelo maintained that her vertigo condition caused ConAgra Foods to regard her as having suffered from a disability that substantially limited her ability to perform the “major life function of work.”¹¹ In September 1998, prior to her employment with ConAgra Foods, D’Angelo was first diagnosed with vertigo.¹²

One month later, ConAgra Foods hired her to work in its shrimp division as a “spreader”—an entry-level position requiring her to stand at a moving conveyor belt (called the ‘spreader belt’) and spread shrimp with her fingers to prevent it from sticking together.”¹³ About a year later, she was promoted to “stacker,” a position that required her to “take sealed boxes off of a machine and stack them onto a pallet for a forklift operator.”¹⁴ ConAgra Foods then promoted her again in March 2000 to become a “product transporter.”¹⁵

Three months later ConAgra Foods transferred D’Angelo to its fish division, where she continued working as a product transporter; her responsibilities included filling boxes with shrimp and transporting them to different locations within the plant.¹⁶ It was generally understood that

“employees were considered qualified to work in any position at or below the level of their own job.”¹⁷ Thus, in addition to performing her product transporter functions, she would, at times, also have to perform other tasks, such as forming, packing, and stacking boxes.¹⁸

In September 2001, D’Angelo’s vertigo reappeared when her new supervisor assigned her to monitor the box-former belt, which required her to conduct quality inspections of boxes that were going by in a line by simply staring at them as they went by.¹⁹ At this time, D’Angelo notified her supervisor that she could not perform work that involved standing in front of the conveyor because it made her dizzy.²⁰ She also gave the plant manager a note from her doctor, stating that she could not look at moving objects such as belts.²¹ The following day, ConAgra Foods terminated D’Angelo, basing the termination on the fact that D’Angelo’s work required her to be around conveyors.²²

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The District Court granted summary judgment for ConAgra Foods, finding that D’Angelo did not meet the definition of “disabled” under the ADA.²³ Although the court decided that there were genuine issues of fact concerning whether ConAgra Foods “regarded” D’Angelo as disabled, it also determined that just because someone is “regarded as” disabled does not necessarily entitle them to reasonable accommodation.²⁴ In addition, the court held that D’Angelo was not a “qualified individual” under the ADA because she could not perform “essential job functions,” such as working on a conveyor, even with the accommodation.²⁵



On appeal, the Circuit Court affirmed that D’Angelo’s vertigo did not qualify as an actual disability since it did not “substantially limit one or more of the major life activities.”²⁶ The court held that D’Angelo created a material issue of fact as to whether ConAgra Foods regarded her as disabled in light of its testimony that it perceived her impairment as substantially more limiting.²⁷ The court decided that there was also a material issue of fact as to whether working on a conveyor belt was an essential function of the product transporter job.²⁸ Reversing the District Court’s decision, the Eleventh Circuit held that “regarded-as disabled individuals... are [in fact] entitled to *reasonable accommodations* under the ADA.”²⁹ The court further held that a “regarded as” employee is “disabled... if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities.”³⁰

However, the Eleventh Circuit in *D’Angelo* did not go far enough in its ruling. It failed to provide substantial discussion regarding the application of its “regarded as” rule to the facts. The court decided that the ADA comported in near perfect analogy to the provisions of the Rehabilitation Act’s “regarded as” provision.³¹ Despite recognizing that the ADA’s plain language may lead to a “windfall” for employees “regarded as” disabled or other “bizarre” results, the court maintained that it would blindly reinforce the federal statute.³² In rejecting the argument regarding potential inequitable outcomes, the court held that the ADA, if interpreted properly, actually promoted the equality of an employee “regarded as” disabled to the level of an employee who

does not suffer prejudice.³³ Judge Fay’s dissenting opinion, however, skirted the “regarded as” issue and accused D’Angelo of “failing to communicate” her impairment to ConAgra Foods.³⁴

Unfortunately, while the *D’Angelo* majority reached the correct result, the court only scratched the surface on the issues surrounding “regarded as” disability liability. This article argues that not only is reasonable accommodation

required for employees with “regarded as” disabilities under the ADA, but employers must make an effort to engage in an “informal, interactive process”³⁵ in order to determine the appropriate reasonable accommodation. The interactive process is significant for two reasons: for example, by engaging in a process to determine the appropriate reasonable accommodation, employers can (1) avoid liability, and (2) decrease reactive stereotyping of disabilities that lead to discriminatory practices against people with abilities.

