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## QUALIFIED DOES NOT MEAN OVER-QUALIFIED: THE ADA'S ACCOMMODATION OF LAST RESORT SHOULD NOT BE A COMPETITION!

*Dana Ortiz-Tulla\**

“It’s not our disabilities, it’s our abilities that count.”<sup>1</sup>

### I. INTRODUCTION

Laws are enacted for the betterment of society as a whole.<sup>2</sup> One such law is the Americans with Disabilities Act (“ADA”).<sup>3</sup> Congress states in the ADA that its purpose is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>4</sup> Additionally, Congress expresses the need “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>5</sup> The ADA “ensures that the Federal Government plays a central role in enforcing the standards established . . . on behalf of individuals with disabilities.”<sup>6</sup> The federal circuit courts have fallen short of fulfilling the ADA’s purpose in relation to reassignment as a

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<sup>1</sup> *Quotes and a Story*, PEARL BUCK CTR., <https://pearlbuckcenter.com/quotes-and-a-story-on-dis-ability> (last visited Mar. 29, 2021) (quoting Chris Burke).

<sup>2</sup> See Tom Head, *Why We Need Laws to Exist in Society*, THOUGHTCO. (Jan. 16, 2021), <https://www.thoughtco.com/why-laws-exist-721458> (discussing the reasons why laws exist).

<sup>3</sup> 42 U.S.C. § 12101.

<sup>4</sup> § 12101 (b)(1).

<sup>5</sup> § 12101(b)(2).

<sup>6</sup> § 12101(b)(3).

reasonable accommodation.<sup>7</sup> This Note will discuss the need for an unequivocal resolution as to whether an employee with a disability, seeking reassignment to a vacant position as a reasonable accommodation, is forced to compete for the position or whether reassignment is mandatory.

The lack of direction from the Supreme Court has caused a noticeable divide throughout the circuit courts which has led to the unequal treatment of disabled employees. Currently, the Fifth,<sup>8</sup> Eighth,<sup>9</sup> and Eleventh<sup>10</sup> Circuits do not require mandatory reassignment to a vacant position without competition. Conversely, the Seventh,<sup>11</sup> Tenth,<sup>12</sup> and D.C. Circuits<sup>13</sup> hold that reassignment to a vacant position is mandatory even in the face of a legitimate, non-discriminatory hiring policy seeking the most qualified applicant. The Fourth Circuit<sup>14</sup> has recently decided that reassignment in violation of Lowe's merit-based advancement system would not be reasonable.<sup>15</sup>

Part II of this Note will review the ADA, including background, definitions, legislative intent, and Equal Employment Opportunity Commission ("EEOC") guidance. Part III of this Note will discuss the Supreme Court's limited guidance. Part IV will evaluate the Circuit Courts that decided reassignment should require competition including a recent case from the Fourth Circuit. Part V of this Note will examine the Circuit Courts that support mandatory reassignment. Part VI will interpret what qualified means under the ADA and why employers should not use this as a pretext to discriminate against disabled employees. Finally, this Note will consider why reassignment should be mandatory.

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<sup>7</sup> See *infra* notes 8-14 and accompanying text.

<sup>8</sup> Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995).

<sup>9</sup> Huber v. Wal-Mart Stores, 486 F.3d 480 (8th Cir. 2007).

<sup>10</sup> EEOC v. St Joseph's Hosp. Inc., 842 F.3d 1333 (11th Cir. 2016).

<sup>11</sup> EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

<sup>12</sup> Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

<sup>13</sup> Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998).

<sup>14</sup> Elledge v. Lowe's Home Ctrs., LLC, 979 F.3d 1004 (4th Cir. 2020).

<sup>15</sup> *Id.* at 1016.

## II. AMERICANS WITH DISABILITIES ACT

### A. Background and Legislative Intent

Congress intended that the ADA promote equality for disabled Americans by assuring them the opportunity to live independently and with economic self-sufficiency.<sup>16</sup> In furtherance of this goal, the ADA seeks to eliminate discrimination against disabled individuals.<sup>17</sup> Under this statute, a disabled individual is one whose activities are substantially limited by “a physical or mental impairment.”<sup>18</sup>

The ADA prohibits an employer from discriminating against “a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . and privileges of employment.”<sup>19</sup> A qualified individual with a disability is one who can accomplish the essential functions of the job which he or she holds or desires, with or without an accommodation.<sup>20</sup> The term “essential functions” is used to describe fundamental job tasks.<sup>21</sup> Discrimination under the ADA includes not providing reasonable accommodations for a qualified disabled employee’s physical or mental disabilities.<sup>22</sup>

Instead of defining “reasonable accommodations,” the ADA provides a list of examples which may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other

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<sup>16</sup> 42 U.S.C. § 12101(a)(7).

<sup>17</sup> *Id.* (b)(1).

<sup>18</sup> §12102 (1)(A); *see also id.* (2) (describing major life activities).

<sup>19</sup> § 12112(a).

<sup>20</sup> § 12111(8).

<sup>21</sup> H.R. REP. NO. 101-485(II), at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337.

<sup>22</sup> § 12112(b)(5)(A).

similar accommodations for individuals with disabilities.<sup>23</sup>

Under the ADA discrimination may also include denying a disabled qualified employee access to certain opportunities within the company, if the denial is based on a reasonable accommodation request.<sup>24</sup> The ADA requires employers to make reasonable accommodations for disabled employees unless the employer can demonstrate that the accommodation would impose a hardship on the employer.<sup>25</sup> Additionally, the statute defines undue hardship as an action that is significantly difficult to accomplish or a considerable expense.<sup>26</sup>

The ADA requires employers to make reasonable accommodations in order to erase barriers created by a disability.<sup>27</sup> This legislation instructs employers to make decisions based on an individual employee's qualifications, and not on "presumptions as to what a class of individuals with disabilities can or cannot do."<sup>28</sup> Employers are compelled to reasonably accommodate applicants or employees who are "otherwise qualified" for a job.<sup>29</sup> The term "otherwise qualified" is used to describe a disabled person who meets all the criteria for a job, except the criteria that cannot be met due to his or her disability, but may be met if a reasonable accommodation is given.<sup>30</sup>

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<sup>23</sup> § 12111(9).

<sup>24</sup> § 12112 (b)(5)(B).

<sup>25</sup> *Id.* (b)(5)(A).

<sup>26</sup> § 12111 (10)(A); *id.* (B) ("In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include- (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility; (iii) the number of persons employed at such facility; (iv) the effect on expenses and resources, or the impact otherwise on the operation of the facility; (v) the employer's overall financial resources; and (vi) the type of the employer's operation.").

<sup>27</sup> H.R. REP. NO. 101-485(II), *supra* note 21, at 65.

<sup>28</sup> *Id.* at 102.

<sup>29</sup> *Id.* at 64.

