Rethinking the Application of ADA Precedent to FEHA Disability Discrimination Cases

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INTRODUCTION

Charles Gelfo worked as a metal fitter for Lockheed Martin from 1980 to 1984, when he was laid off.1 He was rehired in 1997.2 He injured his lower back on the job in September 2000, but continued to work until he was laid off a month later.3 Although not working, Gelfo remained technically employed for Lockheed because he was on a recall list making him automatically eligible for rehire.4 Two different doctors examined Gelfo in connection with his worker’s compensation claim. The first, Dr. Pratley, examined Gelfo several times in the months immediately after his injury.5 In May 2001, Dr. Pratley released Gelfo to return to work with restrictions on performing repetitive lifting of heavy items, but Lockheed had no metal fitter positions available, and Gelfo remained laid off.6 Then, in June 2001, a second doctor, Dr. Paul, examined Gelfo and determined that he was “permanently disabled” and should not perform “heavy work.”7 Dr. Pratley again examined Gelfo in September 2001 and agreed that Gelfo was seriously and permanently impaired.8 Although Dr. Pratley did not recommend any “specific work place modifications or preclusions,” he did recommend that Gelfo not do any heavy lifting, repetitive bending, or prolonged sitting or standing.9 Because working as a metal fitter requires all of those activities, Dr.

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2. Id.
3. Id.
4. Id.
5. Id.
6. Id. at 878–79.
7. Id. at 879.
8. Id.
9. Id.
Pratley determined that Gelfo would not be able to return to his previous position. Dr. Pratley recommended Gelfo's enrollment in a vocational rehabilitation program designed to retrain him as a plastic parts fabricator and assembler. Gelfo completed the ten week vocational rehabilitation program in February 2002, and upon graduation, Lockheed offered each trainee a position as a fabricator. Two days after graduation, however, Lockheed revoked its offer to Gelfo. A Lockheed placement review committee affirmed that decision, determining through a review of Gelfo's medical records and testimony from his workers' compensation action that his medical restrictions rendered him unable to perform the essential functions of a fabricator, and that no reasonable accommodation was possible.

At all points during the vocational rehabilitation program and after, Gelfo insisted that his back "felt great"; he never claimed to be actually disabled. Dr. Pratley agreed upon reexamination in February 2002 that the work restrictions he had earlier recommended were no longer necessary and cleared Gelfo to return to work. However, even after being informed that Gelfo had taken a position with another company that required him to perform the same functions without any accommodations, Lockheed refused to reevaluate its assessment of Gelfo's medical condition.

After exhausting administrative remedies, Gelfo filed suit against Lockheed on March 30, 2003, alleging violations of California's Fair Employment and Housing Act ("FEHA") and common law wrongful termination claims. The trial court found the wrongful termination claim was time barred. The court further determined that portions of the FEHA claims were barred because Gelfo was not actually disabled; the court found that an employer has no duty to provide reasonable accommodation or engage in interactive dialogue about accommodations with an employee or applicant who is not actually disabled. The only

10. Id.
11. Id.
12. Id. at 880.
13. Id.
14. Id. at 880–81.
15. Id. at 884. The court notes that "Gelfo insists that, had Lockheed discussed the matter with him, it would have learned his restrictions—to the extent they required any accommodation at all—could easily have been accommodated by permitting him an additional break or two, or allowing him to occasionally sit on a stool." Id. at 895 n.20.
16. Id. at 880.
17. Id. at 880–81.
18. Id. at 881.
19. Id.
20. Id. at 881–82. Neither the ADA nor FEHA make use of the term "actually" disabled, but following the lead of the courts that have discussed this issue, I will make use of it for the sake of clarity. See id. at 885 n.8.
issue submitted to the jury was the allegation that Lockheed had violated FEHA by refusing to hire Gelfo based on its perception that he was physically disabled. The jury returned a verdict in favor of Lockheed. The California Court of Appeal reversed, holding that the lower court erred in its disposition of the claims that did not reach the jury, as well as in its instructions to the jury on the remaining claims. Many of these errors followed from the lower court’s determination that an employer has no duty to provide reasonable accommodations or engage in interactive dialogue about accommodations with an employee or applicant who is not actually disabled. The appellate court held that an employer does have a duty “to provide a reasonable accommodation to an applicant or employee who is not ‘actually’ disabled, but is ‘regarded as’ having a disability.” The employer also has a duty to engage in an informal dialogue with the “regarded as” disabled applicant or employee to determine effective reasonable accommodations. Based on the record before it, the appellate determined that Gelfo was not “actually disabled” as a matter of law; indeed, he had never claimed to be so. It also found as a matter of law that Lockheed had “regarded” Gelfo as disabled. There was no factual question on that issue for the jury to decide because Lockheed had “never maintained its decision not to hire Gelfo was premised on anything other than its belief that medical restrictions imposed as a result of Gelfo’s lower back injury rendered him unable to perform the essential functions of a fabricator.” After determining these matters of law and articulating the proper legal standard for employers’ duties in the “regarded as” disabled context, the appellate court remanded to the superior court for determination of the facts relevant to Gelfo’s claims of discrimination in hiring, failure to provide reasonable accommodation, and failure to engage in the interactive process.

By so holding on the issue of the employer’s duty to accommodate in the “regarded as” context, the court weighed in on an issue “novel to California” and which so far “only federal courts [had] considered . . .

