

## MANDATED REASSIGNMENT FOR THE MINIMALLY QUALIFIED

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### I. INTRODUCTION

A manufacturing company has recently posted a vacancy. The vacancy is open to all current company employees and outside applicants. The company's longstanding policy has been to hire the most qualified applicant for the job, whether that person is a current employee or an outside applicant. The

company generally gives current employees a slight advantage over outside applicants, but nonetheless, the most qualified applicant will be chosen. Several current employees apply for the position, all seeking the transfer because it will be an improvement over their current position. Among the current employees who apply, there is one man who has worked at the company for years, but who has recently suffered a permanent back injury that renders him unable to perform the functions of his current position. Due to this injury, the man qualifies as a disabled employee protected by the Americans with Disabilities Act (“ADA”). He and the company have attempted to modify the essential functions of his job description so that he could remain in his position, but nothing has been successful. Thus, he is seeking reassignment to the vacant position as a reasonable accommodation under the ADA.

Amongst the candidates seeking the manufacturing company’s vacancy, the disabled employee is not the most qualified candidate. In fact, he holds the minimal qualifications necessary to be considered. When it comes time to make a hire, the manufacturing company chooses another, highly qualified individual for the vacant position. There are no other vacancies in the company. The disabled employee and the company make further attempts to accommodate his disability to maintain his employment, but are unsuccessful. Thus, the company decides to terminate the disabled employee.

Subsequently, the disabled employee files a discrimination lawsuit, alleging that the company failed to reasonably accommodate his disability in violation of the ADA. He argues that the employer was obligated to reassign him to the vacant position over the more qualified individual who earned the position. He files the lawsuit in the United States District Court for the Northern District of Illinois, located within the Seventh Circuit. Citing recently held precedent for support, the judge finds for the disabled employee, holding that the ADA mandates reassignment to vacant positions even for minimally qualified disabled employees who can no longer perform the essential functions of their current position due to their disability. Thus, the manufacturing company violated the statute by not reassigning the minimally qualified disabled employee over the most qualified candidate who earned the position.

This hypothetical situation highlights an issue that has sparked debate amongst the federal circuits. The United States Courts of Appeals for the Seventh, Tenth, and D.C. Circuits have all interpreted the ADA to require employers to reassign disabled employees to vacant positions over more qualified applicants under the ADA’s reasonable accommodation provisions.<sup>1</sup> On the other hand, the United States Court of Appeals for the Eighth Circuit has held the opposite, interpreting the ADA to allow competitive

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<sup>1</sup> See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998); Taylor Brooke Concannon, *Don’t Throw the Baby Out with the Bathwater: Taking the Seventh Circuit’s Decision in EEOC v. United Airlines, Inc. Too Far*, 52 WASHBURN L.J. 613, 614 (2013).

reassignments.<sup>2</sup> The remaining circuits have tended to avoid the direct question of whether reassignment to a vacant position is mandated under the ADA, but some have discussed the issue in slightly different contexts. The circuit split runs along lines of statutory interpretation, policy concerns, and business interests. Congress included reassignment as a possible accommodation for an employee who could no longer perform the essential functions of his position, but courts have disagreed on whether reassignment is required in the face of non-discriminatory hiring policies.

This Note will argue that mandating reassignment of a minimally qualified disabled employee to a vacant position over a more qualified individual who has applied to the position is unreasonable because it would create an undue hardship for the employer. Thus, the Fourth Circuit should not follow the Seventh, Tenth, and D.C. Circuits when presented with this question in the future. Section II of this Note will outline general provisions of the ADA, the ADA's reasonable accommodation provision, the purpose of the ADA, and the basics of reassignment as a reasonable accommodation. Section III will analyze the case law that has arisen within the reassignment context. Section III.A will discuss the United States Supreme Court's decision in *US Airways, Inc. v. Barnett*,<sup>3</sup> which is the Court's only opinion concerning reassignment under the ADA. Section III.B will analyze the circuits that have concluded that the ADA may require reassignment, even over a more qualified candidate. Section III.C will next analyze the case law that has interpreted the ADA as not requiring reassignment. Section IV will argue why mandated reassignment is unreasonable in light of congressional intent, effect on third parties, and the burden on the employer. Section V will suggest that the Fourth Circuit follow the Eighth Circuit's reasoning that the ADA does not mandate reassignment over a more qualified individual.

## II. BACKGROUND

To better understand the reasoning of the courts in reassignment cases, it is necessary to understand the ADA and its purpose. The ADA was passed in 1990 and codified under 42 U.S.C. § 12101.<sup>4</sup> The ADA was based heavily on its predecessor, the Rehabilitation Act of 1973.<sup>5</sup> However, the Rehabilitation Act only applied "to federal government agencies, government contractors, and

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<sup>2</sup> See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).

<sup>3</sup> 535 U.S. 391 (2002).

<sup>4</sup> 42 U.S.C. §§ 12101–12213 (2012).

<sup>5</sup> See Carrie L. Flores, Note, *A Disability Is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees To Automatic Reassignment*, 43 VAL. U. L. REV. 195, 202 (2008).

recipients of federal funds . . . .”<sup>6</sup> When the ADA was enacted in 1990, it was the first time the federal government imposed the same rules on the private sector that it had imposed on public employment for nearly 30 years.<sup>7</sup> The ADA applies to both public and private sectors, addressing discrimination based on disability in the areas of employment and public services, programs, activities, and accommodations.<sup>8</sup> The Act is regulated by the Equal Employment Opportunity Commission (“EEOC”).<sup>9</sup>

While it was considering the ADA, Congress found census data, national polls, and other studies showing that disabled individuals, as a group, occupied an inferior status in society and were severely disadvantaged.<sup>10</sup> A survey cited by Congress found that persons with disabilities generally are poorer, have less education, have less social and community life, and express less satisfaction with life compared to non-disabled persons.<sup>11</sup> As such, Congress set out to end this disparity. The purpose of the ADA was to provide “a clear and comprehensive national mandate” to end disability discrimination and bring disabled individuals into the American mainstream.<sup>12</sup> In order to accomplish this goal, Congress recognized that it was pivotal for disabled individuals to gain employment and stay employed.<sup>13</sup> The high expectation was

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<sup>6</sup> *Id.*; see also Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9 (1996).

<sup>7</sup> RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 22* (2005). Its predecessor, the Rehabilitation Act of 1973, only protected federal employees and employees of institutions that received federal aid. Joshua Benjamin Forman, *Not Getting Hired Because You Are Obese, but Not Getting Fired Because You Are Obese: How the New Changes to the ADA Have Set a Double Standard, and What’s to Prevent Companies from Trimming the Fat at the Office 5* (Aug. 2012) (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=joshua\\_forman](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=joshua_forman) (citing 29 U.S.C. § 794(a) (2013) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”)).

<sup>8</sup> Flores, *supra* note 5, at 202–03.

<sup>9</sup> 42 U.S.C. § 12111(1) (2013); see also 42 U.S.C. § 12116.

<sup>10</sup> See 42 U.S.C. § 12101(a)(6).

<sup>11</sup> H.R. REP. NO. 101-485, pt. 3, at 25 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 447.

<sup>12</sup> *Id.* at 23. The ADA protects two types of individuals. “A disabled individual who could perform the job in its present form, but whom the employer refuses to hire because of a . . . belief that she cannot perform the requisite tasks or out of revulsion against the worker’s disability . . . .” Karlan & Rutherglen, *supra* note 6, at 8. “The other category of protected individuals consists of persons whose physical or mental impairments prevent them from performing the job in its current form, but who could perform the job if it were reconfigured in an appropriate fashion.” *Id.* at 8–9.

<sup>13</sup> Concannon, *supra* note 1, at 620.

that the ADA would open doors for individuals with disabilities to all sectors of the economy, not just those that were federally-funded.<sup>14</sup>

Despite the good will and lofty intentions that the original ADA set out to fulfill, those goals were not realized.<sup>15</sup> This was primarily attributed to the imprecise language and conflicting judicial opinions produced by the Act.<sup>16</sup> Accordingly, Congress passed the ADA Amendments Act of 2008 (“ADAAA”).<sup>17</sup> House Majority Leader Steny Hoyer, Representative Jim Sensenbrenner, Senator Tom Harkin, and Senator Orrin Hatch led the charge to revise the narrow interpretations placed upon the ADA by the Supreme Court.<sup>18</sup> One of Congress’s primary purposes in passing this amended act was to broaden the definition of “disability.”<sup>19</sup> Congress was dissatisfied that the courts had strictly defined disability, thereby finding that many claimants were not disabled under the ADA.<sup>20</sup> Congress also sought to provide some protection for soldiers returning home from the conflict in the Middle East, many of whom returned with psychological illnesses.<sup>21</sup> Thus, Congress broadened the scope of what constitutes a disability by stating that the law should be more inclusive and less exclusive.<sup>22</sup>

The ADA is unique among other anti-discrimination statutes because it places an affirmative duty on an employer to assist an employee in performing essential job functions.<sup>23</sup> The ADA, Title VII, and the Age Discrimination in Employment Act (“ADEA”) are the three major employment anti-discrimination statutes that Congress has passed.<sup>24</sup> Title VII prohibits

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<sup>14</sup> Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1277 (2009).

<sup>15</sup> See Adam Keating, *Reexamining Reasonableness: An Analysis of Reasonable Accommodation Under the ADA 4* (Apr. 26, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1597416](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597416).

<sup>16</sup> *Id.*; see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); Anderson, *supra* note 14, at 1278–84 (discussing how courts were left to interpret the statute with a limited sense of the history of discriminatory treatment of disabled individuals).

<sup>17</sup> Keating, *supra* note 15, at 5.

<sup>18</sup> EMILY A. BENFER, AM. CONSTITUTION SOC’Y FOR LAW AND POLICY, *THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT 1* (2009), available at <http://www.law.georgetown.edu/archiveada/documents/BenferADAAA.pdf>.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> Sandra K. Collins & Eric P. Matthews, *Americans with Disability Act: Financial Aspects of Reasonable Accommodations and Undue Hardship*, 39 J. HEALTH CARE FIN. 79, 80 (2012).

<sup>22</sup> See Benfer, *supra* note 18, at 3.

<sup>23</sup> See Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1047 (2000).

<sup>24</sup> See *id.*

employers from making adverse employment decisions “because of” race, color, religion, sex, or national origin; the ADEA prohibits employers from discriminating against a person’s age.<sup>25</sup> In contrast, while the ADA bans discrimination “because of” disability, it goes a step further than the other anti-discrimination statutes by imposing an affirmative duty on the employer to assist the disabled employee to sufficiently perform the essential functions of the job.<sup>26</sup> Neither Title VII nor the ADEA allow protected persons to demand accommodation in their favor.<sup>27</sup> Under those statutes, a person can only demand that he be treated equally and without discrimination.<sup>28</sup>

Under the ADA, the term “disability” means any impairment that substantially limits one or more major life activities of an individual.<sup>29</sup> Physical impairments include disorders that affect the neurological system, the musculoskeletal system, the respiratory system, and the cardiovascular system.<sup>30</sup> Mental impairments include “mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>31</sup> This includes any individual who is “regarded as” having such an impairment.<sup>32</sup> An individual satisfies the “regarded as” requirement by showing that the person has been subjected to an adverse employment action because of an

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<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 1047–48. The ADA

requires employers not just to eschew disability-based disparate treatment or to revise policies that have an adverse disparate impact on disabled employees as a class, but to attend to every (qualified) disabled employee’s unique needs and to tailor workplace policies accordingly so that every (qualified) disabled employee can fully participate in the workplace.

Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL’Y REV. 1, 29 (2013).

<sup>27</sup> *See* Befort & Donesky, *supra* note 23, at 1047. Title VII allows for a limited duty to accommodate for an individual’s religion. *Id.* at 1047 n.10. However, Title VII’s religious reasonable accommodation provision places a very slight legal obligation on employers as the Supreme Court, in order to avoid constitutional questions under the Establishment Clause, has interpreted the provision very narrowly. Karlan & Rutherglen, *supra* note 6, at 6–7. In contrast, “there is no constitutional principle [restricting] government benefits for the disabled”; “[t]he door was thus open for the duty of reasonable accommodation to receive a broader interpretation” under the ADA. *Id.* at 7–8.

<sup>28</sup> *See* Karlan & Rutherglen, *supra* note 6, at 7–8.

<sup>29</sup> 42 U.S.C. § 12102(1)(A) (2012). A major life activity includes “caring for oneself, performing manual tasks, . . . eating, sleeping, walking, . . . and working.” 42 U.S.C. § 12102(2)(A).

<sup>30</sup> H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450. This is not an exhaustive list, but features some of the major bodily systems.

<sup>31</sup> *Id.*

<sup>32</sup> 42 U.S.C. § 12102(1)(C).

actual or perceived physical or mental impairment, whether or not the impairment actually limits a major life activity of that person.<sup>33</sup>

A claim for failure to accommodate does not require a showing of intentional discrimination.<sup>34</sup> An accommodation is generally regarded as any change in the work environment or way that tasks are usually done to allow the disabled employee equal employment opportunities.<sup>35</sup> “An employer is not required to [grant] the specific accommodation that the employee requests, but EEOC regulations . . . make clear that the preference of the [employee] should be given consideration.”<sup>36</sup> Furthermore, an employer is not required to provide an ineffective accommodation.<sup>37</sup> The employee must provide proof that the proposed accommodation will actually enable him to perform the essential functions of the job.<sup>38</sup> A reasonable accommodation may include making existing facilities used by employees readily accessible to a disabled employee, job restructuring, modification or acquisition of equipment, reassignment to a vacant position, etc.<sup>39</sup> Essentially, this imposes a duty on the employer to take a wide range of actions to accommodate an employee before the employer is permitted to release the disabled employee. For an employer to lawfully release a disabled individual from his services without providing an accommodation, the employer must show that the accommodation imposes an undue hardship on the employer.<sup>40</sup>

Under the ADA, an “undue hardship” is any action that would require significant difficulty or expense on the part of the employer.<sup>41</sup> The ADA lists several factors for courts to analyze when considering undue hardship: the size of the employer, the financial resources of the facility or the employer overall, and the type of operations undertaken by the employer.<sup>42</sup> The burden of proving an undue hardship is placed upon the defendant-employer.<sup>43</sup> Subsequently, the nature of an undue hardship will depend on the size of the employer and its

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<sup>33</sup> 42 U.S.C. § 12102(3)(A).

<sup>34</sup> BARBARA T. LINDEMANN ET AL., EMPLOYMENT DISCRIMINATION LAW 13-113 (5th ed. 2012).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 13-114.

<sup>37</sup> *See id.* at 13-116.

<sup>38</sup> *Id.*

<sup>39</sup> 42 U.S.C. § 12111(9)(A)–(B) (2012).

<sup>40</sup> *See* 42 U.S.C. § 12112(5)(A).

<sup>41</sup> 42 U.S.C. § 12111(10)(A).

<sup>42</sup> *See* 42 U.S.C. § 12111(10)(B)(i)–(iv).

<sup>43</sup> *See* 42 U.S.C. § 12112(b)(5)(A). “The burden of proving undue hardship rests with the defendant because the undue hardship defense is an affirmative defense to a claim of discrimination under the ADA.” Rachel Schneller Ziegler, *Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act*, 101 MICH. L. REV. 840, 868 (2002).

financial resources. Smaller companies generally have more limited obligations, whereas larger companies will find it more difficult to prove an undue hardship.<sup>44</sup> Courts have also looked at other factors not listed in the statute or regulations to determine whether a particular action constitutes an undue hardship. Past practices of society, the effect on others, and a cost-benefit analysis of the requested accommodation have all been considered.<sup>45</sup> Undue hardship is an affirmative defense to discrimination under the ADA. Thus, the defendant-employer will be absolved of liability if it can prove the existence of an undue hardship.<sup>46</sup>

EEOC guidelines also state that once an individual with a disability requests an accommodation, the employer should engage in an interactive process to ascertain what type of accommodation should be made.<sup>47</sup> This is intended to be an informal process where the employer is entitled to ask relevant questions that will enable it to make a decision.<sup>48</sup> The employee does not have to identify a specific accommodation, but he does have to describe the limitations that he faces because of the disability so that the employer can make an effective accommodation.<sup>49</sup> In certain situations, the disability and the type of accommodation needed are obvious, but where they are not, the employer and the employee should engage in this interactive process to ascertain the best accommodation for the employee without unduly burdening the employer.<sup>50</sup>

Reassignment is specifically listed in the ADA's text as a potential reasonable accommodation.<sup>51</sup> The employer should reassign the employee to an equivalent position in terms of pay and status.<sup>52</sup> Employers are not required to create a new position for the employee and the employer is not required to reassign another employee in order to make the accommodation for the disabled employee (this is commonly referred to as "bumping").<sup>53</sup> The position must be vacant.<sup>54</sup> Moreover, reassignment should be viewed as a last resort

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<sup>44</sup> See Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1151 (2010).

<sup>45</sup> Ziegler, *supra* note 43, at 872.

<sup>46</sup> *Id.* at 868.

<sup>47</sup> See EEOC ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, EEOC COMPLIANCE MANUAL ¶ 16 (2002) [hereinafter ENFORCEMENT GUIDANCE], available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> LINDEMANN ET AL., *supra* note 34, at 13-146.

<sup>52</sup> *Id.* at 13-146 to -147.

<sup>53</sup> *Id.* at 13-149.

<sup>54</sup> See *id.*



accommodation. It should only be considered when there is no other reasonable accommodation that would allow the employee to perform the essential functions of his current position.<sup>55</sup> Additionally, the employer is not obligated to reassign the disabled employee to the vacant position if he is not qualified for the position at all.<sup>56</sup> A “qualified individual with a disability,” means an individual with a disability “who, with or without a reasonable accommodation, can perform the essential functions of the position.”<sup>57</sup> In sum, an employer may be obligated to reassign a disabled employee to a vacant position if he cannot perform the essential functions of his current position. However, it is unsettled whether the employer is obligated to reassign the disabled employee over a more qualified candidate.

### III. REASSIGNMENT IN THE COURTS

Federal circuits have been split over the scope of the ADA’s reasonable accommodation requirement. There are only a handful of circuits that have dealt with reassignment. Of those that have, not all have dealt directly with a situation where a minimally qualified disabled candidate seeks reassignment over a more qualified candidate, but rather discuss reassignment in the context of seniority systems. The following section will outline the split by discussing the major decisions from the U.S. Supreme Court and the various federal circuits. Section A will discuss the Supreme Court’s leading opinion on reassignment; Section B will discuss the circuits interpreting the ADA to mandate reassignment; Section C will discuss the circuits interpreting the ADA to allow competitive reassignment.

#### A. *The U.S. Supreme Court*

Nearly from the time it was passed, the Supreme Court and federal appellate courts have attempted to grapple with the broad scope of the ADA.<sup>58</sup> Regarding reassignment, the leading Supreme Court case is *US Airways, Inc. v. Barnett*.<sup>59</sup> In *Barnett*, the plaintiff injured his back while working in a cargo-handling position.<sup>60</sup> US Airways had a well-established seniority system, which the plaintiff invoked so as to be temporarily reassigned to a mailroom

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<sup>55</sup> *Id.* at 13-147.

<sup>56</sup> *Id.* at 13-150.

<sup>57</sup> 42 U.S.C. § 12111(8) (2012); Daugherty v. City of El Paso, 56 F.3d 695, 696 (5th Cir. 1995).

<sup>58</sup> See Samuel Issacharoff & Erin Scharff, *Antidiscrimination in Employment: The Simple, the Complex, and the Paradoxical* 19 (N.Y.U. L. & Econ., Working Paper No. 209, 2010).

<sup>59</sup> 535 U.S. 391 (2002).

<sup>60</sup> *Id.* at 394.

position.<sup>61</sup> However, per company policy, US Airways opened the position to bidding for senior employees.<sup>62</sup> Barnett learned that two employees senior to him were going to bid on the vacancy.<sup>63</sup> Barnett requested that the company make an exception to the seniority system to allow him to permanently remain in the mailroom.<sup>64</sup> US Airways allowed Barnett to remain in the mailroom for five months while it contemplated the accommodation, but eventually chose not to make an exception. Barnett was subsequently fired.<sup>65</sup>

US Airways argued that the ADA only required equal treatment of individuals with disabilities, and employers were not required to extend preferential treatment to vacancy applicants.<sup>66</sup> Barnett argued that the statute only required an effective accommodation, which would require the accommodation to meet the needs of the disability, nothing more.<sup>67</sup> Justice Stephen Breyer, writing for the majority, took a cautionary approach, finding that disabled employees were entitled to a preference in employment decisions.<sup>68</sup> On the other hand, the Court found that a reassignment that violated a bona fide seniority system would normally be unreasonable.<sup>69</sup> However, the majority also held that, even though it was ordinarily unreasonable to violate an established seniority system, the plaintiff was still free to show that the requested accommodation was reasonable in the particular facts of the case.<sup>70</sup> Thus, the Court established a two-step inquiry where the plaintiff has the initial burden of showing that an accommodation seems reasonable on its face, whereby the employer would have the burden of establishing that the requested act would create an undue hardship.<sup>71</sup>

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<sup>61</sup> *Id.* The “seniority system was unilaterally imposed by [US Airways] rather than the product of a collective bargaining agreement.” Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 320 (2007).

<sup>62</sup> *Barnett*, 535 U.S. at 394.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 397.

<sup>67</sup> *Id.* at 399.

<sup>68</sup> *See Concannon*, *supra* note 1, at 628.

<sup>69</sup> *Barnett*, 535 U.S. at 403.

<sup>70</sup> *Id.* at 405.

<sup>71</sup> *Id.* at 401–02. For example, in the case of Barnett, he would have the initial burden of showing that allowing him to retain his position in the mailroom would not substantially disrupt the seniority system that was in place, perhaps by showing that the two other employees could obtain similar positions without pushing him out. US Airways would then have the burden of showing that the accommodation would create an undue hardship because it substantially disrupted the seniority system.