<sup>30</sup> *Id.* at 64-65.

### **B. Equal Employment Opportunity Commission Guidance**

The EEOC was vested with enforcement and regulatory authority by the ADA.<sup>31</sup> Although the EEOC's Interpretive Guidance is less than controlling authority, it does "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>32</sup>

When examining reasonable accommodations, EEOC regulations are similar to the ADA prohibitions, stating that employers are required to provide reasonable accommodations unless there is an undue hardship to the employer.<sup>33</sup> Unlike the statute, the EEOC regulations attempt to provide a more meaningful definition of reasonable accommodation, stating that a reasonable accommodation means:

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position, or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges or employment as are enjoyed by its other similarly situated employees without disabilities.<sup>34</sup>

The EEOC regulations also include a non-exhaustive list of reasonable accommodations and add guidance to determine appropriate reasonable accommodations, noting that absent a

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<sup>31</sup> 42 U.S.C. §§ 12116-12117, 12205a.

<sup>32</sup> *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986)).

<sup>33</sup> 29 C.F.R. § 1630.9(a) (2011).

<sup>34</sup> § 1630.2(o)(1).

hardship, employers are required to provide an accommodation for qualified disabled employees.<sup>35</sup>

Additionally, the EEOC Enforcement Guidance attempts to clarify the responsibilities of employers and rights of disabled individuals regarding reasonable accommodation requests.<sup>36</sup> The EEOC's guidance indicates that reasonable accommodations are a "fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities."<sup>37</sup> More specifically, the EEOC guidance elaborates on the accommodation of reassignment.<sup>38</sup> The EEOC guidance states that reassignment as a reasonable accommodation "must be provided" if an employee can no longer carry out the essential function of his or her job with or without an accommodation, unless there is an undue hardship to the employer.<sup>39</sup> The guidance notes that a disabled employee must be qualified, meaning that he or she must meet the "requisite skill, experience, education, and other job-related requirements," and also be able to "perform the essential function of the new position."<sup>40</sup> The EEOC guidance makes sure to specifically point out that an employee "does not need to be the best qualified individual" in order to be reassigned.<sup>41</sup> Additionally, the guidance indicates that reassignment to a vacant position is the reasonable accommodation of "last resort."<sup>42</sup> This accommodation is utilized when employees can no longer carry out the necessary functions of the job they hold.<sup>43</sup> The transfer of a qualified employee to a vacant position may prevent loss of employment and allow the employer to keep a valuable worker, just as legislators intended.<sup>44</sup>

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<sup>35</sup> *Id.* at (2)-(4).

<sup>36</sup> U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act, NO. 915.002 (2002), 2002 WL 31994335.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *See id.* at 20-24.

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 20.

<sup>43</sup> *Id.*

<sup>44</sup> H.R. REP. NO. 101-485(II), *supra* note 21, at 63.

**III. SUPREME COURT DECISION**

The United States Supreme Court supplied some direction for disabled employees requesting a reassignment in *U.S. Airways, Inc. v. Barnett*.<sup>45</sup> Robert Barnett worked as a customer service agent for U.S. Air<sup>46</sup> for ten years.<sup>47</sup> Barnett suffered a back injury when he was working as a cargo handler for U.S. Air in 1990.<sup>48</sup> Once he returned to work, Barnett realized he was unable to perform the physical aspects of his position.<sup>49</sup> Barnett was able to use his seniority to transfer to a position in the mail room.<sup>50</sup> In 1992, Barnett learned that “two employees with greater seniority planned to exercise their seniority right to transfer to the mail room.”<sup>51</sup> This would eliminate Barnett’s mail room position and limit him to cargo area jobs.<sup>52</sup> Barnett requested he be allowed to remain in the mail room as an accommodation and was granted this request for five months while his claim was evaluated.<sup>53</sup> In January of 1993, Barnett was removed from his position in the mail room and placed on leave.<sup>54</sup> Barnett filed a complaint with the EEOC which determined that U.S. Air may have committed discrimination when it denied Barnett’s request for a reasonable accommodation.<sup>55</sup> Barnett sued and the district court granted summary judgment for U.S. Air.<sup>56</sup> Barnett appealed, arguing that a violation of the ADA occurred when U.S. Air failed to extend his mail room reassignment request.<sup>57</sup> The Ninth Circuit reversed the district court decision, stating that

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<sup>45</sup> 535 U.S. 391 (2002).

<sup>46</sup> See Ben Mutzabaugh, *US Airways’ Final Flight Closes Curtain on Another Major Airline*, USA TODAY (Oct. 15, 2015, 12:33 PM) <https://www.usatoday.com/story/todayinthesky/2015/10/16/us-airways-final-flight-american-merger/73922874> (discussing the name change of U.S. Air to U.S. Airways in 1997).

<sup>47</sup> *Barnett v. U.S. Air, Inc.* 228 F.3d 1105, 1108 (9th Cir. 2000) (en banc), *vacated* 535 U.S. 391 (2002).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1109.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



Barnett's accommodation request was reasonable unless the employer could prove an undue hardship.<sup>58</sup> The court held that reassignment, where an employer has a seniority system, requires a fact intensive analysis.<sup>59</sup> The court continued by stating that "[i]f there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees."<sup>60</sup>

U.S. Airways petitioned the Supreme Court for certiorari, asking the Court to decide whether the ADA compels an employer who has an established seniority system to provide a disabled employee with a reassignment as a reasonable accommodation.<sup>61</sup> The Court summarized the parties' interpretation of the ADA when a seniority system is involved.<sup>62</sup> U.S. Airways argued that a violation of a seniority system would always be unreasonable.<sup>63</sup> Barnett protested, stating that a violation of a seniority system could never be a definitive bar to a reasonable accommodation.<sup>64</sup> Barnett conceded that a seniority system violation may show that an accommodation caused an undue hardship to the employer.<sup>65</sup>

The Court began its analysis with U.S. Airways' anti-preference argument.<sup>66</sup> U.S. Airways contended that the ADA does not "require an employer to grant preferential treatment" to disabled employees seeking reasonable accommodations.<sup>67</sup> Rejecting this argument, the Court stated that sometimes preferences will be necessary to achieve the ADA's equal opportunity goal.<sup>68</sup> Acknowledging that any accommodation can be deemed preferential, the Court declared that a difference in treatment which may violate a disability-neutral rule does not, by itself, render an accommodation unreasonable.<sup>69</sup>

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<sup>58</sup> *Id.* at 1122.

<sup>59</sup> *Id.* at 1120.

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

<sup>61</sup> U.S. Airways, Inc. v Barnett, 535 U.S. 391, 396 (2002).