21. Id. at 882.
22. Id.
23. Id. at 885–89.
24. The jury instructions, for example, were so garbled that the jury would have had to find Gelfo to be actually disabled in order to find Lockheed liable on a “regarded as” disabled theory. Id. at 888. Given that Gelfo insisted at all points that he was not actually disabled, it is therefore no surprise that the jury returned a verdict in favor of Lockheed.
25. Id. at 890–91.
26. Id. at 895.
27. Id. at 885–85.
28. Id. at 885–86.
29. Id. at 886.
30. Id. at 897 (citing CAL. GOV’T CODE § 12940(a), (m), (n) (West 2007)).
and only under federal law. The California Supreme Court declined review, so the matter is not finally settled under California law. For the moment, however, the *Gelfo* court's holding is the law of the state. With this ruling, California parts company with the Ninth Circuit's stance on the analogous federal issue and takes sides in a dispute that has left the federal courts almost evenly divided.

In this Note, I will question the *Gelfo* court's method of analysis in the course of agreeing with its result. Although the *Gelfo* court's holding is mainly supported by reference to persuasive federal precedent, the result was correct under the employment provisions of FEHA, no matter how the analogous federal issue under the Americans with Disabilities Act of 1990 ("ADA") might be resolved. I will argue, however, that the *Gelfo* court's reliance on federal precedent is problematic and that this same method of analysis has been a source of serious error on the part of a number of California appellate courts dealing with other state disability law issues. In Part I, I will review the split of the federal circuits on the issue of reasonable accommodations in the "regarded as" context. In Part II, I will discuss the reasoning of the *Gelfo* court for taking sides as it did in this federal circuit split. In Part III, I will discuss some of the fundamental differences in approach between California and federal disability law. With attention to those fundamental differences, I will return to the issue of reasonable accommodations in the "regarded as" context in Part IV. Finally, in Part V, I will examine a recent California Supreme Court ruling that resolved a split among the California appellate districts over applying ADA precedent to FEHA cases in another context. This ruling demonstrates the risk of error that comes with the *Gelfo* court's approach of relying heavily on federal precedent to construe California disability law.

31. *Id.* at 890.
33. The Fifth, Sixth, Eighth, and Ninth Circuits have concluded that an employer has no duty to provide reasonable accommodation to an applicant or employee who is only "regarded as," but not "actually" disabled, while the First, Third, Tenth, and Eleventh Circuits have come to the opposite conclusion. Kristopher J. Ring, *Disabling the Split: Should Reasonable Accommodations Be Provided to "Regarded As" Disabled Individuals Under the Americans with Disabilities Act (ADA)?*, 20 WASH. U. J.L. & POL'Y 311, app. at 364-73 (2006). District courts in the Second Circuit have followed the latter course, and the Second Circuit has affirmed those judgments in relevant part, but has not itself reached the question. *Id.* at 364-65. There are no Fourth Circuit discussions or decisions on the issue, and only one district court in the Fourth Circuit has dealt with the issue, finding no duty of accommodation. *Id.* at 367. The Seventh Circuit has discussed the issue several times, but has not reached the issue, and district courts in the Seventh Circuit are themselves split on the issue. *Id.* at 368-69.
34. *CAL. GOV'T CODE* §§ 12900-12996 (West 2007).
I. The Federal Split

The ADA requires an employer to make “reasonable accommodations” for “an otherwise qualified individual with a disability.” As a corollary, regulations enforcing the ADA require that the employer “make a reasonable effort to determine the appropriate accommodation,” noting that often “[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [applicant or employee] with a disability.” This interactive process is a vital part of the statutory scheme, intended to reduce the need for courts to become involved in adjudicating employer-employee disputes:

The focus of the interactive process centers on employee-employer relationships so that capable employees can remain employed if their medical problems can be accommodated, rather than on sounding a clarion call to legal troops to opine on whether the employee’s impairment is an actual disability within the legal nuances of the [statute].

Almost all the circuits to reach the issue have found that failure to engage in the informal interactive process constitutes a violation of the ADA’s reasonable accommodation requirement, just like a more direct refusal to provide reasonable accommodation.

The ADA’s statutory definition of “disability” has three disjunctive prongs: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an individual]; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The statutory text does not explicitly distinguish between individuals found to be disabled under one or another of the three prongs with regard to how such individuals are to be treated by their

36. Id. § 12112(b)(5)(A).
39. See Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000) (noting that almost all of the circuits to rule on the question have held that the interactive process is mandatory). But see Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (holding that failure to engage in interactive process is not a per se violation, but rather examination on a case-by-case basis is required to determine whether failure to engage in informal interactive process constitutes a failure to provide reasonable accommodation that amounts to a violation of the ADA); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that the plaintiff must produce evidence that a reasonable accommodation is available before an employer is obligated to engage in the interactive process).
40. 42 U.S.C. § 12102(2). The regulations further define “regarded as” disabled as meaning that an individual:

(1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) [h]as [no physical or mental impairment] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l).
employers. Rather, on its face, the ADA requires that employers provide "reasonable accommodations" to all "qualified individual[s] with a disability." Even the courts that have found no duty to accommodate in the "regarded as" context concede that the plain language of the ADA does not differentiate between those who are disabled under either of the first two prongs of the definition and those who are "regarded as" disabled. Thus, the informal interactive process would also seem to apply equally in the "regarded as" context; indeed, it may be even more important in that context, as a "prophylactic means to guard against capable employees losing their jobs even if they are not actually disabled." The interactive process provides employers and employees an opportunity to discuss what might constitute reasonable accommodation for a disability. Where the employee can disabuse the employer of its mistaken belief that the employee is disabled, the need for any sort of accommodation is obviated. And in the view of at least one court, "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."  