In his dissent, Justice Antonin Scalia argued that the ADA did not require a mandatory reassignment to a vacant position. He asserted that the statute only required that the employer not discriminate against the individual “because of the disability of such individual.”<sup>72</sup> Justice Scalia commented that “the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them—those barriers that would not be barriers *but for* the employee’s disability.”<sup>73</sup> In Justice Scalia’s view, workplace barriers eliminated by the ADA “do not include rules and practices that bear no more heavily upon the disabled employee than upon other[]” employees.<sup>74</sup> In the context of *Barnett*, the seniority system burdened the disabled and the non-disabled alike; it was not a barrier because of the disabled individual’s disability.<sup>75</sup> He stated that if the individual was qualified for the position and no one else was seeking the position, he must be granted the transfer.<sup>76</sup> But where there were other persons seeking the position, the ADA did not “envision the elimination of obstacles to the employee’s service in the new position that have nothing to do with his disability.”<sup>77</sup>

While the Court found that reassignments that violated seniority systems would normally be unreasonable, it did not conclude that such reassignments would *always* be unreasonable. Nor did the Court resolve whether mandatory reassignment would be appropriate where there was no seniority system in place. Thus, the question of whether reassignment of a minimally qualified disabled employee over a more qualified individual was left open.

*B. Circuits that Have Construed the ADA To Mandate Reassignment as a Reasonable Accommodation*

The Seventh, Tenth, and D.C. Circuits have interpreted the ADA to mandate reassignment to a vacant position as a reasonable accommodation. The leading cases on this issue for the Tenth and the D.C. Circuits both came before

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<sup>72</sup> *Id.* at 412 (Scalia, J., dissenting) (emphasis added).

<sup>73</sup> *Id.* at 413 (emphasis in original). Justice Scalia outlined several examples to support his assertions. For example, “work stations that [could not] accept an employee’s wheelchair, or an assembly-line process that [would require] long hours of standing” would be workplace barriers that the ADA eliminates in order for the disabled employee to have equal opportunity. *Id.* However, it would not be required for the employer to compensate the disabled employee more than a similarly situated non-disabled employee, even if the higher pay was earmarked for physical therapy. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see also Rebecca Pirus, “Seniority Rules”: *Disabled Employees’ Rights Under the ADA Give Way to More Senior Employees*—U.S. Airways, Inc. v. Barnett, 29 WM. MITCHELL L. REV. 1481, 1508 (2003).

<sup>76</sup> *Barnett*, 535 U.S. at 416.

<sup>77</sup> *Id.*

the Supreme Court ruled on *Barnett*.<sup>78</sup> The Seventh Circuit recently changed its position on the issue in light of the *Barnett* decision and now shares the view of the Tenth and D.C. Circuits.<sup>79</sup>

### 1. The D.C. Circuit

In 1994, Etim Aka (“Aka”) filed a lawsuit in the United States District Court for the District of Columbia alleging violations of the ADA and the ADEA.<sup>80</sup> Aka began working for the defendant, Washington Hospital Center (“WHC”), as an Operating Room Orderly in 1972.<sup>81</sup> These duties included tasks such as “transporting patients and medical supplies to and from WHC’s operating room, [and it] required substantial amounts of heavy lifting and pushing.”<sup>82</sup> In 1991, Aka underwent heart bypass surgery after being admitted to a hospital for heart and circulatory problems.<sup>83</sup>

Aka spent several months in rehabilitation from his surgery and was placed on medical leave of absence by WHC.<sup>84</sup> After his rehabilitation ended, Aka’s doctor gave him permission to return to work, but he was restricted to light or moderate levels of exertion.<sup>85</sup> He requested to be transferred to a position that was compatible with his medical restrictions, but WHC refused, claiming that it was Aka’s responsibility to browse the company’s job vacancy postings and apply for a suitable position.<sup>86</sup> At the time, WHC had a standing collective bargaining agreement (“CBA”) with hospital employees stipulating that hospital employees were to be given preference over non-hospital employees for vacant positions according to their seniority.<sup>87</sup> Aka did as the employer stipulated and applied for several File Clerk positions and for a Central Pharmacy Technician position.<sup>88</sup> Despite his position as a hospital

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<sup>78</sup> See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Center*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc). Though these decisions came out before *Barnett*, they are still representative of the circuits’ positions.

<sup>79</sup> See *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012).

<sup>80</sup> *Aka*, 156 F.3d at 1287.

<sup>81</sup> *Id.* at 1286.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1286–87. Hospital employees were to be given preference over non-hospital employees. Of current hospital employees, those with more seniority were to be given higher preference. However, less senior applicants could be hired if they were more qualified.

<sup>88</sup> *Id.* at 1287.

employee with 20 years of service, Aka was passed over for all of the positions for which he applied.<sup>89</sup>

Aka filed suit, claiming that the hospital violated its duty to reasonably accommodate his disability when it failed to place him in either the Central Pharmacy Technician position or one of the File Clerk positions.<sup>90</sup> The district court concluded that the CBA prevented the hospital from reassigning him outside the normal job application process, but the court of appeals vacated the judgment.<sup>91</sup> Upon rehearing, the D.C. Circuit Court of Appeals, sitting en banc, concluded that the district court erred by granting summary judgment to WHC on the reasonable accommodation claim.<sup>92</sup> The court concluded that the ADA, in some cases, required the employer to reassign a disabled employee as a reasonable accommodation unless there was an undue hardship on the employer.<sup>93</sup>

Responding to dissents from Judge Karen Henderson and Judge Laurence Silberman, the majority found that the word “reassign” within the statutory text must mean something more than allowing a disabled individual to apply for a job on the same basis as non-disabled applicants.<sup>94</sup> The majority also held that Congress could not have intended for the statute to withhold preference to the disabled employee, reasoning that the opposite conclusion would render the statutory language concerning “bumping” redundant.<sup>95</sup> The court conceded that “the ADA’s legislative history [did] warn against preferences for disabled applicants,” but that this prohibition on preferences did not include current employees.<sup>96</sup> The court further concluded that the reassignment provision would be a “nullity” if it did nothing more than put the disabled employee on equal footing with other candidates.<sup>97</sup>

On the other hand, the two dissenting opinions construed the statute differently, citing ADA legislative history in opposition to the majority. Judge Henderson found that WHC had fulfilled its duty to accommodate Aka by giving him the opportunity to apply for the vacancies and giving him

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<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 1286.

<sup>91</sup> *Id.* at 1287–88.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1303.

<sup>94</sup> *Id.* at 1304.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* “If an employee, because of disability, can no longer perform the essential functions of the job that . . . he has held, a transfer to another vacant job . . . may prevent . . . the employer from losing a valuable worker.” H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

<sup>97</sup> *Aka*, 156 F.3d at 1305.

interviews.<sup>98</sup> He concluded that WHC did not discriminate against Aka because of his disability, but rather because the other applicants were more qualified.<sup>99</sup> Judge Silberman concluded that the majority overemphasized the dictionary definition of the word “reassign” and that the majority declined to keep the reasonable accommodation language within the context of the other accommodations listed in the statute.<sup>100</sup> Judge Silberman explained that all of the other accommodations mentioned in the statute regulated the relationship between the employer and the disabled employee with minimal effect on other employees, but the reassignment provision necessarily has a greater impact on other non-disabled employees.<sup>101</sup>

## 2. The Tenth Circuit

One year after the D.C. Circuit laid down its ruling that the ADA may mandate reassignment as a reasonable accommodation, a case arose in the United States District Court for the District of Kansas that did not involve a CBA and forced the court to tackle the issue more directly.<sup>102</sup> In *Smith v. Midland Brake, Inc.*,<sup>103</sup> the Tenth Circuit Court of Appeals also sat en banc to review the previous judgment by the court that held, in part, that a plaintiff was entitled to more than just consideration for a new position in light of a reassignment request.<sup>104</sup>

The plaintiff, Robert Smith, was employed by Midland Brake for nearly seven years in the light assembly department to assemble and test small air valve components of air brakes for large vehicles.<sup>105</sup> In this position, Smith was exposed to various chemicals, solvents, and irritants that led to muscular injuries and chronic dermatitis in his hands.<sup>106</sup> Smith’s physicians restricted his work activities, recommending that he avoid further exposure to contact irritants and ordering him, on occasion, not to work at all for limited periods.<sup>107</sup> Moreover, Smith admitted that his physicians considered him to be permanently disabled, “unfit to work in the light assembly department due to his chronic dermatitis, . . . and that Midland Brake was unable to find [a

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<sup>98</sup> *Id.* at 1311 (Henderson, J., dissenting).

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 1314 (Silberman, J., dissenting).

<sup>101</sup> *Id.* The effect on other employees in the workplace is further expanded upon in Part IV.B of this Note.

<sup>102</sup> *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1166.

<sup>105</sup> *Id.* at 1160.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

suitable accommodation] within the light assembly department that Smith could perform given his physical limitations.”<sup>108</sup> Because it could not find a reasonable accommodation within the light assembly department, Midland Brake terminated Smith.<sup>109</sup>

Smith filed suit under the ADA, claiming Midland Brake failed to reasonably accommodate him, but the district court entered summary judgment in favor of Midland Brake.<sup>110</sup> The court held that Smith was not a qualified individual with a disability because he never provided the employer with a medical release to return to work.<sup>111</sup> The court of appeals affirmed the decision, but reasoned that Smith was not a qualified individual because there was no amount of accommodation that would allow him to perform the existing job.<sup>112</sup> The court then agreed to rehear the ADA claim en banc.

The Tenth Circuit took a similar approach to the D.C. Circuit. The court focused on language defining a qualified individual as one who “can perform the essential functions of the employment position that such individual holds or desires.”<sup>113</sup> The court reasoned that Midland Brake could not limit its consideration of the accommodation to the position Smith currently held, but that it had to consider his qualifications for another position or else the word “desires” would be meaningless within the statute.<sup>114</sup> The panel then cited directly to the D.C. Circuit’s decision in *Aka*, quoting the opinion’s language that reassignment must mean something more than being considered on the same basis as other individuals.<sup>115</sup> The majority specifically rejected the dissent of Judge Paul Joseph Kelly, Jr., who contended that the ADA only required equal treatment for the disabled individual.<sup>116</sup> The majority found this interpretation too narrow, namely because it would undercut the literal meaning of the statute and would render the reassignment provision a “nullity.”<sup>117</sup> Thus, the panel concluded that the employer was required to provide reassignment to a vacant position as a reasonable accommodation, regardless of whether there

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1161 (emphasis omitted) (quoting 42 U.S.C. § 12112(b)(5)(A) (2012)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1164; *see also* *Aka v. Wash. Hosp. Center*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc).

<sup>116</sup> *See Smith*, 180 F.3d at 1164.