<sup>62</sup> *Id.*

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

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

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

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

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

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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Continuing its analysis, the Court discussed Barnett's claim that a reasonable accommodation should only mean that the accommodation is effective.<sup>70</sup> Barnett attempted to persuade the Court to only consider the "accommodation's ability to meet an individual's disability-related needs, and nothing more."<sup>71</sup> The Court rejected this argument explaining how an effective accommodation may be unreasonable because of its impact on fellow employees.<sup>72</sup>

The Supreme Court then considered whether a disabled employee's request for reassignment as an accommodation would be reasonable in light of an employer's seniority system.<sup>73</sup> The Court held that ordinarily such a request would be unreasonable and therefore "the seniority system will prevail."<sup>74</sup> The Court then proposed a two-step approach which would allow a disabled employee to show that an ordinarily unreasonable accommodation request in light of a seniority system was, in fact, reasonable.<sup>75</sup> The disabled employee would need to show that the accommodation "seems reasonable on its face."<sup>76</sup> Once this occurs, the burden shifts to the employer to demonstrate an undue hardship.<sup>77</sup> If the disabled employee is unable to show the accommodation is reasonable "in the run of cases," the employee may be able to show special circumstances which would warrant a finding of reasonableness due to particular facts of the case.<sup>78</sup> Ultimately, the Court held that ordinarily reassignment is not required under the ADA when it would violate a seniority system.<sup>79</sup>

Unfortunately, no further direction has been given to disabled employees who are seeking reassignment outside of a seniority system.<sup>80</sup> The lack of guidance has caused a noticeable divide amongst the United States Courts of Appeals.<sup>81</sup>

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<sup>70</sup> *Id.* at 399.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 400.

<sup>73</sup> *Id.* at 402.

<sup>74</sup> *Id.* at 394.

<sup>75</sup> *Id.* at 401.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 401-02.

<sup>78</sup> *Id.* at 405.

<sup>79</sup> *Id.* at 406.

<sup>80</sup> *United Airlines, Inc. v. EEOC*, 133 S. Ct. 2734 (2013) (denying certiorari on a case involving reassignment in the face of a best-qualified hiring system).

<sup>81</sup> *See supra* notes 8-14 and accompanying text.

#### IV. CIRCUITS THAT HOLD REASSIGNMENT SHOULD NOT BE MANDATORY

##### A. Fifth Circuit

In *Daugherty v. City of El Paso*,<sup>82</sup> Carl Daugherty was a part-time bus driver for the city of El Paso.<sup>83</sup> While employed, Daugherty was diagnosed with a form of diabetes which made him insulin-dependent.<sup>84</sup> Once the city was made aware of the diagnosis, Daugherty was placed on leave without pay and he was eventually fired.<sup>85</sup> Daugherty sued the city, claiming it violated the ADA by not accommodating his disability.<sup>86</sup> At trial, a jury awarded Daugherty \$5,000 in damages and the city appealed.<sup>87</sup>

In this case, the city argued that Daugherty's diabetes is not considered a disability under the ADA and therefore he is not a "qualified individual with a disability."<sup>88</sup> Daugherty conceded that he was unable to perform the essential parts of his duties as a bus driver after his diabetes diagnosis.<sup>89</sup> However, Daugherty argued that he should have been eligible for reassignment as a reasonable accommodation.<sup>90</sup>

The Fifth Circuit stated that a qualified person with a disability is one who can perform the essential duties of a job which he or she "holds or desires."<sup>91</sup> The court rejected the city's position that "desires" only refers to positions sought by job applicants.<sup>92</sup> Instead, the Fifth Circuit read the statutory language as including employees who become disabled, since the overall purpose of the ADA is to prohibit discrimination during hiring, firing, advancement, and other "privileges of employment."<sup>93</sup>

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<sup>82</sup> 56 F.3d 695 (5th Cir. 1995).

<sup>83</sup> *Id.* at 696.

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

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

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 697.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 699 (quoting 42 U.S.C. § 12111(8)).

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

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

The city offered the governing city charter as evidence to support its employment practices.<sup>94</sup> Although employees who were physically unable to perform their duties were given priority, the city explained that the process for filling vacancies required positions be filled by full-time employees before becoming available to part-time employees.<sup>95</sup> The city surmised that if it were to give a vacant full-time position to Daugherty, it would risk being sued.<sup>96</sup>

Ultimately, the court held it “[does] not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.”<sup>97</sup> Additionally, the court stated the ADA “prohibits employment discrimination against qualified individuals with disabilities, no more and no less.”<sup>98</sup>

### **B. Eighth Circuit**

The Eight Circuit held in *Huber v. Wal-Mart Stores*<sup>99</sup> that an employer may reject a reasonable accommodation request for reassignment, if the accommodation would violate a legitimate nondiscriminatory hiring policy which requires the employer to fill the position with the most qualified candidate.<sup>100</sup> In this case, Pam Huber was a grocery order filler for Wal-Mart.<sup>101</sup> While working, Huber permanently injured her right arm which hindered her ability to perform the essential aspects of her job.<sup>102</sup> Huber requested reassignment to a vacant router position, which was equivalent in pay to her current position, but Wal-Mart denied the transfer.<sup>103</sup> Instead, Wal-Mart required Huber to apply for and compete with other applicants for the position.<sup>104</sup> Even though Huber was qualified for

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

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

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 700.

<sup>98</sup> *Id.*

<sup>99</sup> 486 F.3d 480 (8th Cir. 2007).

<sup>100</sup> *Id.* at 483.

<sup>101</sup> *Id.* at 481.

<sup>102</sup> *Id.*

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

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

the router position, Wal-Mart hired a non-disabled applicant.<sup>105</sup> The parties agreed that although Huber was qualified, she was not the “most qualified candidate” which is why she was passed over for the job.<sup>106</sup> Wal-Mart eventually reassigned Huber to another facility as a maintenance associate which paid less than half of her original wages.<sup>107</sup>

The court considered whether an employer, as an accommodation, is required to give an employee preference in transferring to a position that is vacant, if the employee is not the most qualified person vying for the position.<sup>108</sup> The Eighth Circuit held that “the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”<sup>109</sup> The court reasoned that Huber was not discriminated against when Wal-Mart chose an applicant who had superior qualifications.<sup>110</sup> Ultimately, the court held that Huber “was treated exactly as all other candidates were treated for the Wal-Mart job opening, no worse and no better.”<sup>111</sup>

### C. Eleventh Circuit

In *EEOC v. St Joseph’s Hospital Inc.*,<sup>112</sup> the Eleventh Circuit Court of Appeals decided that an employer was not required to reassign a disabled employee without competition, nor was it required to give a disabled employee preferential treatment.<sup>113</sup> In this case, Leokadia Bryk was working in the psychiatric ward of St. Joseph’s Hospital as a nurse for approximately twenty-one years.<sup>114</sup> In 2002, she was diagnosed with spinal stenosis which caused her to experience back pain.<sup>115</sup> Bryk underwent hip surgery in 2009.<sup>116</sup>

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

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

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

<sup>108</sup> *Id.* at 482.