However, despite the lack of explicit differentiation among the separate prongs of the ADA definition of disability, four circuits have held that the third prong of the disability statute must be treated differently, such that applicants or employees who are regarded as disabled by their employers, but who are not actually disabled and do not have a record of disability, have no right to reasonable accommodations. The Fifth Circuit and Sixth Circuit refused to apply a duty of reasonable accommodation in the "regarded as" context, but did not offer reasoning underlying their holdings. Both the Eighth Circuit and Ninth Circuit, however, explained the reasoning behind their finding: "the absence of a stated distinction . . . [was] not tantamount to an explicit instruction by Congress that 'regarded as' individuals are entitled to reasonable accommodations." The Eighth Circuit in Weber v. Strippit, Inc. and the Ninth Circuit in Kaplan v. City of North Las Vegas each found that entitling "regarded as" disabled employees to reasonable

42. See Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 915-17 (8th Cir. 1999).
44. Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005).
45. See supra note 33.
47. Kaplan, 323 F.3d at 1232; accord Weber, 186 F.3d at 915-17.
accommodations would lead to "bizarre results." Specifically, the Weber and Kaplan courts found that a "formalistic reading" of the ADA, applying plain statutory language to find a duty of reasonable accommodation in the "regarded as" context, would lead to different outcomes for similarly situated employees: a healthy employee whose employer regarded her as disabled would be permitted to demand unnecessary accommodations, while her similarly healthy co-worker who was not regarded as disabled would be entitled to no such accommodations. This result would amount to an unjustified "windfall" for the "regarded as" disabled employee.

Although the ADA's definition of disability does not on its face distinguish between "regarded as" and "actually" disabled employees, the holdings of Weber and Kaplan are not entirely without support from the text of the ADA. The congressional findings included in the ADA indicate that it is intended to protect a "discrete and insular minority," which "has been subject to a history of purposeful unequal treatment." To take Mr. Gelfo as a concrete example, it is not necessarily immediately obvious how someone whose employer mistakenly believes him to have a bad back is transformed thereby into a member of a discrete and insular minority. It is also not immediately obvious from the text of the ADA what "reasonable accommodation" might mean, when it is taken as a given in the "regarded as" context that the employee in fact needs no accommodation at all.

Kaplan in particular provides a stark contrast with the other side of the split because the facts of the case are so similar in many respects to the facts that the Third Circuit faced in Williams v. Philadelphia Housing Authority Police Department. In Kaplan, a police officer who had injured his hand was misdiagnosed with rheumatoid arthritis. Based on the misdiagnosis, the police department fired the officer, believing the injury to his hand would be permanent and concluding that he could not perform essential job functions, including using a gun. Kaplan was not actually permanently disabled; contrary to his employer's expectations,

48. Kaplan, 323 F.3d at 1232; Weber, 186 F.3d at 916.
49. Kaplan, 323 F.3d at 1232 (citing Weber, 186 F.3d at 917).
52. 380 F.3d 751, 772-76 (3d Cir. 2004).
53. Kaplan, 323 F.3d at 1227.
54. Id.
the officer did recover from his injury. He sought relief under the “regarded as” prong of the ADA’s definition of disability but, as discussed above, the Ninth Circuit rejected his claim.

Williams also involved a police officer who was mistakenly regarded as disabled by his employer. Like Kaplan, Williams too had limitations due to a medical condition: he had been diagnosed with major depression, so he could not safely handle firearms. He requested assignment to the department radio room as an accommodation for this disability. The department refused, suggesting instead that he take medical leave. When Williams failed to request medical leave, he was eventually terminated. Williams filed suit, claiming violations of the ADA under both the “actual” and the “regarded as” prongs of the ADA’s definition of disability. The latter claim arose from the department’s refusal to assign him to the radio room. Williams argued this refusal was based on a misperception of his limitations insofar as the department regarded Williams not only to be unable to carry a firearm, but also unable to safely have access to or be around others carrying firearms despite the analysis of the department’s own psychologist to the contrary. As a result of this misperception, Williams argued, the department did not regard him as capable of working alternative assignments, such as being assigned to the radio room.

The Third Circuit, however, took a very different approach to these facts than the Eighth and the Ninth Circuits would have taken: it reversed the district court’s grant of summary judgment to Williams’ employer on both his actual and regarded as claims. The Third Circuit rejected the department’s argument that an employee who is not actually disabled, but only regarded as disabled, is not entitled to any reasonable accommodation. In so doing, the Williams court not only rejected the approach of Kaplan and Weber, but also rejected dicta from several previous Third Circuit opinions cited in Kaplan as persuasive precedent. The Third Circuit explicitly disagreed with Kaplan’s conclusion that it would be bizarre for a healthy employee regarded as

55. Id. at 1231.
56. Id.
57. Williams, 380 F.3d at 772-76.
58. Id. at 757.
59. Id.
60. Id. at 758.
61. Id.
62. Id. at 762-68.
63. Id. at 766.
64. Id.
65. Id. at 776.
66. Id. at 772-74.
67. These cases were Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3d Cir. 1999) and Deane v. Pocono Medical Center, 142 F.3d 138, 149 n.12 (3d Cir. 1998) (en banc).
disabled to be entitled to demand reasonable accommodations from her employer. While acknowledging that "there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,'" the court "perceive[d] no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text." The Williams court also refused to adopt the Kaplan court's interpretation of the legislative intent behind the ADA: "[T]he ADA was written to protect one who is 'disabled' by virtue of being 'regarded as' disabled in the same way as one who is 'disabled' by virtue of being 'actually disabled,' because being perceived as disabled 'may prove just as disabling.'"