<sup>117</sup> *Id.* In both *Aka* and *Midland Brake*, the courts used this language to argue that the reasonable accommodation provision must provide more to the disabled employee than mere consideration of a transfer.

was an individual with superior qualifications who was interested in the job position.<sup>118</sup>

The Tenth Circuit went a step further than *Aka* by stating that the employee had a right to the reassignment if he was qualified and defining what more was required rather than just being considered on equal footing with other non-disabled applicants.<sup>119</sup> The majority read the statute as clearly placing an obligation upon the employer to reassign the disabled employee, regardless of superior candidates, and stated:

[A]n employer discriminates against a qualified individual with a disability if the employer fails to offer a reasonable accommodation. If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.<sup>120</sup>

Judge Kelly's dissent echoed the dissents in *Aka*. Looking at the statute, he concluded that reassignment should not be mandated because the language stipulated that reasonable accommodations "may include" reassignment or other options.<sup>121</sup> He also looked to the legislative history to conclude that Congress could not have intended for the employer to lose some of its discretionary power in hiring decisions.<sup>122</sup> Judge Kelly determined that Congress had made it "abundantly clear" that if a person could "perform the essential functions of the vacant job with or without reasonable accommodation," then the person should be treated equally "without regard to disability, perceived or otherwise."<sup>123</sup> He further stated, "[c]ourts must resist the temptation to 'improve' upon Congress's work."<sup>124</sup> The dissent also touched briefly on the rights of employers explaining, "We should be wary of adopting a reassignment right that unquestionably will affect employer operations and the rights of other employees."<sup>125</sup>

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<sup>118</sup> *Id.* at 1167.

<sup>119</sup> *See* Befort & Donesky, *supra* note 23, at 1068.

<sup>120</sup> *Smith*, 180 F.3d at 1169; Befort & Donesky, *supra* note 23, at 1068 (footnote omitted).

<sup>121</sup> *See Smith*, 180 F.3d at 1180–81 (Kelly, J., dissenting).

<sup>122</sup> *Id.* Judge Kelly cited to the same House Report as did the dissents in *Aka*.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1183. This notion will be further explored in Part IV.



### 3. The Seventh Circuit

The Seventh Circuit only recently held that reassignment is mandated under the ADA.<sup>126</sup> Since 2000, the Seventh Circuit had relied on *EEOC v. Humiston-Keeling, Inc.* as its binding precedent on the matter of reassignment.<sup>127</sup> However, after the Supreme Court's *Barnett* decision, the Seventh Circuit shifted its position in 2012.<sup>128</sup>

In 2000, the Seventh Circuit heard arguments in *EEOC v. Humiston-Keeling, Inc.*<sup>129</sup> The plaintiff, Nancy Cook Houser, alleged that her employer failed to accommodate her tennis elbow condition.<sup>130</sup> Houser worked as a warehouse picker, which required her to carry pharmaceutical products and frequently lift up to five pounds.<sup>131</sup> The employer recognized that it had an obligation to accommodate her disability and made attempts to meet her needs.<sup>132</sup> However, these attempts were futile and Houser subsequently applied for several vacant clerical positions within the company for which she was minimally qualified.<sup>133</sup> She was passed over for these positions in favor of more qualified candidates.<sup>134</sup>

Judge Richard Posner's opinion disagreed with the EEOC's argument that the ADA required an employer to reassign a disabled employee over a more qualified candidate.<sup>135</sup> Posner stressed that Houser's disability "had nothing to do with the office jobs for which she applied" or the employer's decision not to hire her.<sup>136</sup> He also specifically mentioned both *Aka* and *Smith*, distinguishing *Aka* and rejecting *Smith* because it was inconsistent with Seventh Circuit precedent.<sup>137</sup> His major contention was that there was a major difference, "one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for the job . . .

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<sup>126</sup> See Julie Beck, *ADA Requires Reassignment as a Reasonable Accommodation for Disabled Employees: 7th Circuit Reverses Its Own Precedent in EEOC v. United Airlines*, INSIDECOUNSEL (Nov. 28, 2012), <http://www.insidecounsel.com/2012/11/28/ada-requires-reassignment-as-a-reasonable-accommod>.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*; see also *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012).

<sup>129</sup> 227 F.3d 1024 (7th Cir. 2000).

<sup>130</sup> See *id.* at 1026.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The defendant attempted to make an arm sling so that she could carry the products with less stress on her elbow, but she gave up on the sling after only a few hours, leading to questions of whether she gave it a fair shot. *Id.*

<sup>133</sup> *Id.* at 1026–27.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 1029; see also Concannon, *supra* note 1, at 626–27.

<sup>136</sup> *Humiston-Keeling*, 227 F.3d at 1027.

<sup>137</sup> *Id.* at 1028.

and requiring employers to hire [minimally qualified] applicants merely because they are members of [a protected] group.”<sup>138</sup> This, he said, would be “affirmative action with a vengeance.”<sup>139</sup>

Nonetheless, the Seventh Circuit switched gears in 2012 when it decided *EEOC v. United Airlines, Inc.*<sup>140</sup> The plaintiff, Joe Boswell, worked as a mechanic for United Airlines at the San Francisco International Airport for over a decade before he was diagnosed with a brain tumor.<sup>141</sup> When it was determined that he no longer could perform the functions of the mechanic position, Boswell applied for several other vacant positions for which he was minimally qualified.<sup>142</sup> However, he was turned down for all of these positions and was eventually placed on involuntary leave.<sup>143</sup> Even though United Airlines had Reasonable Accommodation Guidelines that gave disabled employees preferential treatment,<sup>144</sup> the EEOC filed suit on behalf of Boswell in San Francisco (the case was transferred to Illinois upon United Airlines’ motion).<sup>145</sup>

The district court granted United Airlines’ motion to dismiss, citing *Humiston-Keeling* as binding precedent.<sup>146</sup> Initially, the court of appeals affirmed the decision of the district court, citing *Humiston-Keeling* and several other Seventh Circuit cases decided after *Barnett*.<sup>147</sup> However, the court of appeals granted a rehearing to decide the question of whether *Humiston-Keeling* and other post-*Barnett* cases were still viable interpretations of the ADA.<sup>148</sup>

Upon rehearing, the Seventh Circuit began its analysis by noting that the courts that relied on *Humiston-Keeling* did not conduct a detailed analysis of that decision’s validity post-*Barnett*.<sup>149</sup> The court relied on the two-step test set out in *Barnett* and the decision’s interpretation that disabled individuals

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<sup>138</sup> *Id.* at 1028–29.

<sup>139</sup> *Id.* at 1029 (emphasis added).

<sup>140</sup> 693 F.3d 760 (7th Cir. 2012).

<sup>141</sup> Concannon, *supra* note 1, at 617.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.* at 616. United Airlines adopted Reasonable Accommodations Guidelines in 2003 to address disabled employees who could no longer perform the essential functions of their current jobs even with an accommodation. The Guidelines stipulated that the disabled employee could submit an unlimited number of applications, the employee was guaranteed an interview, and the employee would receive priority consideration over a similarly qualified candidate; however, the disabled employee was not to be automatically given the position. *United Airlines*, 693 F.3d at 761.

<sup>145</sup> *United Airlines*, 693 F.3d at 761.

<sup>146</sup> *Id.*

<sup>147</sup> Concannon, *supra* note 1, at 618.

<sup>148</sup> *See United Airlines*, 693 F.3d at 760–61.

<sup>149</sup> *Id.* at 761.

were entitled to a preference under the ADA.<sup>150</sup> The court also noted that one of its previous decisions, *Mays v. Principi*,<sup>151</sup> had actually found that *Barnett* “bolster[ed] *Humiston-Keeling* by equating seniority systems with any other normal method of filling vacancies.”<sup>152</sup> However, this court found that *Mays* incorrectly asserted that a best-qualified hiring process was the same as a seniority system.<sup>153</sup> The court supported this conclusion by finding that “[w]hile employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns . . . presented by the violation of a seniority policy.”<sup>154</sup> Thus, in light of its findings, the Seventh Circuit explicitly overruled *Humiston-Keeling* and held that the “ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified.”<sup>155</sup>

#### 4. Policy of Mandating Reassignment as a Reasonable Accommodation

The Seventh, Tenth, and D.C. Circuit Courts’ decisions are rooted in their interpretation that the ADA’s purpose is to provide disabled employees something more than the opportunity to compete with other individuals for a vacant position. This interpretation falls within guidelines issued by the EEOC.<sup>156</sup> The EEOC has taken a strong stance on the issue by explicitly stating in its guidelines that reassignment does not include competing for a job and that reassignment would be of little value if a disabled employee would have to compete for a vacant position.<sup>157</sup> The guidelines further state that an employer must modify its policy if it does not allow any employees to transfer from one position to another in order to satisfy its reasonable accommodation requirement, unless the employer could show that modification to the policy would create an undue hardship.<sup>158</sup>

These circuits have also focused on the meaning of the word “reassign” to find support for mandating reassignment. In *Aka*, the court stated that the

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<sup>150</sup> See *id.* at 762–63.

<sup>151</sup> 301 F.3d 866 (7th Cir. 2002).

<sup>152</sup> *United Airlines*, 693 F.3d at 763–64. As mentioned above, *Barnett* held that violation of established seniority systems would normally be unreasonable in the run of cases. *US Airways, Inc., v. Barnett*, 535 U.S. 391, 403 (2002).

<sup>153</sup> *United Airlines*, 693 F.3d at 764.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 761.

<sup>156</sup> See generally ENFORCEMENT GUIDANCE, *supra* note 47.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

“core word ‘assign’ implies some active effort on the part of the employer.”<sup>159</sup> An employee who applied for and obtains a job elsewhere in the business would not be thought to be reassigned in the normal sense of the word.<sup>160</sup> The courts also relied on the literal reading of the word “reassignment” to find support in their argument that the ADA’s prohibition against preferences for disabled applicants does not apply to existing employees, only to new applicants. These courts found that if Congress had intended for disabled employees to be treated exactly like other applicants, then there would be no need for the statutory language to further explain that employers had no obligation to bump another employee or for the statute to discuss a disabled employee and a disabled job applicant separately.<sup>161</sup> Otherwise, the statute would be redundant.<sup>162</sup>

*C. Circuits that Have Construed the ADA To Allow for Best-Qualified Hiring Practices when Reassigning Disabled Individuals*

Federal circuits that support the employer’s right to impose a merit-based hiring policy include the Eighth, Fifth, and Fourth Circuits. There is also support for merit-based policies to prevail in other circuits, but this Note will focus on the Eighth, Fifth, and Fourth Circuits.<sup>163</sup>

1. The Eighth Circuit

Pam Huber worked for Wal-Mart in Arkansas as a dry grocery order filler when she sustained an injury to her right arm and hand, which prevented her from performing the essential functions of her job.<sup>164</sup> Due to her disability, Huber requested to be reassigned to a router position, which was deemed vacant.<sup>165</sup> Wal-Mart did not agree to automatically reassign Huber to the router position because it had a policy of hiring the most qualified applicant for vacant

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<sup>159</sup> *Aka v. Wash. Hosp. Center*, 156 F.3d 1284, 1304 (D.C. Cir. 1998).

<sup>160</sup> *Id.*

<sup>161</sup> *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999); *Aka*, 156 F.3d at 1304.

<sup>162</sup> *Aka*, 156 F.3d at 1304.

<sup>163</sup> *See Hedrick v. W. Reserve Care Sys. and Forum Health*, 355 F.3d 444 (6th Cir. 2004) (holding that while an employer may have an obligation to reassign an employee to a vacant position for which she is qualified, the ADA does not mandate that she be afforded preferential treatment); *Terrell v. USAIR*, 132 F.3d 621, 627 (11th Cir. 1998) (“We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers.”); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379 (2d Cir. 1996) (“[T]he Fed did not have an affirmative duty to provide [Wernick] with a job for which she was qualified; it only had an obligation to treat her in the same manner that it treated other similarly qualified candidates.”).

<sup>164</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2007).