<sup>109</sup> *Id.* at 483 (footnote omitted).

<sup>110</sup> *Id.* at 484.

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

<sup>112</sup> 842 F.3d 1333 (11th Cir. 2016).

<sup>113</sup> *Id.* at 1345.

<sup>114</sup> *Id.* at 1337.

<sup>115</sup> *Id.* at 1338.

After the surgery, she depended on a cane for support and to alleviate back pain.<sup>117</sup> Bryk continued to work in the hospital's psychiatric ward with her cane until 2011, when she was demoted from Charge Nurse to Clinical Nurse II for violating procedures.<sup>118</sup> During the disciplinary action, the hospital became concerned that patients could use Bryk's cane as a weapon.<sup>119</sup> Bryk was given thirty days to find and apply for another position if she wanted to remain employed.<sup>120</sup> However, Bryk was required to compete with other applicants for any position for which she applied.<sup>121</sup> Although she applied for seven positions, she did not qualify for any position.<sup>122</sup> Bryk freely admitted that certain medical or surgical positions would not be appropriate because she had only worked in psychiatric or drug dependency units for the last twenty-one years.<sup>123</sup>

The Eleventh Circuit began by analyzing whether Bryk was "disabled" under the ADA, and determined, that her physical impairment was limiting enough to deem her disabled.<sup>124</sup> The court also analyzed whether Bryk was a "qualified individual."<sup>125</sup> The ADA defines a "qualified individual" as one who can perform the duties of the position he or she holds or desires.<sup>126</sup> Using this definition, the court found that Bryk was qualified.<sup>127</sup> Once the court determined Bryk was a qualified disabled employee, it analyzed whether the ADA requires reassignment to a vacant position without competition.<sup>128</sup>

The court concluded that "the ADA does not require reassignment without competition for, or preferential treatment of, the disabled."<sup>129</sup> The Eleventh Circuit reached this conclusion by suggesting that the use of the word "may," when referring to

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

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

<sup>124</sup> *Id.* at 1344.

<sup>125</sup> *Id.*

<sup>126</sup> 42 U.S.C. § 12111(8).

<sup>127</sup> *St. Joseph's Hosp.*, 842 F.3d at 1344.

<sup>128</sup> *Id.* at 1345.

<sup>129</sup> *Id.*

reassignment as a possible reasonable accommodation, means that reassignment should not be mandatory.<sup>130</sup> Continuing its analysis, the court used the framework in *Barnett*<sup>131</sup> to examine whether reassignment should be mandatory.<sup>132</sup> The Eleventh Circuit decided that reassignment is not reasonable if it violates an employer's "best-qualified hiring or transfer policy."<sup>133</sup> The court rationalized this decision by stating that "[p]assing over the best-qualified job applicants in favor of less-qualified ones is not [] reasonable."<sup>134</sup> Eventually, the Eleventh Circuit determined that undermining the employer's "best-qualified hiring or transfer policy" would impose a substantial hardship.<sup>135</sup>

#### D. Fourth Circuit

The Fourth Circuit recently decided *Elledge v. Lowe's Home Ctrs., LLC*.<sup>136</sup> In this case, Chuck Elledge began working for Lowe's in 1993.<sup>137</sup> Over the course of his employment, Elledge was promoted multiple times, ultimately becoming a Market Director of Stores.<sup>138</sup> This position required Elledge to oversee dozens of stores, which performed well under his supervision.<sup>139</sup>

In 2014, Elledge had knee replacement surgery on his right knee.<sup>140</sup> He was eventually cleared to return to work but with restrictions.<sup>141</sup> Lowe's complied with the doctor's restrictions and, for a time, allowed Elledge to modify the time he spent walking through the stores.<sup>142</sup> After renewing his accommodations, Lowe's

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<sup>130</sup> *Id.* ("The ADA does not say or imply that reassignment is always reasonable. To the contrary, the use of the word "may" implies just the opposite: that reassignment will be reasonable in some circumstances but not in others.").

<sup>131</sup> See *U.S. Airways, Inc. v Barnett*, 535 U.S. 391, 405 (2002).

<sup>132</sup> *St. Joseph's Hosp.*, 842 F.3d at 1346 (discussing the *Barnett* framework.); see *supra* notes 75-78 and accompanying text.

<sup>133</sup> *St. Joseph's Hosp.*, 842 F.3d at 1346.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 979 F.3d 1004 (4th Cir. 2020).

<sup>137</sup> *Id.* at 1007.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1008.

<sup>142</sup> *Id.*

learned that Elledge would be issued a permanent disability parking placard.<sup>143</sup> Upon hearing this, Lowe's contacted Elledge's doctor and learned that Elledge's restrictions would become permanent.<sup>144</sup> Once this information was confirmed, the Regional Human Resources Director voiced her concerns regarding Elledge's permanent medical restrictions.<sup>145</sup>

Eventually, Elledge was told he would no longer be able to remain the Market Director of Stores.<sup>146</sup> Elledge applied for two director-level positions but was rejected for both under Lowe's succession planning policy.<sup>147</sup> Eventually, Elledge accepted early retirement with a severance package, but later sued claiming ADA violations.<sup>148</sup>

The Fourth Circuit Court of Appeals began its analysis by determining that Elledge was not able to fulfill the essential duties of his current position.<sup>149</sup> Elledge argued that even though he was unable to perform the duties of his job, Lowe's violated the ADA by not reassigning him to a comparable vacant position.<sup>150</sup> The Fourth Circuit described reassignment as a balancing act between the rights of the disabled employee, the employer, and other employees.<sup>151</sup> The court contended that de-emphasizing reassignment allows for a better relationship between disabled and non-disabled employees.<sup>152</sup> The Fourth Circuit reasoned that reassignment would deplete workplace morale if a disabled employee were to disrupt the expectations of those employees who are not disabled.<sup>153</sup> The court analogized Lowe's merit-based advancement system to the seniority system present in *Barnett*.<sup>154</sup> The court concluded that Lowe's practice of consistently identifying and advancing employees, based on a disability neutral merit system, fell within the same principles as the

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

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

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

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1011.

<sup>150</sup> *Id.* at 1013-14.

