Examining the Americans with Disabilities Act's Reassignment Provision Through an Equal Protection Lens

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Introduction

Imagine this fictional situation: Jane Doe is a nurse who has worked for the past five years at Hillstone Hospital. One of the requirements of her job is the ability to move patients and equipment. However, a recent car accident has left Jane with a severely injured back and she's been given a ten-pound lifting restriction by her doctor and will need surgery in the future. For all intents and purposes, she now qualifies as "disabled." Hillstone cannot fire Jane just because her disability inhibits her from performing all aspects for her job. The Americans with Disabilities Act ("ADA") was enacted to protect the employment rights of disabled employees, like Jane. Therefore, Jane's disability status imposes certain duties on Hillstone. Hillstone is obligated to find ways to accommodate her disability so that she may maintain her employment status with the hospital.

After considering various accommodations, such as a modified work schedule, job restructuring, and other adjustments, both Jane and her employer conclude she will be unable to perform the essential functions of her job as a nurse in a way that also meets her lifting restriction. As a last resort, Jane's employer may consider reassigning Jane to a different position within the Hospital. Jane is aware of a comparable position in the Hospital's pharmacy that is currently vacant. Jane meets the requirements and qualifications set out in the job description, so she puts in her application for reassignment. It is the Hospital's policy to fill all open positions with current employees under a merit-based system, which it calls

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a "Best-Qualified Transfer Policy." Jane meets the minimum requirements in the job posting, but a nondisabled employee, Amy, also applies. The transfer would be a promotion for Amy. Amy has worked for the Hospital for two years more than Jane, as well as received higher evaluation scores from her supervisor during their overlapping years. Under the policy, it is clear that Amy is the best applicant for the job. However, for Hillstone's ultimate decision to be lawful, it must consider its obligations to the disabled applicant under the ADA.

Because reassignment to another position is the only way to retain Jane's employment with the Hospital, the employer must decide if the open position should go to Jane automatically, or if it can use its legitimate employer transfer policy as an excuse to transfer another employee to the open position. The outcome would depend largely on the circuit court that governs Hillstone Hospital. If Hillstone is in the Seventh Circuit, for example, Hillstone must set aside its transfer policy and reassign Jane to the vacant position instead of Amy, the better-qualified applicant. Amy would then remain in her current position and need to wait until she can apply for another job opening. The Eighth Circuit, on the other hand, would allow the employer to ignore Jane's disability when making its decision, considering the subjective factors of the "best-qualified" policy. Ultimately, the Eighth Circuit would allow the Hospital to hire Amy and terminate Jane.

This Note discusses the disparate results of the ADA's reassignment provision highlighted in the above hypothetical and suggests a solution to the circuit split. Part I of this Note examines the burgeoning social awareness of discriminatory treatment of disabled employees that underlies the ADA and provides an overview of what constitutes "reasonable accommodation" under the ADA. Particular focus on an employer's duty to reassign a disabled employee will be supported by the Supreme Court's evaluation of the role of preferential treatment. Part II presents the current circuit split and parses through the prevailing arguments for when, if ever, an employer must choose a minimally qualified employee over a more qualified applicant for a position. For the purposes of this Note, this situation will be termed "mandatory reassignment," in which an employer must put aside its existing, facially neutral and non-discriminatory employment policies to reassign a qualified disabled employee to a vacant, equivalent position. Part III addresses accusations that the ADA's mandatory reassignment provision constitutes affirmative action in favor of disabled employees, and considers whether the statute is justifiably safeguarded from the constitutionally based issue.

I. History of the ADA's Enactment and the Supreme Court's

Recognition of the Reassignment Provision.

A. The Call for Reasonable Accommodation

Under the command of the Fourteenth Amendment of the Constitution, all mistreated citizens should be able to turn to the legal system to regain "equal protection under the law."[1] The Constitution, however, only gives the "protected" classification to certain subsets of the population that are more vulnerable to discrimination on the basis of race, color, religion, sex and national origin.[2] However, the list is not exhaustive. The Fourteenth Amendment gives Congress the power to make laws that apply the idea of "equal protection" when evidence indicates that a particular group of people is systematically subject to discrimination.[3] In 1990, Congress acted under Section 5 of the Fourteenth Amendment to enact the ADA, a statute aimed to protect disabled individuals.[4] Congress's action was spurred by findings based on census data, national polls, and other studies that showed disabled individuals were severely disadvantaged socially, vocationally, economically and educationally when compared with the rest of society.[5] Disability discrimination "denie[s] people with disabilities the opportunity to compete *on an equal basis* and to pursue those opportunities for which our free society is justifiably famous."[6] Accordingly, the ADA seeks to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for disabled individuals.[7]

Congress carefully drafted Title I of the ADA to focus on discrimination that disabled individuals suffer in the workplace.[8] Title I

1. U.S. CONST. amend. XIV.

2. *Id.*

3. *Id*. at § 5.