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Skeptics oppose allowing liability for “regarded as” disability claims because they believe it creates a “windfall” for individuals that are “regarded as” disabled³⁶ and fails to protect “public health and safety” by interrupting an employer’s inherent managerial rights.³⁷ However, the same skeptics should find comfort in ADA safeguards, such as the “direct threat” provision³⁸ and seniority rights protection.³⁹ The following section analyzes the legal support and benefits for the “interactive process,” while the final section discusses legal safeguards that protect management’s rights to take adverse employment actions yet ensure that runaway litigation does not ensue.

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Legal Analysis

The “Interactive Process”

An employer has a duty under the ADA to determine whether an employee has a disability.⁴⁰ This step, in most cases, assists the employer in avoiding potential liability and, where necessary, helps employees receive appropriate reasonable accommodation. The common law reflects logical methods for which an employer can show his or her good faith in interacting with an employee that he or she perceives to have an actual disability. For example, employers can “meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants[,] ... and offer and discuss available alternatives when the request is too burdensome.”⁴¹ The implementation of such a process ensures that “employers... become more [informed] about their employees’ capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.”⁴²

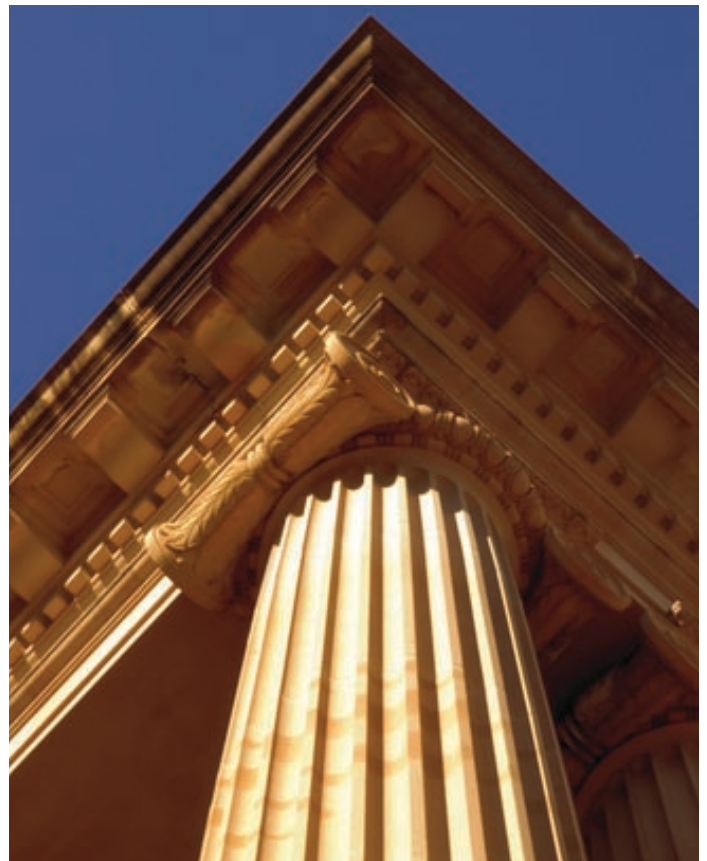
In *D’Angelo*, ConAgra Foods could have avoided liability by engaging in an interactive process with D’Angelo to determine the extent of her vertigo condition and what job activities would have exacerbated it.⁴³ However, at the time of D’Angelo’s transfer to monitor the box-former belt, her new supervisor was unaware of her vertigo condition.⁴⁴ A short discussion with D’Angelo or her doctor may have clarified that ‘conveyors’ were not the same as other machines, such as forklifts or pallet jacks, which D’Angelo had previously worked with. Indeed,

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“the only accommodation she sought from ConAgra was an exemption from working on the spreader belt... and on the box-former belt.”⁴⁵ While Judge Fay’s dissenting opinion noted that D’Angelo had the responsibility to communicate with ConAgra Foods, legal doctrine suggests otherwise.