Kaplan and Weber do not discuss any United States Supreme Court precedent relevant to the issue of reasonable accommodations in the "regarded as" context. Indeed, the high court has never attempted to construe the ADA disability definition's "regarded as" prong, and only once has it directly addressed the meaning of "reasonable accommodations," in a decision that has no direct application to this circuit split. Williams and its progeny, however, have presented a fairly compelling argument that straightforward application of settled United States Supreme Court precedent requires the conclusion that there is no distinction under the ADA between "actual" and "regarded as" disability claims with respect to the employer's duty to provide reasonable accommodations. Although the Supreme Court has provided no guidance on the issue with regard to the ADA, precedent interpreting the ADA's predecessor, the Rehabilitation Act of 1973 exists. The Rehabilitation Act's definition of disability is substantially the same as the ADA's, with both actual and regarded as prongs. In Bragdon v. Abbott, the United States Supreme Court found that the ADA must be construed "to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." In School Board of Nassau County v. Arline, the high court interpreted the Rehabilitation Act "to preclude discrimination against '[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have

68. Williams, 380 F.3d at 774.
no actual incapacity at all.” In Arline, as here, failure to provide reasonable accommodations was the form of discrimination at issue. Williams and its progeny, therefore, conclude that the precedent of Arline applies to the ADA as well and find that the duty to provide reasonable accommodations applies in the “regarded as” disabled context.

There are those who have argued, albeit rather unconvincingly, that Arline simply does not apply to “regarded as” claims because the narrow holding of Arline involved the “record of disability” prong, not the “regarded as” prong of the disability definition. But neither Kaplan nor Weber attempted this sort of engagement with precedent: as noted above, each conceded that the plain language of the statute would lead them to the opposite conclusion from the one they eventually reach. The respective courts cited nothing—no congressional findings, no legislative history, no other materials—to support the notion that Congress meant anything other than what it said, besides the courts’ conclusion that straightforward application of the plain language of the ADA would lead to “bizarre” results.

77. See Michelle A. Travis, Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims, 78 N.C. L. REV. 901, 933 n.125 (2000). Travis may no longer hold this position, however, and properly so: the importance of Arline lies in its treatment of a plaintiff without an actual disability, not its narrow holding. See Michelle A. Travis, Perceived Disabilities, Social Cognition, and “Innocent Mistakes.” 55 VAND. L. REV. 481, 550 (2002) (stating that Arline was the first interpretation of the “regarded as” prong of the Rehabilitation Act). This apparent change in Travis’s reading of Arline, and argument why her earlier position was wrong, is pointed out in Nicholas R. Frazier, In the Land Between Two Maps: Perceived Disabilities, Reasonable Accommodations, and Judicial Battles over the ADA, 62 WASH. & LEE L. REV. 1759, 1785 & nn.220–21 (2005).
78. This point is made in D’Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1239 (11th Cir. 2005).
This circuit split over the duty to provide reasonable accommodations in the "regarded as" disabled context, in other words, is not really an issue of statutory interpretation, nor is it an argument about the application of ambiguous precedent, even though the dispute has as its battleground the text of the ADA and judicial interpretation of that text. Rather, the courts on each side of this split have demonstrated through their holdings that their fundamental conceptions of what the ADA is and how it ought to operate are simply incompatible.

Before discussing these differing conceptions of the ADA in more detail, I will turn to Gelfo and FEHA. As a matter of California law, it does not matter how or if the United States Supreme Court ultimately chooses to resolve the circuit split I have discussed in Part I. However, examination of the reasoning, both explicit and implicit, underlying the Gelfo court's holding serves as a useful exercise, highlighting the reasons for the federal circuit split. Those reasons in turn bear upon the appropriateness of applying federal precedent to the matter of state disability law at issue in Gelfo.

II. THE GELFO COURT'S APPLICATION OF FEDERAL PRECEDENT TO INTERPRETATION OF FEHA

The structure of protections of California disability law under FEHA is similar in many respects to the ADA's. Like the ADA, FEHA's definition of disability has three disjunctive prongs: actually disabled, record or history of disability, and regarded as disabled.79 FEHA similarly requires that an employer provide reasonable accommodation for the known physical or mental disabilities of an employee or applicant.80 FEHA provides for a separate statutory cause of action for failure to engage in an interactive process to "determine reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition,"81 which is analogous to the process mandated by regulations implementing the ADA's reasonable accommodations requirement. Therefore, in deciding the issue of first impression before it, the Gelfo court found federal precedent interpreting the "regarded as" prong of the ADA disability

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**Bizarre? The Application of Reasonable Accommodation to Employees "Regarded As" Disabled Under the ADA Does Not Necessarily Lead to Bizarre Results, 75 Miss. L.J. 1063 (2006).**

79. CAL. GOV'T CODE § 12926(i), (k) (West 2007); see also id. § 12926.1(d)(3).

80. Id. § 12940(a), (m); Bagatti v. Dep't of Rehab., 118 Cal. Rptr. 2d 443, 454-55 (Ct. App. 2002).

81. CAL. GOV'T CODE § 12940(n) (West 2007); see also id. § 12926.1(e); Gelfo v. Lockheed Martin Corp., 43 Cal. Rptr. 3d 874, 895 (Ct. App. 2006) ("[A]n employer's duty to accommodate is inextricably linked to its obligation to engage in a timely, good faith discussion with an applicant or employee whom it knows is disabled, and who has requested an accommodation, to determine the extent of the individual's limitations, before an individual may be deemed unable to work.").
Application of federal precedent was somewhat complicated for the *Gelfo* court by the fact that the federal circuit courts are split almost evenly on the issue. Nonetheless, the *Gelfo* court did not turn to close analysis of California law as the primary basis for adopting the approach of one side of the split rather than the other. The court did mention in passing that the California legislature intended FEHA to provide greater protection to employees than the ADA and that FEHA be liberally construed to accomplish its purposes. But by and large the court did not rely on independent state grounds to substantiate its holding. Instead, the court's holding is phrased in terms of taking sides in the federal circuit split:

> The legal analysis in *Williams* [and cases from other circuits following *Williams*] is equally applicable in this case. For the reasons stated in those cases, we conclude the trial court erred in concluding an employer has no duty, as a matter of law, to provide a reasonable accommodation to an applicant or employee who is 'regarded as' disabled under FEHA.