<sup>165</sup> *Id.*

positions; thus, Huber would have to compete against other candidates for the position.<sup>166</sup> Wal-Mart ultimately filled the position with another, non-disabled candidate, reassigning Huber to a maintenance associate position.<sup>167</sup> Wal-Mart found that Huber was not the most qualified candidate for the job and hired the more qualified candidate to fill the router position.<sup>168</sup> Huber subsequently filed suit in the United States District Court for the Western District of Arkansas alleging that Wal-Mart failed to provide her with a reasonable accommodation by not giving her the router position.<sup>169</sup>

The Eighth Circuit Court of Appeals relied heavily on the Seventh Circuit's decision in *Humiston-Keeling* to determine that Wal-Mart did not have a duty to automatically reassign a disabled employee to a vacant position.<sup>170</sup> The court cited language from *Humiston-Keeling* that decisions based upon the merits of the candidates are not discriminatory and to hold otherwise would convert a non-discrimination statute into an affirmative action statute.<sup>171</sup> The Eighth Circuit also cited to *Barnett* to bolster its decision, focusing on language where the Court held that an employer is normally not required to give a disabled employee higher seniority status in order to retain his position when there is another candidate with higher seniority status.<sup>172</sup>

Thus, the court found that an employer was not required to automatically reassign a disabled employee to a position for which a more qualified candidate was applying.<sup>173</sup> The court concluded that doing so would be affirmative action for the disabled employees, which is not what Congress intended the ADA to provide. The court further held that Wal-Mart did in fact accommodate Huber by reassigning her to a maintenance associate position, supported by earlier decisions that found an employer does not have a duty to reassign the employee to the position of his choice.<sup>174</sup>

## 2. The Fifth Circuit

In an earlier ADA case, Carl Daugherty brought suit against the city of El Paso, Texas, for failing to reassign him to a vacant position when he became an insulin-dependent diabetic.<sup>175</sup> Daugherty was working in a permanent

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 482.

<sup>170</sup> *Id.* at 483.

<sup>171</sup> *See id.*

<sup>172</sup> *Id.* at 484.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995).

position as a part-time bus driver when he was removed from that position due to his diabetes.<sup>176</sup> Daugherty was then placed on leave and was referred to the city's personnel office in order to find another position.<sup>177</sup> The city claimed that it offered Daugherty a toll booth position, but he turned it down because the pay was too low; Daugherty claimed that he was never offered the position.<sup>178</sup>

The court found that the city offered Daugherty several positions, or the opportunity to obtain several positions, but that Daugherty was unwilling to take many of those offers.<sup>179</sup> It was also unclear to what extent Daugherty was qualified for many of the positions that he sought to apply for at the personnel office. The city director of personnel stated that many of the positions that Daugherty wanted to apply for were full-time positions that he was not qualified for or would have required the city to violate its own rules and policies, which would have opened the city up to liability from other employees and candidates.<sup>180</sup>

The Fifth Circuit found that Daugherty's claim failed because he was unable to show that he was treated any differently than any other part-time employee whose job was eliminated.<sup>181</sup> The court cited to the statutory language, emphasizing that the plain language states that a reasonable accommodation "may include" reassignment to a vacant position.<sup>182</sup> The court also relied on a Rehabilitation Act case<sup>183</sup> and analogized that the city was not required to fundamentally alter its policies or programs to accommodate a disabled employee.<sup>184</sup> However, the main thrust of the court's decision rested on the fact that Daugherty was not treated any differently than any other employee who lost his position. The court found that perhaps the city could alter its policies to be more lenient for all employees, but that Daugherty had failed to show that the city's alleged unwillingness to provide him with another job was discriminatory against his disability.<sup>185</sup> The court concluded by explicitly stating that the ADA does not require affirmative action in favor of individuals with disabilities by giving priority to disabled employees in hiring or reassignment over those who are not disabled. The ADA only prohibits

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<sup>176</sup> *Id.* at 696. The city did not have many full-time positions.

<sup>177</sup> *Id.* at 699.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 700.

<sup>182</sup> *Id.* at 698.

<sup>183</sup> The Rehabilitation Act is the primary predecessor to the ADA. The *Daugherty* court relied on *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991), which held that a defendant was not required to fundamentally alter its practices to accommodate a disabled employee.

<sup>184</sup> *Daugherty*, 56 F.3d at 700.

<sup>185</sup> *Id.*

discrimination against qualified individuals with disabilities, “no more and no less.”<sup>186</sup>

### 3. The Fourth Circuit

Like *Barnett, EEOC v. Sara Lee Corp.*<sup>187</sup> arose amidst a dispute over a seniority system. However, the Fourth Circuit supplied some comments that would likely apply in this context. Vanessa Turpin was an employee for Sara Lee in its Florence, South Carolina, plant when she began to suffer from epilepsy.<sup>188</sup> Her condition often affected her sleep patterns and sometimes occurred while she was working, but she was still able to care for her child and continue working after a seizure occurred.<sup>189</sup> However, when Sara Lee shut down its plant in another South Carolina town, it offered those employees the opportunity to transfer to the Florence plant while maintaining their current seniority status.<sup>190</sup> An employee with 20 years of seniority wanted to work during Turpin’s shift, which meant Turpin would have to move to another shift later in the day or night.<sup>191</sup> Sara Lee, in light of the longstanding seniority policy and its doctor’s opinion that moving shifts would not affect Turpin’s sleep patterns,<sup>192</sup> decided not to accommodate Turpin by allowing her to retain her position on the first shift. Turpin subsequently accepted a severance package.<sup>193</sup>

Turpin filed suit, claiming that Sara Lee had failed to reasonably accommodate her. The Fourth Circuit found that she was not disabled within the meaning of the ADA and that even if she was, Sara Lee had not failed in its duty to reasonably accommodate her.<sup>194</sup> The court found that violating a seniority policy would be unreasonable. The court further stated that an employer is not required by the ADA to violate a legitimate, non-discriminatory policy.<sup>195</sup> Here, the court reasoned that violating a legitimate, non-discriminatory policy “tramples on the rights” of other, non-disabled

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<sup>186</sup> *Id.*

<sup>187</sup> 237 F.3d 349 (4th Cir. 2001).

<sup>188</sup> *Id.* at 351.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Turpin attempted to stay on the first shift by producing a note from her doctor that a shift change would significantly affect her sleep patterns and thus, worsen her seizures. *Id.* Sara Lee’s doctor opined that a shift change would not significantly affect her sleep patterns unless she worked on a rotating schedule, which did not seem to be what would happen. *Id.*

<sup>193</sup> *Id.* at 351.

<sup>194</sup> *Id.* at 352–53.

<sup>195</sup> *Id.* at 355.

employees.<sup>196</sup> The court found that the policy was a neutral method of resolving sensitive questions in the workplace and allowed all workers to know the “rules of the game” before any company decisions were made.<sup>197</sup>

Recently, the Fourth Circuit left open the question of whether an employer was obligated to reassign a disabled employee over a more qualified candidate.<sup>198</sup> In *Jackson v. Fujifilm Manufacturing USA Inc.*, Timothy Jackson was hired as a manufacturing technician in a factory that produced photographic paper.<sup>199</sup> Five years later, the employer announced that it was closing Jackson’s factory and that employees could either accept a severance package or opt to remain with the company to be reassigned through the employer’s reassignment policy.<sup>200</sup> Jackson announced to the employer that he had a permanent disability due to a motor vehicle accident in which he was involved 13 years prior,<sup>201</sup> as well as an injury he suffered in 2006.<sup>202</sup> He was reassigned to another position but also applied for several other positions.<sup>203</sup> Jackson did not receive any of the other positions he applied for because the employer decided to hire individuals who were more qualified.<sup>204</sup>

The district court ruled against Jackson and granted the employer’s motion for summary judgment.<sup>205</sup> The court found that Jackson did not produce sufficient evidence that he was actually disabled and that he did not produce sufficient evidence that he was more qualified than the individuals who were hired ahead of him.<sup>206</sup> Upon appeal to the Fourth Circuit Court of Appeals, the court affirmed the district court’s ruling based upon its finding that Jackson failed to show that he was adequately disabled under the ADA.<sup>207</sup> The court reasoned that he did not present sufficient evidence to show that he was substantially limited in a major life activity.<sup>208</sup> Thus, because it dismissed the

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 354–55.

<sup>198</sup> *See Jackson v. Fujifilm Mfg. USA, Inc.*, 447 F. App’x. 515 (4th Cir. 2011).

<sup>199</sup> *Jackson v. Fujifilm Mfg. USA, Inc.*, No. 8:09–1328–RBH–BHH, 2010 WL 5778218, at \*1 (D.S.C. June 18, 2010).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* Jackson told his employer when he was hired that he suffered a fractured hip in a 1991 motor vehicle accident and a fractured femur in a 1993 motor vehicle accident. However, he apparently did not announce that these were permanent impairments until the employer decided to close the factory in 2006.

<sup>202</sup> *Id.* at \*2.

<sup>203</sup> *Id.*

<sup>204</sup> *See id.*

<sup>205</sup> *Id.* at \*10.

<sup>206</sup> *Id.* at \*7–10.

<sup>207</sup> *Jackson v. Fujifilm Mfg. USA, Inc.*, 447 F. App’x. 515 (4th Cir. 2011).

<sup>208</sup> *Id.*



claim based on his failure to show he was disabled under the ADA, the court did not rule upon Jackson's claim that his employer failed to reasonably accommodate him.<sup>209</sup> Subsequently, the Fourth Circuit did not weigh in on the debate of whether an employer is mandated to reassign a minimally qualified disabled employee over a more qualified, non-disabled employee.<sup>210</sup>

#### 4. Policy Arguments Against Mandating Reassignment

The Fourth, Fifth, and Eighth Circuits all touch on the same basic notion that employers should not be forced to violate or disregard legitimate, non-discriminatory policies in order to accommodate a minimally qualified disabled employee. These circuits opine that mandating reassignment in violation of a non-discriminatory policy is essentially affirmative action that would create reverse discrimination against non-disabled employees or applicants. A mandate could also have severe repercussions against the employer from other employees by creating unstable working environments or increasing the likelihood that a lawsuit will be brought against the employer.<sup>211</sup> The courts opine that all workers in a company rely on non-discriminatory policies and the ADA should not force employers to penalize employees free from disability in order to vindicate the rights of disabled workers.<sup>212</sup>

Essentially, these courts focus their arguments around the rights of other employees and the employers, whereas the courts that favor automatic reassignment focus their arguments on the rights of the disabled employee. The former circuits reject the idea that a minimally qualified disabled employee should receive an open position over a more qualified, non-disabled employee solely on the basis of being in a protected class. These circuits have instead adopted the notion that mandating automatic reassignment in the face of a legitimate, non-discriminatory policy would be unreasonable. Citing to legislative history and to the statute, these circuits have found that the ADA only seeks to place disabled persons on the same footing as all other employees or job candidates. As stated in *Sara Lee*, allowing a disabled employee to violate a legitimate, non-discriminatory policy would "convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an

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<sup>209</sup> See *id.*

<sup>210</sup> See *Marshall v. AT&T Mobility*, 793 F. Supp. 2d 761 (D.S.C. 2011) (noting that the Fourth Circuit has not specifically addressed the issue and holding that the defendant's failure to award the plaintiff an open position as an accommodation was not in itself a violation).