<sup>151</sup> *Id.* at 1014.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1015-16.



automatic seniority-system in *Barnett*.<sup>155</sup> Ultimately, the Fourth Circuit decided that reassignment in violation of Lowe's advancement policies would not be reasonable.<sup>156</sup>

## V. CIRCUITS THAT SUPPORT MANDATORY REASSIGNMENT TO A VACANT POSITION

### A. Seventh Circuit

#### *i. Pre Barnett Decision*

The significance of the Seventh Circuit Court of Appeals' holding in *EEOC v. United Airlines, Inc.*,<sup>157</sup> requires a discussion of *EEOC v. Humiston-Keeling, Inc.*<sup>158</sup> In *Humiston-Keeling*, Nancy Cook Houser was working in a pharmaceutical products warehouse as a product picker.<sup>159</sup> Houser was involved in a work accident which led to severe tennis elbow, diminishing her ability to lift items with her right arm.<sup>160</sup> The employer originally attempted to accommodate Houser in her current warehouse position by "rigg[ing] an apron" so she could continue to carry items to the conveyor with her left arm.<sup>161</sup> When this accommodation was unsuccessful, Houser was reassigned to a temporary greeter position.<sup>162</sup> Once the temporary position ended, Houser applied for vacant clerical positions within the company.<sup>163</sup> Although qualified, Houser was passed over in favor of other applicants, and was eventually let go.<sup>164</sup>

The Seventh Circuit Court rejected the EEOC's position that an employer is required to reassign a qualified disabled employee, absent an undue hardship.<sup>165</sup> The court reasoned that the EEOC's interpretation would require "employers to give bonus points to

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<sup>155</sup> *Id.* at 1016.

<sup>156</sup> *Id.*

<sup>157</sup> 693 F.3d 760 (7th Cir. 2012).

<sup>158</sup> 227 F.3d 1024 (7th Cir. 2000).

<sup>159</sup> *Id.* at 1026.

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

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1026-27.

<sup>165</sup> *Id.* at 1027.

people with disabilities.”<sup>166</sup> Further, the court rejected the EEOC’s argument that if the reasonable accommodation merely allowed Houser to compete, there would be nothing “left of the duty to reassign a disabled worker.”<sup>167</sup> The court asserted that plenty is left, including the employer’s consideration regarding the feasibility of assigning disabled workers to positions in which their disabilities “will not be an impediment to full performance.”<sup>168</sup> Once the employer determines that reassignment is feasible, then the reasonable accommodation is mandatory, as long as the employer is not required “to turn away a superior applicant.”<sup>169</sup> Ultimately, the Seventh Circuit held that “the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it’s the employer’s consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant.”<sup>170</sup>

*ii. Post Barnett Decision*

In *EEOC v. United Airlines, Inc.*,<sup>171</sup> the EEOC urged the Seventh Circuit Court of Appeals to revise its interpretation of reassignment as a reasonable accommodation.<sup>172</sup> The EEOC contended that the holding in *Barnett* undermines the court’s previous ruling in *Humiston-Keeling*.<sup>173</sup> Further, the EEOC argued that “the ADA requires employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified.”<sup>174</sup>

In this case, the EEOC sued United Airlines in district court, alleging that the company’s reasonable accommodation guidelines violated the ADA.<sup>175</sup> The district court dismissed the case citing the binding precedent in *Humiston-Keeling*, which held that a policy

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

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

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

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

<sup>170</sup> *Id.* at 1029.

<sup>171</sup> 673 F.3d 543 (7th Cir. 2012), *vacated* 693 F.3d 760 (2012).

<sup>172</sup> *Id.* at 543.

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

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

<sup>175</sup> *Id.* at 543-44.

requiring competition for a disabled employee requesting a reasonable accommodation was not a violation of the ADA.<sup>176</sup> EEOC's contention that the *Barnett* decision undermined *Humiston-Keeling*, was also rejected by the district court.<sup>177</sup>

Although the Seventh Circuit believed that the EEOC's interpretation of reassignment under the ADA "may in fact be more supportable," the court stated that overruling a prior decision is "no easy task."<sup>178</sup> The court explained that the EEOC needed to provide a "compelling reason to deviate from precedent," by showing that the court's "established interpretation of the ADA in *Humiston-Keeling* is no longer viable after *Barnett*."<sup>179</sup>

Ultimately, the Seventh Circuit decided that EEOC's arguments were not persuasive enough to show that the decision in *Humiston-Keeling* was no longer good law.<sup>180</sup> However, the court did recommend "*en banc* consideration of the present case since the logic of EEOC's position . . . is persuasive with or without consideration of *Barnett*."<sup>181</sup>

In September of 2012, the Seventh Circuit decided that its holding in *Humiston-Keeling* was no longer valid after *Barnett*.<sup>182</sup> The court held "that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."<sup>183</sup> The court continued by noting that a "best qualified selection policy" is not similar to a "seniority system."<sup>184</sup> The court explained that "[w]hile employers may prefer to hire the best qualified applicant, violation of a best-qualified selection policy" does not create the same concerns and burdens as a violation of a seniority system.<sup>185</sup> Since the Supreme Court has held that reassignment to a vacant position, absent an undue hardship, is

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<sup>176</sup> *Id.* at 544.

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

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

<sup>179</sup> *Id.* at 545-46.

<sup>180</sup> *Id.* at 546.

<sup>181</sup> *Id.* at 546-47.

<sup>182</sup> EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012).

<sup>183</sup> *Id.* at 761.

<sup>184</sup> *Id.* at 764.

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

reasonable, “an employer must implement such a reassignment policy.”<sup>186</sup>

### B. Tenth Circuit

The Tenth Circuit Court of Appeals held in *Smith v. Midland Brake, Inc.*<sup>187</sup> that reassignment to a vacant position “must mean something more than the mere opportunity to apply for a job with the rest of the world.”<sup>188</sup> In this case, Robert Smith worked in the light assembly department for nearly seven years as a tester of valve components for the air brakes of large vehicles.<sup>189</sup> During his employment, Smith developed a chronic skin irritation and muscular injuries from constant contact with chemicals.<sup>190</sup> Smith’s injuries were so severe that his physicians restricted his work activities and recommended that he avoid further exposure to irritants, and at times, ordered him to abstain from work for limited periods.<sup>191</sup> Smith acknowledged that his physician considered him permanently disabled and unfit to continue working in the assembly department.<sup>192</sup> Smith also contended that given his limitations, his employer was incapable of finding him a position in his current department.<sup>193</sup> Midland Brake eventually fired Smith because it was unable to accommodate him in the light assembly department.<sup>194</sup>

Smith sued Midland Brake alleging that it failed to reasonably accommodate him, but the District Court of Kansas entered summary judgment for Midland Brake.<sup>195</sup> The District Court held that Smith “was not a qualified individual with a disability” because he never provided Midland Brake with a medical release which would allow him to return to work.<sup>196</sup> The Court of Appeals affirmed the District Court’s judgment, concluding that “no amount of accommodation

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

<sup>187</sup> 180 F.3d 1154 (10th Cir. 1999) (en banc).

<sup>188</sup> *Id.* at 1164.

<sup>189</sup> *Id.* at 1160.