The *Gelfo* court could have noted that the federal courts have fought this issue to a draw and turned to close analysis of California law. Instead, the *Gelfo* court discussed federal law at length, finding *Williams* and its progeny "better-reasoned" than *Kaplan* and *Weber*.

I would argue that the *Gelfo* court's agreement with *Williams* and its progeny is not the result of a coincidental similarity of philosophy between this panel of the California Court of Appeal and the Third Circuit. Rather, the *Gelfo* court's analysis, even when it is explicitly applying federal precedent, is implicitly shaped by the distinctive features of California disability law. *Williams* and its progeny take an approach that is much more consistent with California law than the *Weber* and *Kaplan* courts, which is why the *Gelfo* court finds the former to be better reasoned. To demonstrate this point, I will turn in the next section to comparison of the differing approaches to disability law represented by the ADA and FEHA. I will argue that the *Gelfo* court is absolutely correct to treat the "regarded as" prong of FEHA the same as the other prongs of the FEHA disability definition, because that result is most consistent with California's approach to disability law.

### III. Comparing the ADA and FEHA

Despite the similarities noted above, there are fundamental differences in structure and purpose between California disability law, as
embodied in FEHA, and the federal approach under the ADA. For example, the Gelfo court notes that the ADA and FEHA "share the goal of eliminating discrimination."86 This is true, from a certain perspective; both Congress and the California legislature included explicit statements of legislative intent to "eliminate discrimination."87 However, as I will argue below, the basic understanding of what that phrase means, and who is to be protected by law against discrimination on the basis of disability, is very different under the two legislative schemes.

The congressional findings included in the ADA assert that "individuals with disabilities are a discrete and insular minority" that have been

subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.88

This is powerful language, invoking Congress's power to address violations of equal protection under the Fourteenth Amendment as described in the United States Supreme Court's famous Footnote 4 of United States v. Carolene Products Co.89

But although the congressional findings in the ADA do constitute a strong statement against discrimination, it must be noted that they embody an approach to disability law that seeks only to confer protections on a limited category of individuals, a "discrete and insular minority." The congressional findings note that it is a large and growing minority. The first finding listed is the observation 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."90 Nonetheless, the implicit corollary to this number is that there are hundreds of millions of Americans who do not have a disability, and thus do not come within the primary intended scope of the ADA's protections. This basic approach of defining a relatively narrow, discrete class of individuals is continued in the substantive provisions of the Act:

86. Id. at 891–92.
87. 42 U.S.C. § 12101(b)(1) (2000) ("It is the purpose of this act ... to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities ... "); CAL. GOV'T CODE § 12920.5 (West 2007) ("In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.").
"No covered entity shall discriminate against a qualified individual with a disability because of the disability . . . ."91 The ADA does not provide a blanket prohibition of discrimination on the basis of disability.92 Rather, it defines a certain “qualified” set of individuals “with a disability” who are to be afforded protection.

The California legislature has declared a very different approach to disability law in FEHA:

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.93

This broad anti-discrimination policy, intended to reach discrimination against “all persons” on account of disability, among other things, is echoed in the substantive provisions of FEHA, which prohibit discrimination against “any person.”94

On its face, this statutory language indicates an approach to disability law under FEHA that is quite different from that of the ADA. Like the ADA, FEHA too is intended to protect the civil rights of individuals with a disability, among other things. Indeed, disability is explicitly included as a protected category in California’s primary civil rights law, the Unruh Civil Rights Act.95 The definition of disability is identical in FEHA and the Unruh Civil Rights Act.96 The current version of the definition was added to both statutes by the same legislative enactment, the Prudence Kay Poppink Act.97 Moreover, the legislature has explicitly directed that the “opportunity to seek, obtain and hold

91. Id. § 12112(a) (emphasis added).
92. Compare with Title VII of the Civil Rights Act of 1964: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ." Id. § 2000e-2 (2000).
93. CAL. GOV'T CODE § 12920 (West 2007) (emphasis added).
94. Id. § 12940(a).
95. CAL. CIV. CODE § 51(b) (West 2007) ("All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (emphasis added)).
96. See id. § 51(e).
97. 2000 Cal. Stat. 5812. Prudence Kay Poppink, incidentally, was a lawyer, a graduate of Hastings College of the Law, who specialized in employment and housing law for decades, working at the California Fair Employment and Housing Commission, including as the Commission’s regulations coordinator. She also drafted some of the language that was eventually adopted into FEHA. In 2000, she was forced to retire for health reasons, and the bill, which was already working its way through the legislature, was named in her honor. See State Bar of California, http://www.calbar.ca.gov (enter “Poppink” into “Search Calbar Site”; then follow hyperlink “Public Lawyer of the Year 2000”) (last visited Nov. 22, 2007).
employment without discrimination because of . . . physical disability, mental disability, [or] medical condition . . . is hereby recognized as and declared to be a civil right." But California's Legislature does not appear to have been working under the "discrete and insular minority" model of civil rights invoked by Congress with regard to the ADA. Rather, disability rights are described as inhering in "all persons," whether disabled or not: every person in California has the right to "seek, obtain and hold employment without discrimination or abridgment on account of" disability.99

This is not to say that under California law all employer discrimination on the basis of disability is forbidden. Where the discrimination is justified because the employee is "unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations," an employer will not be held liable under FEHA.100 Thus, the end effect of the FEHA statutory scheme, like the ADA, is to delineate a finite group of people—people who are disabled, within the meaning of the respective statutes and who have been subjected to impermissible discrimination by their employers on the basis of that disability. Under both California and federal law, only those who fall within that finite group will have a legal claim against their employer.