Granting “regarded as” employees reasonable accommodation *may help prevent discrimination*, if accompanied by an employer-initiated interactive process.⁴⁶ “[T]he real danger is not that an employee will fail to educate an employer concerning her abilities,” but rather that the employer will send home the employee incorrectly believed to be disabled without pay while an employee who is accurately seen as able to work receives pay.⁴⁷ In *D’Angelo*, based on a four-sentence doctor’s note, ConAgra Foods’ supervisors falsely believed that D’Angelo’s condition would prevent her from holding any position because

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they involved “moving equipment.”⁴⁸ Whether the belief was innocent or prejudiced is irrelevant under the ADA.⁴⁹ Indeed, if ConAgra Foods had complied with the regulations of the Equal Employment Opportunity Commission (“EEOC”), D’Angelo would not have had her career disrupted and could be doing the other tasks she was used to performing as part of her work responsibilities.⁵⁰

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Legal ‘Safeguards’ that Fortify Business Autonomy and Rein in Litigation

Although encouraging an “interactive process” would likely, standing alone, cause employers to increase managerial decision-making and avoid liability, numerous ADA ‘safeguards’ provide further protections for employer rights. In fact, the determination of whether an accommodation is reasonable is a fact-specific endeavor.⁵¹ Employers cannot be forced to make any and all accommodations that an employee may request because the ADA was not intended to interfere with an employer’s decision-making regarding “core management policy.”⁵²

For example, the court in *U.S. Airways, Inc. v. Barnett* suggested that the employer’s ability to devise seniority systems is an example of a “core” managerial decision-making policy the ADA may not disturb.⁵³ In *Barnett*, the Supreme Court held that seniority systems prevail over requested accommodations in most cases because the protection of management decision-making benefits both employers and employees.⁵⁴ Although the Court ruled that certain “special circumstances” may overcome management rights, Justice Stevens’ concurring opinion dulled

the ability of employees—actually disabled or “regarded as” disabled—to overcome senior employees’ rights or management’s authority.⁵⁵ Courts should, and likely will, give Justice Stevens’ approach an expansive read because the majority’s explanation of how an employee overcomes the burden of proving “special circumstances” is vague.⁵⁶ Moreover, if courts grant employees easy access to overcome traditional workplace rules, the economic results may be disastrous for employers.⁵⁷ Regardless, even if a plaintiff establishes a need for reasonable accommodation, the employer can demonstrate undue hardship in providing that accommodation.⁵⁸

Recent judicial expansion of the ADA’s public health and safety provisions should also assuage employers’ concerns of run-away liability and lesser managerial control.⁵⁹ For example, the ADA essentially exempts liability for an employee who is a “direct threat to others” and himself as well.⁶⁰ Striking a labor-management balance, the EEOC “saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job.”⁶¹

On remand in *D’Angelo*, if the law is interpreted as discussed above, ConAgra Foods may avoid risks to both management policy and workplace safety. For instance, invoking *Barnett*, testimony might reveal that higher-level employees have a legally enforceable right under an employee handbook to avoid being demoted to lower-level positions, even though they were “considered qualified” to do the lower work, in order to accommodate D’Angelo under the ADA.⁶² Additionally, the employer’s counsel may want to explore the ADA’s “direct threat” provision, given that ConAgra Foods’ upper management allegedly terminated D’Angelo because she “pose[d] a safety hazard to [herself] and [her] co-workers.”⁶³





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Conclusion

Mandating reasonable accommodation for “regarded as” disability situations fulfills the ADA’s legislative purpose to curtail employers’ sometimes innocent, but usually damaging, misperceptions about employees’ abilities. The *D’Angelo* Court should have gone further than simply rubber-stamping the principle. The interactive process to determine what reasonable accommodation, if any, is necessary, and the ADA’s protections for management rights and workplace safety are crucial elements that were previously overlooked. Not only should these elements be taken into account for public policy reasons, but they must also be considered in light of the labor-management balance they evoke concerning “regarded as” disability claims. **BLB**

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¹ 42 U.S.C.A. §§ 12101-12102, 12111-12113, 12116 (1990). *See, e.g.*, *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005); *Kelly v. Metallics W., Inc.*, 410 F.3d 670 (10th Cir. 2005); *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751 (3d Cir. 2004); *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998).