<sup>211</sup> See Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863, 871-73 (2003). In *Sara Lee*, the court recognized that in South Carolina, a claim of breach of implied contract based on employer policies was available for third parties.

<sup>212</sup> See *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001).

unreasonable imposition on the employers and coworkers of disabled employees.”<sup>213</sup>

IV. THE ADA SHOULD NOT BE CONSTRUED TO MANDATE EMPLOYERS TO AUTOMATICALLY REASSIGN A MINIMALLY QUALIFIED DISABLED INDIVIDUAL TO A VACANT POSITION OVER A MORE QUALIFIED INDIVIDUAL

The view of the Fifth and Eighth Circuits, which have interpreted the ADA to not mandate reassignment, correctly interpret the statute as only an equal opportunity provider. The legislative history, impact on third parties, and the burden on the employers indicate that Congress did not intend for the statute to force employers to assign preferential treatment to disabled employees. Thus, the ADA should not be construed as mandating reassignment of minimally qualified disabled employees over more qualified individuals.

A. *Legislative History Does Not Indicate that Congress Intended for a Mandate*

The legislative history of the ADA has been cited for support by both sides of this argument. However, interpreting the statute as mandating reassignment misses the mark. In several instances, Congress has made clear that an employer still has discretion to choose who it will hire for a vacant position.<sup>214</sup> The legislative history of the ADA specifically states that Congress did not intend to limit the ability of “covered entities to choose and maintain a qualified workforce.”<sup>215</sup> Moreover, Congress specifically stated that the covered employers do not have an obligation to prefer applicants with disabilities over other applicants on the basis of disability.<sup>216</sup> Congress also stated that the employer’s obligation is to consider applicants without regard to an individual’s disability, or the “individual’s need for a reasonable accommodation.”<sup>217</sup>

While the ADA contemplates employers taking actions in order to put disabled individuals on an equal playing field with other, non-disabled individuals, preferential treatment is not consistent with the fundamental idea of the statute.<sup>218</sup> Several congressmen even spoke of the statute not establishing preferential treatment for disabled individuals during the floor debates. Congressman Steny Hoyer stated that the “bill does not guarantee a job—or

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<sup>213</sup> *Id.* (quoting *Dalton v. Subaru-Izuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

<sup>214</sup> See H.R. REP. NO. 101-485, pt. 3 (1990), reprinted in 1990 U.S.C.C.A.N. 445.

<sup>215</sup> *Id.* at 35–36.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* pt. 2, at 56.

<sup>218</sup> Thomas F. O’Neil, III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 359 (2001).

anything else. It guarantees a level playing field.”<sup>219</sup> Moreover, Congressman Don Edwards stated that the “ADA does not require an employer to hire unqualified persons, nor does it require employers to give preference to persons with disabilities.”<sup>220</sup> In this light, it cannot be said that Congress intended for disabled individuals to be automatically reassigned over more qualified candidates when the employer follows a merit-based hiring policy. Nothing in the legislative history suggests that Congress intended to take away an employer’s ability to implement a legitimate, non-discriminatory policy for choosing the most qualified candidate for a vacant position, even where a person is seeking a reasonable accommodation through reassignment.

The fact that reassignment is meant to be considered as an accommodation of last resort is also indicative that Congress did not intend for mandated reassignment.<sup>221</sup> Congress merely intended for reassignment to be considered as an option for accommodation, and it should only be contemplated when all other accommodations are not possible.<sup>222</sup> The Congressional Committee that drafted the statute commented that a reasonable accommodation *may* include reassignment, not that it was required.<sup>223</sup> The statute does not read that reasonable accommodations “shall include reassignment to a vacant position.”<sup>224</sup> If reassignment, or any of the other proposed accommodations, is mandatory, the words “may include” would essentially be meaningless within the framework of the ADA.<sup>225</sup>

Several courts have attempted to distinguish an existing disabled employee from other applicants to a vacant position,<sup>226</sup> but the statutory language does not support a blanket prohibition. The *Aka* and *Smith* majorities attempted to make this distinction by stating that had Congress intended for disabled employees to be treated like other applicants, there would be no need to explain that bumping another employee out of a position to create a vacancy was not necessary.<sup>227</sup> Essentially, the courts argued that Congress must have intended to confer additional rights to existing employees as opposed to applicants. However, Judge Kelly’s dissent in *Smith* offered lengthy discussion

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<sup>219</sup> Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*, 18 LAW & INEQ. 85, 113 (2000).

<sup>220</sup> *Id.*

<sup>221</sup> Flores, *supra* note 5, at 240–41.

<sup>222</sup> *Id.*

<sup>223</sup> See H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

<sup>224</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1183–84 (10th Cir. 1999) (Kelly, J., dissenting).

<sup>225</sup> *Id.*; Jennifer Beale, *Affirmative Action and Violation of Union Contracts: The EEOC’s New Requirements Under the Americans with Disabilities Act*, 29 CAP. U. L. REV. 811, 823–25 (2002).

<sup>226</sup> See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998); *Smith*, 180 F.3d 1154.

<sup>227</sup> *Aka*, 156 F.3d at 1304.

on this issue. Judge Kelly pointed out that this was not the case because the provision was meant to prevent the employer from imposing blanket bans on reassignment and it prevents an employer from automatically deeming a disabled employee unqualified because of his disability.<sup>228</sup> Moreover, attempting to distinguish between an existing employee and merely an applicant leaves open the question of how an employer should proceed when both candidates are existing employees (as is often the case). Under the *Smith* majority rationale, this creates a catch-22 for the employer.<sup>229</sup>

### B. *Effect on Third Parties*

In the majority opinion of *Barnett*, Justice Breyer alluded to an accommodation being unreasonable because of its effect on third parties, i.e., fellow employees.<sup>230</sup> The Court stated that one way for a plaintiff to show that his requested reassignment was reasonable in the face of a seniority system was to show that coworkers had low expectations of equal treatment under the policy.<sup>231</sup> By mandating reassignment for the disabled employee, the interests of fellow employees are necessarily affected. Any other employee who sought to transfer into the vacant position would feel unfairly slighted because they were not chosen for the position because another candidate was disabled. The ADA was enacted in order for disabled individuals to have an equal opportunity to establish themselves in the American workforce and not to be excluded based upon their disability. The ADA did not set out to disadvantage non-disabled persons.<sup>232</sup> However, if the statute is read to mandate reassignment of disabled individuals to vacant positions over more qualified non-disabled individuals, that is exactly what the Act would do; it would place non-disabled individuals at a disadvantage in certain circumstances.

Some courts have discussed the notion that disruption of the workplace or lowering of employee morale could be sufficient to create an undue hardship.<sup>233</sup> While these courts note that the employee morale would have to be significantly affected for the issue to amount to an undue hardship, it is not difficult to imagine a situation where this would be the case. For example, assume an employer has a vacancy available and the employer has a policy of

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<sup>228</sup> *Smith*, 180 F.3d at 1184 (Kelly, J., dissenting).

<sup>229</sup> This idea will be explored more in Section IV.

<sup>230</sup> *US Airways, Inc., v. Barnett*, 535 U.S. 391, 400–01 (2002).

<sup>231</sup> Sandy Andrikopoulos & Theo E. M. Gould, *Living in Harmony? Reasonable Accommodations, Employee Expectations, and US Airways, Inc. v. Barnett*, 20 HOFSTRA LAB. & EMP. L.J. 345, 359 (2003).

<sup>232</sup> H.R. REP. NO. 101-485, pt. 3 (1990), reprinted in 1990 U.S.C.C.A.N. 445.

<sup>233</sup> See *Barth v. Gelb*, 2 F.3d 1180, 1190 (D.C. Cir. 1993); *Holt v. Olmstead Twp. Bd. of Trustees*, 43 F. Supp. 2d 812, 824 (N.D. Ohio 1998) (quoting *Draper v. U.S. Pipe and Foundry, Co.*, 527 F.2d 515 (6th Cir. 1975)).

hiring the most qualified candidate. It is generally common for employers to post vacancies for all employees to apply if they wish to be considered. For whatever reason, several non-disabled employees put in applications for the vacancy. It can be inferred that for whatever their various reasons are, the candidates each find the vacant position to be better in some way. However, the candidates are all denied the position because an inferior candidate obtained the position based upon his requested accommodation. The non-disabled individuals may still have a job, but the company morale could be so low in the future that it adversely affects the business. Employees could lack incentive to produce and succeed or may have to work harder or longer in order to subsidize for the disabled employee's lower productivity. The employees could become very hostile to the disabled individual, which would affect his performance on the job. The situation could lead to disruption within the workplace that would make it extremely difficult for the business to operate successfully.

To expand upon the previous point, some courts have held that any accommodation that requires co-employees to work harder or longer is unreasonable.<sup>234</sup> For example, assume a disabled employee cannot perform the essential functions of his current position because of a bad back and he seeks reassignment. The employer has a vacant position in its factory packing products. The bulk of the job requires the employee, along with a small team of other employees, to pack the products onto a pallet, though every few hours, the pallet gets full and has to be moved for an empty one to take its place. Normally, the team members take turns pushing the loaded pallet to the loading dock.<sup>235</sup> The disabled employee can pack the products without any assistance, but he cannot push the loaded pallet due to his condition. Under the approach taken by circuits that have found reassignment mandatory, the disabled individual would likely have to be given the position, even over a non-disabled candidate, because the burden on the other employees in the team might be seen as minimal. Those circuits likely would require the non-disabled team members to work harder and longer in order to compensate for the disabled individual's inability to move the palette because it would be seen as a small part of the job.<sup>236</sup>

The above scenario highlights a situation where non-disabled employees might become very disgruntled with the employer, leading to low morale or hostility to the disabled individual because of higher workloads. But

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<sup>234</sup> Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 574 (2013) (citing *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995)).

<sup>235</sup> Porter, *supra* note 234, at 573–74.

<sup>236</sup> See *Miller v. Ill. Dep't of Transp.*, 643 F.3d 190 (7th Cir. 2011) (holding that it was reasonable for members of a team to substitute for the disabled worker where the worker was only unable to perform 3% of the job).

what about a situation where the safety of other employees is put in jeopardy because an employer was forced to transfer a minimally qualified disabled individual over a more qualified, non-disabled person? What if the disabled employee sought reassignment into a position in a chemical factory or a steel production facility where the work is inherently more dangerous? Experience on the job often leads to increased safety precautions by employees, which leads to elevated safety for other employees. It would be detrimental to other employees, and cut against their right to a safe working environment, to force the employer to hire a minimally qualified, less experienced individual.