Even if FEHA and the ADA reach the same end point,101 however, they do so from different directions: where the ADA begins with the goal of protecting a discrete and insular minority, FEHA begins by forbidding all discrimination on the basis of disability and then providing exceptions for certain circumstances where the employer action is justified. Even if the two statutory schemes have similar end results on some issues, on other issues the difference in approach leads to very different results. In the next section, I will return to the "regarded as" disabled issue, with attention to the effect of these different approaches on the analysis.

IV. RETURNING TO THE "REGARDED AS" ISSUE

The different approaches to disability law embodied by FEHA and the ADA need not necessarily lead to different results on the issue of an employer's duty to provide reasonable accommodations and engage in the interactive process to determine reasonable accommodations in the

98. CAL. GOV'T CODE § 12921 (West 2007).
99. Id. § 12920.
100. Id. § 12940(a)(1).
101. At least the end point is analogous. As noted above, FEHA's substantive protections for employees are significantly broader than the ADA's. There will be many plaintiffs, therefore, who have a claim under FEHA but do not fall within the protections of the ADA.
“regarded as” disabled context. As noted above, under the plain language of the ADA, an employee who is regarded as disabled by his or her employer is entitled to the same protections as an employee who is actually disabled. From this perspective, the “regarded as” disabled employee simply is an “individual with a disability” under the plain language of the statute; that is, someone who is a member of the finite class of individuals intended to come under the ADA’s protections. The same result is reached from a different direction by following the plain language of FEHA. Nothing in the statutory language would except an employer in the “regarded as” context from the general rule of liability for discrimination on account of disability; indeed, there is explicit direction that FEHA is intended “to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.”

Examination of the different approaches of California and federal disability law does shed some light, however, on why such a dramatic circuit split has arisen in the federal courts on the issue, but not in California. Some of the federal circuits have perceived a tension between the substantive provisions of the ADA, which appear to extend protections to the “regarded as” disabled individual, and Congress’s express findings and purposes. The court in Kaplan, for example, noted that the ADA is intended to decrease “‘stereotypic assumptions not truly indicative of the individual ability of [people with disabilities].’” The court continued:

Dispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments. Were we to entitle ‘regarded as’ employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees’ talents clearly.

The Kaplan court also found that “[t]o require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers’ limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential.” Thus, despite the plain language of the statute, the Kaplan court refused to find any duty to accommodate a “regarded as” disabled employee.

102. CAL. GOV'T CODE § 12926.1(d)(3) (West 2007); see also id. § 12926(i), (k).
104. Id.
105. Id.
106. Id.
There are, of course, responses to the points the Kaplan court makes. The court misses the main point of applying the duty of reasonable accommodation and the associated informal interactive process in the "regarded as" context, giving the employer an opportunity to realize that the employee is not in fact disabled and should not be regarded as such. The argument that employees would have an incentive to do nothing to educate their employers of their true capabilities simply ignores the duty on the part of both employer and employee to engage in an interactive process to determine what would constitute reasonable accommodations. An employee who deliberately allowed an employer to continue in a mistaken belief that the employee was disabled would almost certainly be found to have acted in bad faith, and the employer would not be held liable. If an employer stubbornly insists on regarding the employee as disabled, despite the employee's good faith effort to disabuse the employer of that notion, any "unnecessary" accommodations that may be required because of that mistaken belief would seem to be the employer's fault, not the employee's.

However, even though Weber and Kaplan's arguments are refutable, it cannot be said that their holdings are entirely without basis. That is to say, the court in Kaplan was not entirely without reason for looking at the plaintiff before it and concluding that, based on the express purposes of the ADA, Congress could not have meant to reach this set of facts. Kaplan was a police officer whose only "disability" was that his employer incorrectly believed him to have arthritis in his hand. How is such a person a member of a "discrete and insular minority" that has been subjected to a history of discrimination? Again, the comparison with Williams is important, here not for the similarity but for the difference in the facts. In both cases the plaintiffs were police officers who were fired because their respective disabilities meant, among other things, that neither could safely use a gun. Williams, however, in fact suffered from serious depression. While Kaplan actually could use a gun, although his employer believed otherwise, Williams could not safely do so. Williams's claim was in part based on the argument that although he could not carry a weapon safely, there was no danger in letting him be around others who were armed, as would be the case if he were assigned to the radio

107. See Kelly v. Metallics W., Inc., 410 F.3d 670, 676 (10th Cir. 2005); see also supra text accompanying note 44.
108. See Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000); see also supra text accompanying note 39.
110. Kaplan, 323 F.3d at 1228.
room of the department as an accommodation for his disability. Williams therefore had an easier set of facts than Kaplan for making the case that his employer's action was based on "stereotypic assumptions" about the "discrete and insular minority" of people with his particular disability.

As discussed above, in contrast to the federal approach, extending protections to the "discrete and insular minority" of "individuals with a disability," FEHA sets up a general rule applying the protections of FEHA to "all persons" unless there is some applicable exception that would excuse employer discrimination. There is no exception excusing employer discrimination against a person who is regarded as, but not actually disabled. There is thus no tension between the substantive provisions of FEHA and the express statements of legislative intent on this issue. Without ever looking to federal precedent, therefore, it is clear that employers owe "regarded as" disabled plaintiffs a duty of reasonable accommodation and must participate in an interactive process to determine those reasonable accommodations under California law. Although the Gelfo court primarily relied on analysis of federal law, its holding was fully consistent with California disability law. It is, I would propose, because the Gelfo court examined the federal circuit split with a perspective informed by California's approach to disability law, as much as any flaws in the reasoning of Kaplan and Weber, that the Gelfo court found Williams and its progeny "better-reasoned."