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

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

<sup>192</sup> *Id.*

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

<sup>194</sup> *Id.*

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

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

could allow Smith to perform his existing job.”<sup>197</sup> The Tenth Circuit agreed to rehear Smith’s ADA claim en banc.<sup>198</sup>

The Tenth Circuit began with a detailed discussion regarding the interpretation of the ADA’s requirements.<sup>199</sup> The court discussed the statutory framework of the ADA, noting that the threshold issue, whether the employee is qualified, must be met.<sup>200</sup> Midland Brake argued that since Smith was unable to perform the essential function of his existing job, he did not meet the definition of qualified.<sup>201</sup> The court disagreed with Midland’s argument, determining that although an individual must be able to “perform the essential function of a job,” that does not mean only his existing job.<sup>202</sup> The ADA’s language includes other jobs the disabled employee “desires” as long as he or she is able to fulfill the duties required by the position, otherwise the word is meaningless.<sup>203</sup> The Tenth Circuit supported this conclusion by examining the definition of reasonable accommodation and suggesting that reassignment to a vacant position, “includes a reassignment from the employee’s current job to one that he or she desires.”<sup>204</sup> Building on this reading of the ADA, the court pointed to the House Committee on Education and Labor report which stated that if a disabled employee can no longer perform the essential functions of the job, “a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker.”<sup>205</sup> Further, the court determined that a qualified employee with a disability is one who can perform the duties of “an appropriate reassignment job within the company, with or without reasonable accommodation, even though he or she cannot perform their existing job no matter how much accommodation is extended.”<sup>206</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1161.

<sup>201</sup> *Id.* (“The ADA defines a ‘qualified individual with a disability’ as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual *holds or desires.*” (emphasis added) (quoting 42 U.S.C. § 1211(8)).

<sup>202</sup> *Id.*

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

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1162.

<sup>206</sup> *Id.*

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The court also addressed the argument in Judge Kelly’s dissenting opinion.<sup>207</sup> Judge Kelly suggested that the ADA only grants the disabled employee equal consideration of their application for the vacant position.<sup>208</sup> The Tenth Circuit found this interpretation too narrow since it would undermine the literal meaning of reassignment and render the statutory language a “nullity.”<sup>209</sup> The court reasoned that reassignment requires an employer to do “something more” than merely allow a disabled employee the opportunity to apply for a vacant position.<sup>210</sup> Additionally, the court pointed out that the ADA already prohibits employers from discriminating against disabled employees, whether they are an outside applicant or one who is seeking reassignment.<sup>211</sup> The Tenth Circuit inferred that if reassignment merely meant that an employer is required to consider an existing disabled employee alongside other applicants, the language would be redundant since those protections are already afforded in the application process.<sup>212</sup>

Further, the court focused on the EEOC Interpretive Guidance to show that merely considering a disabled employee’s application for reassignment would amount to a “hollow promise” because the right to ask for reassignment is not equal to “reassignment itself.”<sup>213</sup> If a disabled employee did not have the right to reassignment, but only had the right to request a reassignment then the:

employer could merely go through the meaningless process of consideration of a disabled employee’s application for reassignment and refuse it in every instance. It would be cold comfort for a disabled employee to know that his or her application was “considered” but that he or she was nevertheless still out of a job—a job to which he or she was otherwise qualified and as to which he or she had a reasonable claim to reassignment.<sup>214</sup>

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<sup>207</sup> *Id.* at 1164.

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

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1164-65.

<sup>213</sup> *Id.* at 1167.

<sup>214</sup> *Id.* at 1167.

Ultimately, the Tenth Circuit concluded that an employee is entitled to reassignment to a vacant position as one of several reasonable accommodations an employer must consider if a disabled employee is unable to perform the essential duties of his or her position.<sup>215</sup>

### C. District of Columbia Circuit

In *Aka v. Washington Hospital Center*,<sup>216</sup> the District of Columbia Circuit Court of Appeals held that an employer is obligated to do more than simply allow disabled employees to apply and compete for a vacant position.<sup>217</sup> The court noted that the ADA's "reference to reassignment would be redundant if permission to apply were all it meant."<sup>218</sup>

Etim Aka worked as an operating room orderly at Washington Hospital Center (WHC) for nineteen years before needing bypass surgery.<sup>219</sup> He spent several months in rehabilitation before receiving permission from his doctor to return to work with a light to moderate duty restriction.<sup>220</sup> Aka asked WHC for a transfer to a compatible job which adhered to his medical restrictions, but they refused to do so.<sup>221</sup> WHC insisted that Aka was responsible for searching the job postings for vacant positions.<sup>222</sup> Aka applied for several positions, but he was passed over for all of them.<sup>223</sup>

Aka sued WHC alleging, among other things, a violation of the ADA by failing to reassign him to a vacant position.<sup>224</sup> The District Court for the District of Columbia granted summary judgment for WHC, but a panel of the D.C. Circuit reversed and

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<sup>215</sup> *Id.*

<sup>216</sup> 156 F.3d 1284 (D.C. Cir. 1998).

<sup>217</sup> *Id.* 1305.

<sup>218</sup> *Id.* at 1304.

<sup>219</sup> *Id.* at 1286.

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

<sup>221</sup> *Id.*

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

<sup>223</sup> *Id.* at 1287.

<sup>224</sup> *Id.*

remanded the reasonable accommodation claim.<sup>225</sup> WHC requested a rehearing of the case en banc.<sup>226</sup>

The D.C. Circuit began its analysis regarding Aka's reassignment claim by addressing whether he was "otherwise qualified."<sup>227</sup> WHC claimed that since Aka was unable to perform his duties as an orderly, the Hospital was not obligated to grant him a reasonable accommodation.<sup>228</sup> The court indicated that WHC misread the statute, determining that a disabled employee is entitled to seek reassignment if he or she can perform the essential duties of the desired job.<sup>229</sup> The D.C. Circuit reasoned that the EEOC guidelines and the legislative history of the ADA "both support this reading."<sup>230</sup> In the end, the court held that WHC is required to reasonably accommodate an employee with a disability unless it can demonstrate an undue hardship.<sup>231</sup>

## VI. USING QUALIFICATION AS A PRETEXT FOR DISCRIMINATION

In general, discrimination against disabled individuals has been well established in employment.<sup>232</sup> Before the enactment of the ADA, misconceptions about persons with disabilities was extremely prevalent.<sup>233</sup> This level of misunderstanding was brought to light when "[e]very government and private study on the issue has shown that employers disfavor hiring persons with disabilities."<sup>234</sup>

### A. Qualified Means Qualified

The courts holding that reassignment should not be mandatory are missing the point of a reasonable accommodation. These courts are analyzing whether an employee should be given preference for a position if he or she is not the most qualified. For example, the

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1288.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1301.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1303.

<sup>232</sup> See H.R. REP. NO. 101-485(II), *supra* note 21, at 28-29. (describing the discrimination faced by individuals with disabilities).

<sup>233</sup> *Id.* at 71.

<sup>234</sup> *Id.* at 71.