² *See* Pat Shellenbarger & Sarah Kellogg, *Protection for Disabled ‘Could Go Further,’* GRAND RAPIDS PRESS, July 26, 2005, at 2 (finding that “[n]ationally, about 42 percent of disabled men and 34 percent of disabled women ages 21 to 64 are employed compared with about 66 percent of all people in that age group”); William C. Smith, *Drawing Boundaries: The Supreme Court is Siding with Employers and Narrowing the Reach of the Americans with Disabilities Act. Is that what its Drafters Had in Mind?*, 88 A.B.A.J. 49, 50 (2002) (stating “[i]n 2001, employers prevailed in 95.7 percent of the federal court cases that reached the merits of claims by workers or job applicants under Title I”).

³ 42 U.S.C.A. § 12102(2)(C) (1990) (emphasis added). *See, e.g.*, *D’Angelo*, 422 F.3d at 1237-38; *Williams*, 380 F.3d at 775; *Kelly*, 410 F.3d at 676.

⁴ *See, e.g.*, *Kaplan*, 323 F.3d at 1233; *Weber*, 186 F.3d at 917; *Newberry*, 161 F.3d at 279. *See also* Symposium, *Defining the Parameters of Coverage Under the Americans With Disabilities Act: Who Is An Individual with a Disability?*, 42 VILL. L. REV. 587 (1997) (“The broad definition provided by the EEOC was intended to implement a strong congressional intent that individuals be judged on ability and not on the basis of myths, fears and stereotypes about disability.”).

⁵ *Williams*, 380 F.3d at 776.

⁶ 422 F.3d 1220 (11th Cir. 2005).

⁷ Herein, “D’Angelo,” “Employee,” or “Appellant.”

⁸ Herein, “ConAgra Foods,” “Employer,” or “Appellee.”

⁹ *D’Angelo*, 422 F.3d at 1224.

¹⁰ *Id.* at 1221.

¹¹ *Id.* at 1221-22.

¹² *Id.* at 1222.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1223 (11th Cir. 2005).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1224.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1226.

²⁷ *Id.* at 1222.

²⁸ *Id.* at 1225.

²⁹ *Id.* at 1235.

³⁰ *Id.* at 1228 (quoting *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999) for its holding that an employee is regarded as “disabled... if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities”).

³¹ *Id.* at 1236-37

³² *Id.* at 1238 (“We are without authority to pass judgment on the... congressional enactment.”).

³³ *See id.* at 1239 (noting that a “regarded as” disabled employee is disabled within the meaning of the ADA because he is differently situated than an “impaired” employee in that the former is subject to the stigma of the disabling and discriminatory attitudes of others)

³⁴ *Id.* at 1240.

³⁵ 29 C.F.R. § 1630.2(o)(3) (1991).

³⁶ *See Weber v. Strippit, Inc.*, 186 F.3d 907, 917 (8th Cir. 1999) (emphasizing that “[d]isabusing... employers of their misperceptions” allows windfall for the plaintiff). *See also Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232 (9th Cir. 2003) (holding that entitling “regarded as” employees to reasonable accommodation may provide employees with a windfall if the “employers’ misperception of a disability” is perpetuated).

³⁷ *See Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 291-92 (1987) (Rehnquist, C.J., dissenting) (arguing that contagiousness of plaintiff’s disease is not a handicap within the meaning of the Rehabilitation Act and that Congress intends to avoid the Act’s interference with public health and safety concerns).

³⁸ 42 U.S.C.A. § 12111(3) (1990).

³⁹ *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002) (holding that “a showing that the assignment would violate the rules of the seniority system warrants summary judgment for the employer”).