In sum, the issue of an employer's duty (or lack thereof) to reasonably accommodate employees who are regarded as disabled, but not actually disabled, is one about which reasonable minds perhaps can disagree on the federal level because of the tension some courts have found between Congress's express findings and statements of purpose and the substantive provisions of the ADA. There is no such tension to be found, however, in FEHA. Therefore, when the Gelfo court reflexively turned to federal law for guidance on this matter of first impression for California law, it unnecessarily complicated the analysis. This complication did not lead the Gelfo court into error because it sided with the federal circuits whose holdings were most consistent with California disability law, either because those circuits' holdings are in fact "better-reasoned," as the Gelfo court put it, or because California's approach to disability law implicitly informed the court's decision to

112. Id. at 766.
113. That said, I do find Williams and its progeny much more persuasive, insofar as those courts give effect to the plain language of the ADA. If Congress meant something other than what it said in the substantive provisions of the ADA, it should amend the ADA to make itself clear. Also, although there may be some circumstances in which applying a duty of reasonable accommodation in the "regarded as" context would lead to bizarre results, I am not convinced that the factual situations of Weber or Kaplan constitute such circumstances.
agree with one side of the federal split over the other.

In other circumstances, however, the analytic move on the part of California appellate courts to apply federal precedent to interpret California disability law has not been as benign as in *Gelfo*. In the next section, I will turn to an issue that is in a sense the inverse of the "regarded as" issue I have discussed so far, in that it involves an issue that is settled as a matter of federal law, but until recently had split the California appellate courts.

V. APPLICATION OF ADA PRECEDENT TO CONSTRUE FEHA CAN LEAD TO ERROR

As noted above, *Gelfo* involved a matter of first impression in California. No other California appellate court has addressed the issue of reasonable accommodations in the "regarded as" context, so there has been no opportunity for disagreement. Moreover, a future split in the California appellate courts on this particular issue is unlikely because the legislature has stated explicitly that FEHA protections are intended to extend to those who are regarded as, but not actually disabled. The *Gelfo* court's method of analysis, however, of turning reflexively to federal precedent as a guide to interpreting California disability law, represents a potentially problematic precedent. There is a risk that reflexive application of federal precedent will lead to error by courts faced with other California disability law issues if those courts fail to pay heed to the significant differences between the ADA and FEHA. Unfortunately, the California Supreme Court recently demonstrated that it is prone to precisely that analytic deficiency.

In *Green v. State*, the California Supreme Court addressed a question of statutory interpretation of FEHA that had split the courts of appeal. 114 At issue in *Green* was what a plaintiff must prove to support a claim of employment discrimination on account of disability under FEHA. 115 California courts have sometimes applied the federal "McDonnell Douglas test," a three-stage burden shifting test designed for use in evaluating disability claims under the ADA. 116 In the first stage,

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114. 165 P.3d 118 (Cal. 2007).
115. Id. at 121.
the plaintiff must make a prima facie showing of liability on the part of the employer: if the plaintiff cannot do so, the employer is entitled to summary judgment without presenting any further evidence.\footnote{117} If the employee meets this burden, the second stage of the test requires the employer to produce sufficient evidence to shift the burden back to the employee.\footnote{118} In the third stage, the employee must not only produce evidence of discrimination, but must prove discrimination by a preponderance of the evidence.\footnote{119}

When the \textit{McDonnell Douglas} test is applied in federal cases under the ADA, the employee's prima facie showing in the first stage of the test must include evidence that the employee is a "qualified individual" in the meaning of the statute, that is, that he or she has the capacity to perform a job's essential duties "with or without reasonable accommodation."\footnote{120} Several California courts of appeal, including the court in \textit{Brundage v. Hahn},\footnote{121} have presumed without analysis that the same standard applies when the \textit{McDonnell Douglas} test is employed in FEHA disability cases, requiring plaintiffs to demonstrate in their prima facie case that "(1) plaintiff suffers from a disability; (2) plaintiff is a qualified individual; and (3) plaintiff was subjected to an adverse employment action because of the disability."\footnote{122}

The California Court of Appeal in \textit{Green}, however, refused to follow the presumption of \textit{Brundage} and its progeny, holding that a plaintiff need only establish that "(1) plaintiff is a person with a disability or medical condition, and (2) the defendant made an adverse employment decision (3) because of plaintiff's disability or medical condition."\footnote{123} Under this interpretation, once the plaintiff makes this prima facie showing, the burden shifts to the defendant to establish as an affirmative defense that plaintiff's physical disability renders him unable to perform

\footnotesize{\addcontentsline{toc}{section}{Notes}

\footnote{117}{\textit{McDonnell Douglas}, 411 U.S. at 802.}
\footnote{118}{Id.}
\footnote{119}{Id.}
\footnote{120}{See 42 U.S.C. § 12112(a) (2000); Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996).}
\footnote{121}{66 Cal. Rptr. 2d 830 (Ct. App. 1997).}
\footnote{122}{Id. at 835; accord Hastings v. Dep't of Corr., 2 Cal. Rptr. 3d 329, 334 (Ct. App. 2003); Finegan v. County of Los Angeles, 109 Cal. Rptr. 2d 762, 767 (Ct. App. 2001); Jensen v. Wells Fargo Bank, 102 Cal. Rptr. 2d 55, 61 (Ct. App. 2000); Quinn v. City of Los Angeles, 100 Cal. Rptr. 2d 914, 915 (Ct. App. 2000); Deschene v. Pinole Point Steel Co., 90 Cal. Rptr. 2d 15, 21 (Ct. App. 1999).}
\footnote{123}{Green v. State, 33 Cal. Rptr. 3d 254, 262 (Ct. App. 2005), rev'd, 165 P.3d 118 (Cal. 2007).}
the job’s essential duties.\textsuperscript{124}

The statutory language of FEHA does not resolve the dispute between the courts of appeal in \textit{Brundage} and \textit{Green}; the burden of proof regarding the employee's qualifications is not explicitly allocated either to the plaintiff or the defendant in the text of the statute. To resolve the disagreement between the appellate districts, the California Supreme Court granted review of \textit{Green}.\textsuperscript{125} A bare four to three majority found, over a vigorous dissent, that the \textit{Brundage} court was correct, concluding that "the Legislature has placed the burden on the plaintiff to show that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation)."\textsuperscript{126} Thus, in the opinion of the majority, the ADA and FEHA are to be interpreted identically on the issue of employee qualifications, and ADA precedent that places the burden of proving qualifications on the employee may be applied to state disability discrimination claims under FEHA.