On the other hand, allowing an employer to maintain a legitimate, non-discriminatory policy of hiring the most qualified candidate based upon the merits of individuals would avoid many of the problems that mandatory reassignment would bring to third parties. An employer's policy to hire the most qualified candidate allows for other employees to develop legitimate expectations in the policy's provisions.<sup>237</sup> Consistent application of these policies promotes fairness and predictability, while also creating incentives within the workplace.<sup>238</sup> Thus, allowing employers to maintain neutral policies allows the employer to preserve a stable working environment. All things equal, an employer would generally not offer a minimally qualified candidate a position when more qualified candidates have applied. Employees would not expect for this to be the case. The ADA prohibits the employer from discriminating against a disabled employee in the terms and conditions of his employment based upon his disability.<sup>239</sup> Yet by mandating that an employer ignore a neutral policy to hire the most qualified candidate, the rights to equal treatment in the terms and conditions of non-disabled employees would be discriminated against because of another person's disability. If, as Congress has stated, the purpose of the reasonable accommodation requirement is to allow for equal employment opportunity, then the rights and interests of non-disabled employees should not be of secondary importance. The rights and interests of the non-disabled and the disabled alike should be equal.<sup>240</sup>

It is clear that Congress intended for both employers and non-disabled employees to bear some burden when it enacted the ADA to allow disabled individuals more opportunity.<sup>241</sup> However, it is unlikely that Congress intended for non-disabled employees to bear such a burden that could affect their own livelihoods. A policy of hiring the most qualified applicant is not

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<sup>237</sup> Befort & Donesky, *supra* note 23, at 1092.

<sup>238</sup> *Id.*

<sup>239</sup> 42 U.S.C. § 12112(a) (2012).

<sup>240</sup> Long, *supra* note 211, at 899.

<sup>241</sup> *See id.*

discriminatory.<sup>242</sup> In today's world, many positions require workers that have undergone certain specialized training, often at great expense to the individual. It would cut against the equal opportunity goals of the ADA for the candidate, disabled or not, with exceptional credentials to be turned away simply because another candidate is unable to perform in his current position. The other candidate has a reason for seeking that position—perhaps it pays more money, perhaps the shift occurs at a more desirable time of the day, or perhaps it would be more challenging and fulfilling for that person—yet he would be turned down for the position only on the basis that another candidate has a disability.<sup>243</sup> Congress intended for the ADA to put disabled individuals on equal footing with non-disabled individuals.<sup>244</sup> The ADA acts as a shield against discrimination for those who are disabled;<sup>245</sup> it should not be used to unreasonably exclude an unprotected group of individuals from opportunity.

### C. *Burden on the Employer Is Unreasonable*

Often, an accommodation will have a relatively minor effect on the operation of the employer's business and will be relatively inexpensive.<sup>246</sup> However, the notion of mandated reassignment to a vacant position over a more qualified candidate combines both financial and administrative aspects that unreasonably burden the employer. The most basic of these burdens is the employer's right to choose and maintain a qualified workforce that it believes will be the most productive and successful for business operations.

Mandating reassignment over a more qualified candidate impinges upon management's overall flexibility and productivity in the workplace.<sup>247</sup> It cuts against the ideal of a free market society by forcing employers to maintain a less economically efficient workforce.<sup>248</sup> Requiring an employer to reassign a disabled employee to a vacant position over a more qualified individual is tantamount to requiring the employer to lower its workplace standards.

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<sup>242</sup> *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007); O'Neil & Reiss, *supra* note 218, at 360.

<sup>243</sup> *See Flores*, *supra* note 5, at 48.

<sup>244</sup> *See Huber*, 486 F.3d at 484.

<sup>245</sup> *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 356 (4th Cir. 2001).

<sup>246</sup> *See generally* Sandra K. Collins & Eric P. Matthews, *Americans with Disability Act: Financial Aspects of Reasonable Accommodation and Undue Hardship*, 39 J. OF HEALTH CARE FINANCE 79 (2012). Accommodations generally will consist of altering work stations or other physical aspects of the workplace that are inexpensive to put in place.

<sup>247</sup> Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 946 (2003).

<sup>248</sup> *See* PETER DAVID BLANCK, *EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH* 212 (2000).

Employers will usually seek out the most qualified candidate for any position that becomes vacant, not simply the first qualified candidate that comes along. Economically, this is common sense. Employers invest in the people that they hire, an investment that they intend will produce dividends for them in the future.<sup>249</sup> It is very likely that by hiring a less qualified individual for a position, disabled or not, the employer will see less return on this investment, thus harming the employer in the short and long term.<sup>250</sup> A less qualified candidate will likely not be as productive, thereby depriving the employer of his expected return on the investment made. This would likely be exacerbated by prolonged tenure in the position by the inferior candidate.<sup>251</sup> Denying the employer the opportunity to hire the most qualified individual deprives it of the ability of highly trained employees who may have more years of experience than the less qualified individuals.<sup>252</sup> Thus, as a matter of sound business principles, an employer should not be required to reassign a less qualified individual over a more qualified individual.

These basic business principles are accentuated in times of economic downturn, especially for smaller businesses that fall within the purview of the ADA. Smaller businesses often struggle to stay afloat during difficult economic conditions and they seek to maintain the most efficient workforce for minimal costs. In a time when the business is struggling to make ends meet, the employer is saddled with a less productive work force that is detrimental not only to the employer, but potentially to other employees if the employer is forced to make further cost reductions. Even in a strong economy, an employer may be compelled to reduce costs in other areas of the business in order to compensate for the lack of production from the less qualified disabled employee. This is unreasonable.

One basic assumption that underlies much of the ADA is that disabled individuals have difficulty obtaining new positions because of their disabilities and many negative stereotypes that accompany them.<sup>253</sup> Proponents of mandatory reassignment reason that the non-disabled individual will have more opportunities to seek other positions.<sup>254</sup> However, lost in this reasoning is the effect that passing over a more qualified candidate has on the employer itself. The employer could potentially lose the non-disabled candidate if he decides to leave the business for perceived unfairness. Due to ADA confidentiality rules,

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<sup>249</sup> See Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 25 (2007).

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> Befort, *supra* note 247, at 946.

<sup>253</sup> H.R. REP. NO. 101-485, pt. 3 (1990), reprinted in 1990 U.S.C.C.A.N. 445.

<sup>254</sup> Befort & Donesky, *supra* note 23, at 1089. This presumption also ignores the increasing specialization of the workforce, which makes it more difficult for non-disabled individuals to move from job to job.



the employer is not allowed to disclose that an employee has a disability or that a more qualified candidate was passed over because of the other person's disability.<sup>255</sup> The mistreated employee might stay in his position, but negative effects on workplace morale could be pervasive, as discussed in Section IV.B. On the other hand, the mistreated employee could also leave the business and pursue other opportunities. The employer would be stuck in a situation where it has lost a highly qualified, highly productive employee while being forced to move forward with a minimally qualified, less productive employee in one position and another vacant position to fill because the former employee quit. Thus, the employer has now been dealt a double blow.

As this situation indicates, an employer must have the ability to set forth legitimate, non-discriminatory policies to maintain a successful business. The employer must be able to set policies to avoid uncertainty and to provide stability within its workplace.<sup>256</sup> Not only do employees have a right and legitimate expectation that company policies will be followed to provide for equal opportunity, so too does the employer that such policies will be followed so that the company will operate smoothly and achieve its goals. An employer should not be forced to make a hiring decision that could potentially increase the likelihood of future litigation against itself. Not only could other employees potentially bring lawsuits against the employer, but the mere fact that a minimally qualified individual has been entrusted with the new position could increase the likelihood of a lawsuit against the employer. In *Humiston-Keeling*, Judge Posner set forth several hypotheticals that highlight this potential conflict.

Posner's first example involved two employees of the same company who were both disabled.<sup>257</sup> In Posner's hypothetical, two disabled employees both applied for a transfer to a vacant position, but the minimally qualified disabled individual, who requested an accommodation, was awarded the position over the more seriously disabled, more qualified individual.<sup>258</sup> The hypothetical attempted to show the contradiction in preferential treatment to disabled individuals when two were competing against each other instead of awarding the position to the most qualified candidate. The employer faces a Hobson's choice between two potential lawsuits.<sup>259</sup> One disabled employee could bring a lawsuit for failing to reasonably accommodate his disability whereas the other disabled employee could potentially bring a lawsuit alleging failure to hire because of his disability. EEOC Guidance states that an employer

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<sup>255</sup> See Flores, *supra* note 5, at 245.

<sup>256</sup> EEOC v. Sara Lee Corp., 237 F.3d 349, 353 (4th Cir. 2001).

<sup>257</sup> EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027 (7th Cir. 2000).

<sup>258</sup> *Id.*

<sup>259</sup> Brief for Society for Human Resources Management as Amicus Curiae Supporting Petitioner at 10, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2001) (No. 00-1250).

may not disclose that an employee is receiving an accommodation because this would usually amount to disclosing that an individual has a disability, which may not be visible.<sup>260</sup> Thus, the rejected employee will likely not know that the employer is attempting to accommodate an individual and will bring suit, forcing the employer to suffer the costs of litigation.<sup>261</sup>

Another example that Judge Posner discussed involved a 29-year-old, white disabled employee and a 62-year-old, non-disabled black woman.<sup>262</sup> If mandatory reassignment is required when both of these individuals are interested in the same position, then the younger, white male is entitled to the position. Posner argued that the government and the EEOC are tasked with protecting both of these individuals because they each belong to protected groups, but mandatory reassignment implies that one protected group is more important than the other.<sup>263</sup> In its amicus brief in support of US Airways in *Barnett*, the Society for Human Resource Management (“SHRM”) referenced Posner’s argument and briefly expanded upon it.<sup>264</sup> SHRM argued that the ADA’s confidentiality requirements bar the employer from divulging information about the disabled employee’s accommodation requirements. Thus, the employer’s unexplained decision to hire a minimally qualified individual over a more qualified individual who had been with the company for years would be seen as arbitrary and unfair.<sup>265</sup> If these perceptions developed in the workplace, they could poison the atmosphere for employees and the employer could face charges of discrimination if non-selected individuals were part of some other protected class.<sup>266</sup> Subsequently, the employer may be exposed to allegations of discriminatory treatment for not providing a reasonable accommodation or, on the other hand, allegations of discriminatory treatment on the basis of another protected characteristic if it turns down the more qualified individual. Requiring an employer to choose between being charged with discrimination based on disability and being charged with discrimination on the basis of another protected trait is unreasonably burdensome on the employer.<sup>267</sup> Allowing the employer to maintain a legitimate, non-discriminatory merit-based policy of hiring the most qualified candidate

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<sup>260</sup> ENFORCEMENT GUIDANCE, *supra* note 47, ¶ 42.

<sup>261</sup> Brief for Society for Human Resources Management as Amicus Curiae Supporting Petitioner, *supra* note 259, at 10.

<sup>262</sup> *Humiston-Keeling*, 227 F.3d at 1027.

<sup>263</sup> *Id.*

<sup>264</sup> Brief for Society for Human Resources Management as Amicus Curiae Supporting Petitioner, *supra* note 259, at 7.

<sup>265</sup> *Id.* at 8–9.

<sup>266</sup> *Id.* at 9.

<sup>267</sup> Flores, *supra* note 5, at 246–47.

alleviates these concerns because it allows the employer to take the protected traits out of the equation.