⁴⁰ *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 771 (3d Cir. 2004) (“[A]n employer has a duty... to engage in an ‘interactive process’ of communication... to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate.”) *see* 29 C.F.R. § 1630.2(o)(3) (1991) (suggesting that employers may have to “initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation” to determine the appropriate reasonable accommodation).

⁴¹ *Williams*, 380 F.3d at 772 n.16 (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999)).

⁴² *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 676 (10th Cir. 2005).

⁴³ *C.f. Hamm v. Runyon*, 51 F.3d 721, 725 (7th Cir. 1995) (holding that through communication with the employee, the employer determined that accommodation was not appropriate).

⁴⁴ *D’Angelo v. ConAgra*, 422 F.3d 1220, 1223 (11th Cir. 2005) (“D’Angelo did not mention her condition when she was hired at Singleton.”).

⁴⁵ *Id.* at 422 F.3d at 1234 n.6.

⁴⁶ *Williams*, 380 F.3d at 775-76 n.19.

⁴⁷ *Kelly*, 410 F.3d at 676.

⁴⁸ *D’Angelo*, 422 F.3d at 1229 n.5.

⁴⁹ *See Kelly*, 410 F.3d at 676 (noting that “an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions”).

⁵⁰ *See D’Angelo*, 422 F.3d at 1230 (describing the Vice President’s description of the “essential functions” of the product transporter job, which did not mention conveyor belt work).

⁵¹ *See Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998) (“Whether an accommodation is reasonable depends on specific circumstances.”).

⁵² *See id.* at 525 (holding that an employer could not be forced to create a part-time position even if it could have been a reasonable accommodation because staffing decisions are part of the employer’s “core management policy”).

⁵³ 535 U.S. 391, 403-05 (2002) (discussing why an employer may refuse to make the requested accommodation if it would conflict with the seniority policy).

⁵⁴ *See id.* at 405-06 (“Such management decision making, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs....”).

⁵⁵ *See id.* at 409 (Stevens, J., concurring) (“[I]f a seniority system... would give someone other than the individual seeking the accommodation a legal entitlement or contractual right to the position to which reassignment is sought, the seniority system prevents the position from being vacant.”).

⁵⁶ *See id.* at 416 (Scalia, J., dissenting) (stating that it was unclear to him how an employee may “be entitled to an exception, for example, if he showed that ‘one more departure’ from the seniority rules ‘will not likely make a difference’”).

⁵⁷ *See id.* at 414-15 (Scalia, J., dissenting) (arguing that “[t]he right to be given a vacant position so long as there are no obstacles to that appointment... is of considerable value. If an employee is hired to fill a position but fails miserably, he will typically be fired. Few employers will search their organization charts for vacancies to which the low-performing employee might be suited”).

⁵⁸ *Id.* at 395; *see also* 42 U.S.C.A. § 12111(10) (1990) (defining “undue hardship”); 42 U.S.C.A. § 12112(b)(5)(A) (1990) (defining discrimination to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).

⁵⁹ *See* 42 U.S.C.A. § 12111(3) (1990) (relating to “direct threat”); 42 U.S.C.A. § 12113 (listing defenses to discrimination); *see also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 73 (2002) (expanding employer’s business necessity defense); *U.S. Airways v. Barnett*, 535 U.S. 391, 406 (2002) (holding that “a showing that the assignment would violate the rules of the seniority system warrants summary judgment for the employer”).

⁶⁰ *See Chevron U.S.A.*, 536 U.S. 73 (holding that the ADA did not preclude the harm-to-self regulation); *see* 42 U.S.C.A. § 12111(3) (defining “direct threat”); 29 C.F.R. § 1630.2(r) (1991) (defining “direct threat”).

⁶¹ *Chevron*, 536 U.S. at 86.

⁶² *See Barnett*, 535 U.S. at 406 (holding that the ADA does not require an employer to permanently assign a disabled employee to a particular position when another employee is entitled to that position under the employer’s “established seniority system”).

⁶³ *D’Angelo*, 422 F.3d at 1224.