The opinion of the majority of the California Supreme Court in \textit{Green} is marred by remarkably poor reasoning. As the dissent points out: "[T]he majority ignores the statute's structure, distorts its legislative and regulatory history, and relies on inapposite authority."\textsuperscript{127} The majority opinion relies heavily on the premise that under FEHA an employer is not liable for discriminating on the basis of disability against an employee who is not qualified to perform the job.\textsuperscript{128} The majority concludes from this premise that the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.\textsuperscript{129} This reasoning does not hold water: no party advocated that employers should be liable under FEHA for discriminating against the unqualified. The issue before the Court was whether plaintiffs should be forced to prove their qualifications as part of their prima facie case, or whether employers must raise plaintiffs' lack of qualifications as an affirmative defense.\textsuperscript{130} Either way, unqualified employees would not be entitled to relief under FEHA. This fallacious reasoning by the majority is characterized by the dissent as the majority's "fundamental" error.\textsuperscript{131}

I agree with each of the dissent's individual criticisms of the majority opinion, although I will not discuss each of those criticisms in detail here.

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Green}, 165 P.3d 118, 121 (Cal. 2007).
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.} at 126 (Werdegar, J., dissenting).
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{See id.}
  \item \textsuperscript{131} \textit{Id.}
\end{itemize}
I would quibble only with the dissent's identification of the majority's "fundamental" error. Certainly, the error of logic the dissent identifies does "pervade" the majority's discussion, but I would suggest that the majority's weak logic is in turn motivated by an erroneous assumption that is even more fundamental: ADA precedent is to be presumed relevant to interpreting FEHA. The California Supreme Court had previously stated in *Guz v. Bechtel National, Inc.* that "[b]ecause of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." In *Green*, the majority in essence reads the word "pertinent" out of that statement, focusing blindly on the similarities between the two statutes and making no attempt to discern any pertinent differences. The majority asserts that the ADA and FEHA are "strikingly similar" and the rest of the opinion is filtered through the distorting prism of that notion.

The damage of *Green*’s holding may extend beyond simply the narrow holding of the case, which may result in reversal of the judgment Green had previously won against his employer. More importantly than the result for any particular plaintiff, or even the allocation of the burden of proof regarding employee qualifications, the majority in *Green* has once again affirmed an approach to interpreting California disability law that mechanically applies federal precedent, without any serious consideration that California disability law may be materially different. The majority’s opinion is, among other things, a remarkable collection of string cites to federal authority regarding the ADA, interrupted only occasionally by reference to California precedent. It is significant that when the *Gelfo* court sought support for the notion that "state law will part ways with federal law in order to advance the legislative goal of providing greater protection to employees than the ADA," it did not cite a California Supreme Court case, but rather a federal district court opinion applying California law. There simply has not been a clear mandate from California’s highest court that this extra level of analysis is necessary. Indeed, out of context, the pithy rule from *Guz* that

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132. 8 P.3d 1089, 1113 (Cal. 2000).
133. *Green*, 165 P.3d at 123.
134. The majority's disposition of the case was to reverse the judgment of the Court of Appeal affirming the jury's judgment against Green's employer, the State of California. Technically, the Supreme Court only “remand[ed] the matter for proceedings consistent with this decision.” *Id.* at 126. It is possible that on remand the Court of Appeal would find any error at trial harmless, even in light of the Supreme Court's decision, but it is likely that it will remand to the Superior Court for retrial.
135. See *id.* at 122.
137. Remarkably, before *Green*, California Government Code section 12926.1(a), which states that FEHA is intended to provide "protections independent from those in the [ADA]" and that
“California courts look to pertinent federal precedent when applying our own statutes” almost implies the contrary, as does the *Green* majority’s observation about the “striking similarities” between FEHA and the ADA.

Thus, the California Supreme Court was presented with, but missed, an important opportunity. It could have done more than just affirm the *Green* Court of Appeal’s refusal to apply an inappropriate federal standard on the issue of what prima facie showing a plaintiff must make on a disability claim. It could also have stated clearly and with the authority of the state’s highest court that although pertinent federal precedent may have some persuasive value, it must always be evaluated in the light of the significantly different approach to disability law mandated by the California legislature. It is perhaps some comfort that three justices were ready to take that opportunity, and perhaps in the future will be able to garner another vote. For the moment, however, the ball is (again) in the Legislature’s court.138

**CONCLUSION**

Although the court in *Gelfo* addressed a matter of first impression under California law, and took sides on an issue that has split the federal circuits, the importance of the case is not so much its narrow holding, but rather its method of analysis. Although the *Gelfo* court came to the right result, similar methods have led astray other California appellate courts, including the California Supreme Court, on other state disability law questions. As demonstrated by the federal and state appellate court splits examined here, it would seem a useful exercise for both the federal and the state courts to conduct a more thorough examination of the fundamental approaches to disability law that underlie their analyses. Both levels of government can thereby thoughtfully address the question of whether their respective disability laws are functioning as intended.