An employer should not have to worry about such issues. The employer should be able to provide his business operation with the best opportunity to succeed that he can. A businessman should not have to suffer long-term negative consequences by being forced to reassign a minimally qualified individual over a more qualified individual simply because the former has a disability, which could be completely irrelevant to his ability to perform the job. As Judge Posner detailed in *Humiston-Keeling*, “there is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job . . . and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of [a protected] group.”<sup>268</sup> Courts should resist the temptation to improve upon Congress’s work.<sup>269</sup> So long as a disabled person can perform the essential functions of the vacant job, that person should be afforded equal consideration without regard to the disability. Congress has made that clear.<sup>270</sup>

#### D. Refuting Scholarship Supporting Mandated Reassignment

The circuit courts and scholarship that support holding mandated reassignment over a more qualified candidate have rooted their conclusions in congressional statements concerning the need for the legislation. These courts argue that the ADA’s reasonable accommodation requirement must mean something more than simply allowing the disabled employee to compete with other candidates.<sup>271</sup> In essence, these scholars and courts generally argue that the disabled employee should prevail because the consequences of him not obtaining the vacant position are more severe than the non-disabled person not receiving the vacant position and the burdens placed on other employees or employers are relatively minor.<sup>272</sup>

Stephen Befort and Tracey Donesky argued in favor of mandated reassignment in their article *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*<sup>273</sup> They asserted that the ADA’s central purpose was to help disabled individuals participate fully in the American workplace and given the choice between terminating or retaining an already existing employee, the employer should

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<sup>268</sup> EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028–29 (7th Cir. 2000).

<sup>269</sup> Smith v. Midland Brake, Inc., 180 F.3d 1154, 1181 (10th Cir. 1999) (Kelly, J., dissenting).

<sup>270</sup> *Id.*

<sup>271</sup> See *Midland Brake*, 180 F.3d 1154; *Aka v. Wash. Hosp. Center*, 156 F.3d 1284 (D.C. Cir. 1998); EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

<sup>272</sup> See Porter, *supra* note 234; Befort & Donesky, *supra* note 23; Befort, *supra* note 247.

<sup>273</sup> Befort & Donesky, *supra* note 23, at 1087–88.

choose to retain the existing employee.<sup>274</sup> Befort and Donesky also argued that retaining the disabled employee provided a benefit to the employer because he was retaining someone who was already familiar with the intricacies and policies of the employer's business.<sup>275</sup> They asserted that the disabled employee has weightier interests in the position than an outside applicant because of his previous employment and time spent with the employer.<sup>276</sup>

On the other hand, what about the interests of the disabled employee compared to another existing employee who also seeks transfer to the vacant position? Befort and Donesky address this concern, as well as Nicole Buonocore Porter in her article, *Martinizing Title I of the Americans with Disabilities Act*.<sup>277</sup> Befort and Donesky conceded that many of the interests that were at issue when compared to a non-employed applicant disappeared when the disabled employee was competing with a coworker.<sup>278</sup> However, they, along with Porter, concluded that the disabled employee should still be granted preferential treatment because if he did not get the accommodation, he would be out of a job.<sup>279</sup> The other employee, on the other hand, could still remain in his current position, with chances for transfer or promotion later in the future.<sup>280</sup> Porter concluded that giving the disabled employee the reassignment put him on equal footing with other non-disabled employees, not just the ability to compete for the position.<sup>281</sup> Befort and Donesky concluded that the employer benefitted by avoiding violation of the ADA and by retaining the non-disabled, highly qualified individual for future transfer or promotion.<sup>282</sup>

A basic assumption that these scholars and courts make is that the non-disabled candidates, other coworkers, and the employers are only minimally affected by mandated reassignment. However, as the previous sections argue, this assumption is not always accurate. For instance, where a coworker also seeks transfer to the vacant position, he seeks that position for some reason. Perhaps he views it as a better position for his circumstances. But perhaps it is the case that the non-disabled employee cannot continue working in his current position for some reason that is not protected by a statute. Suppose the non-disabled employee is in a situation where he will have to quit if he does not obtain the vacant position. Outside of good faith or loyalty, the employer does not have an obligation to accommodate his need for the vacant position, thus he

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1088.

<sup>277</sup> *Id.* at 1088–89; Porter, *supra* note 234, at 576.

<sup>278</sup> Befort & Donesky, *supra* note 23, at 1088.

<sup>279</sup> *Id.*; Porter, *supra* note 234, at 576.

<sup>280</sup> Porter, *supra* note 234, at 576.

<sup>281</sup> *Id.*

<sup>282</sup> Befort & Donesky, *supra* note 23, at 1089.

would also be out of a job if he does not get the vacant position. Befort, Donesky, and Porter would argue that he would have a better opportunity to find another position than the disabled employee. In theory, this may be true, but in practical terms it may not be. The non-disabled employee could face an equally long road back to gainful employment as the disabled individual. Moreover, other burdens the employees have to undertake are not minor, as highlighted in earlier sections. Anti-discrimination statutes such as the ADA and Title VII were meant to promote equality among all people, regardless of their unalterable characteristics, not put the liberty rights of one person above another.

#### V. THE FOURTH CIRCUIT SHOULD FOLLOW THE EIGHTH CIRCUIT

The Fourth Circuit has yet to weigh in on whether a lesser qualified disabled employee should automatically be reassigned to a vacant position over a more qualified candidate. Though the court made some mention of employer obligations under the ADA in *Sara Lee*, that case was decided in the context of a seniority system. In *Jackson*,<sup>283</sup> the court determined that the plaintiff was not disabled within the meaning of the ADA, and thus did not reach the question of whether he should be reassigned over a more qualified candidate.<sup>284</sup> Thus, in this instance, the Fourth Circuit missed the opportunity to settle this issue within its jurisdiction.

Timothy Jackson's case was a superb opportunity for the Fourth Circuit panel to decide this issue. Jackson had requested to be transferred to several positions, but was not chosen because the company hired more qualified candidates.<sup>285</sup> The case presented the court an opportune time to affirm what it alluded to in *Sara Lee*—that an employer is not obligated to abandon a non-discriminatory policy.<sup>286</sup> *Sara Lee* stated that an employer must be able to treat a disabled employee as it would any other worker when the company operated a legitimate, non-discriminatory policy.<sup>287</sup> Moreover, the district court referenced the language of *Sara Lee* stating that the ADA does not require employers to penalize employees free from disability to vindicate the rights of disabled workers.<sup>288</sup> Thus, the opportunity was present for the court to address the issue directly.

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<sup>283</sup> *Jackson v. Fujifilm Mfg. USA, Inc.*, 447 F. App'x. 515 (4th Cir. 2011).

<sup>284</sup> *Id.*

<sup>285</sup> *Jackson v. Fujifilm Mfg. USA, Inc.*, No. 8:09-1328-RBH-BHH, 2010 WL 5778218, (D.S.C. June 18, 2010).

<sup>286</sup> *EEOC v. Sara Lee, Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Supreme Court Declines to Decide ADA Reassignment Question*, 24 THOMPSON'S ADA COMPLIANCE GUIDE 1, July, 2013, at 12.

<sup>287</sup> *Sara Lee*, 237 F.3d at 355.

<sup>288</sup> *Jackson*, 2010 WL 5778218, at \*7.

The court should have found that an employer is not obligated to transfer a disabled employee over a more qualified non-disabled candidate. This would put the Fourth Circuit in line with the Eighth Circuit's decision in *Huber* and the Fifth Circuit's decision in *Daugherty*. Though *Huber* was influenced by the Seventh Circuit's now overturned decision in *Humiston-Keeling*, the case and the reasoning employed still remain valid. Furthermore, there is support for the proposition that mandatory reassignment is not required in the Second, Sixth, and Eleventh Circuits as well.<sup>289</sup> Likewise, there is also support for non-preferential treatment from the Supreme Court itself in *Barnett*. Justice Breyer specifically referred to the burden imposed upon fellow employees if the seniority policy in question were to be violated.<sup>290</sup> While seniority systems are outside the scope of this Note, the burdens imposed on third party employees by violation of a non-discriminatory hiring or transfer policy are very similar. Moreover, Justice Breyer stated that the ADA requires preferences that are needed "for those with disabilities to obtain the *same* workplace" opportunities that non-disabled individuals enjoy.<sup>291</sup>

Thus, although the Fourth Circuit missed an opportunity in *Jackson*, the court should find that the ADA does not mandate an employer to reassign a disabled employee to a vacant position over a more qualified candidate when it is presented with this question in the future. This is a question that is ripe for settling. At the moment, businesses and employees alike are stuck in the limbo of uncertainty. Employees, both disabled and non-disabled, are uncertain about their rights under the current state of the law. Employers are left uncertain how to handle situations where other accommodations simply have not worked, yet the disabled employee only has the minimal qualifications to succeed. Reassignment of a disabled employee to a vacant position is not a simple accommodation like installing a ramp for an individual confined to a wheelchair or altering a work schedule. It is a major shift in workplace dynamics that alters the status quo in a way that no other accommodation can.<sup>292</sup> As Justice Scalia observed in *Barnett*, other accommodations listed in the ADA require the employer to modify policies or procedures that burden a

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<sup>289</sup> *Supreme Court Declines to Decide ADA Reassignment Question*, *supra* note 286; see *Hedrick v. W. Reserve Care Sys. and Forum Health*, 355 F.3d 444 (6th Cir. 2004) (holding that while an employer may have an obligation to reassign an employee to a vacant position for which she is qualified, the ADA does not mandate that she be afforded preferential treatment); *Terrell v. USAIR*, 132 F.3d 621, 627 (11th Cir. 1998) ("We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers."); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379 (2d Cir. 1996) (stating that an employer did not have an affirmative duty to provide the employee with a job for which she was qualified; it only had an obligation to treat her in the same manner that it treated other similarly qualified candidates).

<sup>290</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002).

<sup>291</sup> *Id.* at 397 (emphasis in original).

<sup>292</sup> Long, *supra* note 211, at 871.

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disabled employee “because of [his or her] disability.”<sup>293</sup> Contrary to this, reassignment may require the employer to modify an existing policy that is in no way related to the individual’s disability.<sup>294</sup> Forcing an employer to alter policies or procedures that are not related to the disabled employee’s impediment goes beyond the scope of the ADA and inherently creates an undue hardship on the employer.

## VI. CONCLUSION

Reassignment as a reasonable accommodation is one of the most controversial and tricky accommodations under the ADA today. The circuits have been divided on the issue for some time and the Seventh Circuit’s recent flip has only fanned the fire. This Note has attempted to outline the issue, discussing the various court decisions that have dealt with the issue. This Note argued that mandatory reassignment of a disabled employee over a more qualified candidate, whether disabled or not, should be considered unreasonable in most circumstances. Merit-based hiring is the most effective employment practice for both the employer and the employees. It is not efficient to force an employer to retain a minimally qualified employee when there is a more qualified candidate for a vacant position. Ignoring stereotypes, eliminating physical barriers to the handicapped, and revising tests with an adverse impact on the disabled are all valid concerns that the ADA seeks to prohibit.<sup>295</sup> They require some costs to be borne by all of society or by particular employers for the benefit of the disabled, but they do not require unlimited generosity.<sup>296</sup> Thus, when it is presented with this issue in the future, the Fourth Circuit should stay in line with its precedent to find that the ADA does not require mandatory reassignment and employers should be permitted to make hiring or transfer decisions based on merit.

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<sup>293</sup> *Barnett*, 535 U.S. at 413; Long, *supra* note 211, at 872.

<sup>294</sup> See Long, *supra* note 211, at 872.

<sup>295</sup> Karlan & Rutherglen, *supra* note 6, at 25–26.

<sup>296</sup> *Id.* at 25.

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