Eighth Circuit decided that Wal-Mart did not discriminate against Huber when it declined her reasonable accommodation request.<sup>235</sup> The court's position is that an employer is only required to provide an accommodation that is reasonable and not an accommodation that the employee perceives as ideal.<sup>236</sup> The court's position minimizes Huber's claim because it suggests that this case is no more than a squabble about an employee not receiving her first reassignment choice, when in fact, it is much more than that.

Under the ADA, a qualified disabled employee is one who has the requisite skill to perform the fundamental duties of the job he or she holds or desires.<sup>237</sup> There is no mention of "superior qualifications." In fact, the EEOC's formal regulations specifically prohibit using qualification standards which may tend to exclude individuals with disabilities.<sup>238</sup> Although the language here seems quite plain, some law review authors postulate that being qualified means something more in relation to the reasonable accommodation of reassignment.<sup>239</sup>

In one article, a fictional employer has an opening for a typist, where typing speed is an essential part of the position.<sup>240</sup> The employer has stated that applicants must maintain a minimum typing speed of fifty words-per-minute.<sup>241</sup> The author then states that two people apply for the position, one who types 120 words-per-minute, with flawless accuracy, and one who is disabled typing fifty words per minute, with just above average accuracy.<sup>242</sup> The hypothetical goes on to say that although the one applicant is "more qualified," the position is given to the other applicant based solely on his disability.<sup>243</sup> The author makes sure to specify that the employer has

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<sup>235</sup> Huber v. Wal-Mart Stores, 486 F.3d 480, 484 (8th Cir. 2007).

<sup>236</sup> *Id.* (referring to the holding of Cravens v. Blue Cross & Blue Shield of Kan. City, 214 F.3d 1011, 1019 (8th Cir. 2000)).

<sup>237</sup> 42 U.S.C. §12111(8).

<sup>238</sup> 29 C.F.R. § 1630.10 (2011).

<sup>239</sup> 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* [693 F.3d 760 (7th Cir. 2012)], 52 WASHBURN L. J. 613, 613 (2013); Edward G. Guedes, *Smith v. Midland Brake, Inc. – Writing Affirmative Action into the Americans with Disabilities Act?*, 73 Fla. B. J. 68, 69 (1999).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

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a “bona fide policy of hiring the most-qualified applicant for each available position.”<sup>244</sup>

This hypothetical is misconstruing the meaning of qualified. The ADA does not require a disabled individual to have superior qualifications and flawless accuracy. As previously mentioned, the ADA states that a disabled employee needs to be able to carry out the duties of the job to which he or she wants to transfer.<sup>245</sup> In an attempt to highlight the inaccuracy of a superior qualification standard, the Tenth Circuit states that an employer commits discrimination if it fails to reasonably accommodate a qualified disabled person.<sup>246</sup> The court explains that if a reasonable accommodation cannot keep an employee in an existing job, then reassignment may be necessary as long as the job is vacant, the employee has the necessary qualifications, and the reassignment does not create a burden to the employer.<sup>247</sup> Requiring anything more, such as demanding the employee requesting reassignment “be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.”<sup>248</sup> Essentially, if an employee can perform the duties outlined by an employer, then that employee is qualified. Again, the Tenth Circuit explains:

We have no quarrel with the proposition that an employer, when confronted with two initial job applicants for a typing position, one of whom types 50 words a minute while the other types 75 words a minute, may hire the person with the higher typing speed, notwithstanding the fact that the slower typist has a disability. However, the legislative history clearly distinguishes between the affirmative action of modifying the essential functions of a job (which is not required) and the duty to reassign a disabled person to an existing vacant job, if necessary, to enable the disabled person to keep his or her employment with the company (which is required).<sup>249</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> 42 U.S.C. § 12111(8).

<sup>246</sup> *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1168.

This example provided by the court exemplifies the importance of mandating the reassignment reasonable accommodation for disabled employees. Without mandatory reassignment, disabled employees are forced to compete for positions which they are already qualified for.

No other reasonable accommodation requires the disabled employee to compete for the privilege.<sup>250</sup> An employee requesting a talk-to-text headset as an accommodation does not have to compete in order to stay in his or her current position.<sup>251</sup> Unfortunately, several misguided circuit courts are mandating competition for disabled employees requesting a reassignment.<sup>252</sup>

### **B. Some Preferences Are Needed Despite Disability Neutral Rules**

When read and interpreted carefully, the language of the ADA already supports preferences and at times mandates employers to depart from their neutral policies. For instance, Congress began by prohibiting employers from using any standards or criteria that may have an adverse effect on those with disabilities.<sup>253</sup> This mandatory departure from an employer's already established policies shows that Congress intended extensive reforms in order to afford disabled employees the same opportunities as their non-disabled counterparts.

Regrettably, some courts have misinterpreted the ADA's purpose and disabled employees are once again facing additional obstacles. The Eleventh Circuit's holding in *St. Joseph's Hospital, Inc.* is a good example of an unnecessary hurdle.<sup>254</sup> As previously discussed, the Eleventh Circuit held that "the ADA does not require reassignment without competition for, or preferential treatment of, the disabled."<sup>255</sup> Here, the court decided that it would be unreasonable to require an employer to reassign a disabled employee if it would violate the employer's best-qualified transfer policy.<sup>256</sup>

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<sup>250</sup> See *supra* note 23 and accompanying text.

<sup>251</sup> See H.R. REP. NO. 101-485(II), *supra* note 21 at, 33, 56, 63 (describing typical accommodations which must be provided by employers).

<sup>252</sup> See *supra* notes 8- 10, 14, and accompanying text.

<sup>253</sup> 42 U.S.C. § 12112(b)(3)(A).

<sup>254</sup> *EEOC v. St. Joseph's Hosp. Inc.*, 842 F.3d 1333 (11th Cir. 2016).

<sup>255</sup> *Id.* at 1345.

<sup>256</sup> *Id.* at 1346.

The court mistakenly determined that the ADA only requires equal opportunity and not preferential treatment.<sup>257</sup> This could not be further from the truth.

Several of the reasonable accommodations listed already require employers to provide preferences to disabled employees.<sup>258</sup> For example, employers may be required to modify work schedules, restructure jobs, and adjust training protocols, violating their own neutral policies in order to adhere to the ADA.<sup>259</sup> Even the Supreme Court stated in *Barnett* that “preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.”<sup>260</sup> The Court further explained that contravening “an employer’s disability-neutral rule cannot by itself place the accommodation beyond the Act’s potential reach.”<sup>261</sup> In fact, the Court plainly stated that permitting a disabled worker to violate rules that others must obey does not automatically make an accommodation unreasonable.<sup>262</sup>

### C. Non-disabled Employees and Employers Already Have Protections

Another major concern is that employers and non-disabled employees will be unduly burdened or discriminated against if reassignment were to become mandatory.<sup>263</sup> This is the most baseless concern of all. Employers and non-disabled employees already have several protections including qualification standards,<sup>264</sup> undue hardships,<sup>265</sup> and *Barnett’s* decision regarding seniority systems.<sup>266</sup> Of course, even with several protections in place, courts continue to decide that reassignment requires competition.<sup>267</sup>

In another law review author’s hypothetical, there is an employee who during the course of his employment, suffers an

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<sup>257</sup> *Id.*

<sup>258</sup> *See supra* note 23 and accompanying text.

<sup>259</sup> 42 U.S.C. § 12111(9)(B).

<sup>260</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

<sup>261</sup> *Id.* (explaining how neutral rules would restrict the reasonable accommodation objective).

<sup>262</sup> *Id.* at 398.

<sup>263</sup> *See supra* Part IV.

<sup>264</sup> *See supra* note 20 and accompanying text.

<sup>265</sup> *See supra* notes 25-28 and accompanying text.

<sup>266</sup> *See supra* notes 73-74 and accompanying text.

<sup>267</sup> *See supra* notes 8, 9, 10, 14, and accompanying text.

accident that renders him disabled and incapable of performing the essential functions of his position, with or without an accommodation.<sup>268</sup> There is a vacant position for which the disabled employee is qualified but there is an applicant with more experience who is also interested in the position.<sup>269</sup> The company would rather hire the outside applicant but it reassigns the disabled employee instead.<sup>270</sup> Again, this author's hypothetical involves a disabled employee who is mediocre and only adequately performing.<sup>271</sup> Under the ADA, adequate and mediocre have no meaning in relation to reassignment. A disabled employee is either qualified or not.<sup>272</sup>

The ADA explicitly defines a qualified person with a disability as one who can carry out the essential function of the job.<sup>273</sup> The phrase "essential functions" is included to solidify an employers' control over job requirements for disabled applicants and employees.<sup>274</sup> As long as the "essential functions" are not marginal, the employer can use job descriptions as a method of weeding out underperforming employees.<sup>275</sup>

Additionally, the ADA states "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."<sup>276</sup> This gives employers the ability to produce meaningful job descriptions which allow them to decide what functions are necessary. Disabled employees should not be subjected to a "superior qualification" standard as a means for employers to disqualify them from access to a reasonable accommodation.

As an additional safeguard, employers may show that a reasonable accommodation request would cause an undue

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<sup>268</sup> Edward G. Guedes, *Smith v. Midland Brake, Inc. – Writing Affirmative Action into the Americans with Disabilities Act?*, 73 Fla. B. J. 68, 69 (1999).

<sup>269</sup> *Id.*

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

<sup>271</sup> *Id.*

<sup>272</sup> 42 U.S.C. § 12111(8).

<sup>273</sup> *Id.*

<sup>274</sup> H.R. REP. NO. 101-485(II), *supra* note 21, at 55.

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

<sup>276</sup> 42 U.S.C. § 12111(8).

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hardship.<sup>277</sup> For example, in *Daugherty*, the case involves an established seniority system which, if violated, would cause an undue hardship for the employer.<sup>278</sup> As discussed above, vacant positions were filled by full-time employees before being offered to part-time employees.<sup>279</sup> The Fifth Circuit held that the ADA does not require an employer to give a disabled employee priority in reassignment over a non-disabled employee.<sup>280</sup> The court found that Daugherty's claim failed because he was not "treated differently from any other part-time employee whose job was eliminated."<sup>281</sup> Although the court was correct, at the time, in deciding that Daugherty's claim should fail, the court should have focused on the undue hardship to the employer.<sup>282</sup> Instead, the court included additional unnecessary commentary claiming that the ADA does not require affirmative action for the disabled employee.<sup>283</sup>

Lastly, the *Barnett* two-part test helps employers who have legitimate, non-discriminatory, seniority systems.<sup>284</sup> The *Barnett* decision makes a disabled employee's reassignment request unreasonable if the employer has a legitimate seniority system in place.<sup>285</sup> This shifts the burden to the disabled employee, who must now prove that the reassignment request was reasonable.<sup>286</sup> Only if the disabled employee was successful, would the burden then shift back to the employer to show that the request would cause an undue hardship.<sup>287</sup> This would effectively provide another safeguard for employers faced with reasonable accommodation requests.

## VII. CONCLUSION

As outlined above, it is clear the ADA was enacted to place disabled employees on a level playing field.<sup>288</sup> The ADA is not

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<sup>277</sup> See *supra* note 26 and accompanying text.

<sup>278</sup> *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

<sup>279</sup> *Id.* at 699.

<sup>280</sup> *Id.* at 700.

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

<sup>282</sup> *Id.* at 699.

<sup>283</sup> *Id.* at 700.

<sup>284</sup> See *supra* notes 74-79 and accompanying text.

<sup>285</sup> See *supra* notes 74-79 and accompanying text.

<sup>286</sup> See *supra* notes 74-79 and accompanying text.

<sup>287</sup> See *supra* notes 74-79 and accompanying text.

<sup>288</sup> See *supra* notes 16-30 and accompanying text.

meant to undermine an employer's right to "choose and maintain qualified workers."<sup>289</sup> The statute provides employers with guidance in order to end discrimination against disabled individuals.<sup>290</sup>

Reassignment to a vacant position is called the accommodation of last resort for a reason.<sup>291</sup> At the point of a request for reassignment, the disabled worker and the employer would have already explored other forms of reasonable accommodations<sup>292</sup> and come to the conclusion that they were not feasible. Requiring an employee who is already disabled to compete for the ability to have an accommodation goes against the plain meaning of the statute. No other reasonable accommodation requires the employee to compete, but without some clear direction disabled employees in many regions are required to compete in order to retain employment.

Without mandatory reassignment to a vacant position, the disabled worker will no longer be on a level playing field. In a post-*Barnett*<sup>293</sup> world, the federal circuit courts should take note of *EEOC v. United Airlines, Inc.*, and follow the Seventh Circuits guidance.<sup>294</sup> A most-qualified hiring and transfer policy should not surpass a request for reassignment as a reasonable accommodation, unless the employer can show an undue hardship.<sup>295</sup> Disabled individuals have enough to worry about. They should not have to worry about inconsistent interpretations of the ADA working against them.

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<sup>289</sup> H.R. REP. NO. 101-485(II), *supra* note 21, at 55.

<sup>290</sup> *Id.* at 22.

<sup>291</sup> *See supra* notes 42-44.

<sup>292</sup> *See supra* note 23.

<sup>293</sup> *See supra* notes 45-81.

<sup>294</sup> *See supra* notes 185-189 (discussing the Seventh Circuit holding that the ADA mandates reassignment for disabled employees who are qualified unless the employer can prove an undue hardship).

<sup>295</sup> *See supra* notes 185-189.