4. ADA disabilities include both mental and physical medical conditions. A condition does not need to be severe or permanent to be a disability. Equal Employment Opportunity Commission ("EEOC") regulations provide a list of conditions that constitute disabilities: deafness, blindness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, Human Immunodeficiency Virus ("HIV") infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Further, it doesn't matter if disability was obtained in or outside of the parameters of employment. H.R. REP. NO. 101-116, pt.4 at 22 (1989).

5. 42 U.S.C. §§ 12101(a)(6)–(7).

6. Americans with Disabilities Act of 1990, § 2(a)(9) (emphasis added).

7. 42 U.S.C. § 12101(a)(7).

8. H.R. REP. NO. 101-485, pt.2 at 1 (1990). "People with disabilities fictionalized as incompetent or helpless are typically denied a chance to prove they can do a job effectively, as well as opportunities for promotion and for the reasonable accommodations they need to perform on par with their peers. Intentionally or unintentionally, fictionalization has the potential effect of

states that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[9] In order to allow disabled individuals to participate on an equal basis with nondisabled individuals, the ADA places an obligation on employers to provide a reasonable accommodation to the "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,"[10] unless the employer can demonstrate "that the accommodation would impose an undue-hardship on the operation of the business."[11]

B. The Reasonable Accommodation Provision of the ADA Provides the Option of Reassignment As a Last Resort

A "reasonable accommodation" is any modification or adjustment to the job that enables the employee with a disability to enjoy an equal employment opportunity.[12] Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there may be workplace barriers that keep other disabled employees from performing jobs that they could do if they had some form of accommodation. These barriers may be physical, such as inaccessible facilities or equipment, or procedural, such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed. Reasonable accommodations must be provided to both disabled job applicants and employees.

Determination of what constitutes a reasonable accommodation is a fact-intensive, case-by-case process.[13] Once an employee notifies the employer about a needed accommodation,[14] the employer and employee are then required to engage in an interactive process, first turning to the nature of the position the disabled employee currently holds, looking to its purpose, tasks, and essential functions.[15] The term "essential functions"

setting workers with disabilities up for unequal treatment." Pamela M. Robert and Sharon L. Harlan, *Mechanisms of Disability Discrimination in Large Bureaucratic Organizations: Ascriptive Inequalities in Workplace*, 47 SOC. Q. 4, 607 (2006).

9. 42 U.S.C. § 12112(a).

10. *See id*. A "qualified individual with a disability" is one who can perform the essential functions of the job with or without a reasonable accommodation. *Id.* § 12111(8).

11. *Id*. § 12112(a).

12. 29 C.F.R. § 1630.2(o)(1)(iii) (2001).

13. *See generally* EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996).

14. 29 C.F.R. app. § 1630.9.

15. 42 U.S.C. § 12112(b)(5)(A).

targets the "fundamental job duties of the employment position," not those that are "marginal" in nature. Therefore, when a qualified disabled individual seeks provision of a reasonable accommodation, the employer should first determine which functions of the position in question are absolutely necessary to adequately perform the job. Written job descriptions prepared before advertising or interviewing applicants for the position are considered as relevant, though not conclusive, evidence. Other relevant factors include the amount of time spent performing the function, consequences of the employee not performing the task, and the experience of past and present employees in the position.

Once the essential functions are determined, the employer should consult with the disabled person regarding the limitations imposed by the disability and possible accommodations to overcome those limitations. Congress provides an illustrative, though non-exhaustive, list of examples of reasonable accommodations:

> (a) making existing facilities used by employees readily accessible to and useable 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 similar accommodations for individuals with disabilities.[16]

To assess what accommodation would be reasonable, an employer may start by considering accommodations that would allow the disabled employee to remain in his or her current position. Options include making existing facilities readily accessible—for example, if an employee requires wheelchair access, the employer could build ramps to make the workspace more navigable. An employer could also make appropriate adjustments to the employee's workspace—for example, if sitting at a desk for a long period of time causes an employee back pain, the employer could accommodate the disability by installing a standing or adjustable desk.

In addition, an employer can consider whether modified work schedules would be a reasonable accommodation by adjusting departure or arrival times, providing periodic breaks, providing additional unpaid leave

16. 42 U.S.C. § 12111(9).

or allowing the employee to use accrued paid leave.[17] For example, if a disabled employee is unable to come to the office due to doctors' appointments, the employer could allow the employee to work remotely or start a workday later to accommodate morning appointments.

The option of job restructuring allows an employer to remove certain non-essential tasks from a disabled employee's work requirements. The employer may reallocate or redistribute the marginal functions of a job by exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal job functions performed by other employees that the disabled individual can perform. For example, if there are two secretaries and one has a speech impairment, and speaking on the phone is a marginal job function, the secretary with the speech impairment could take on the filing of the other secretary in exchange for the non-speech impaired secretary answering both phones.

Reassignment may be used as a last resort.[18] However, the scope of the employer's duty to make such an accommodation has been subject to substantial debate. Though the ADA does not explicitly state the parameters for "reassignment,"[19] the EEOC has provided guidelines for its application. The EEOC takes the position that when an employee is unable to perform the essential functions of his or her current position,[20] either with or without an accommodation, the employer must consider reassignment as a reasonable accommodation. When reassignment is deemed necessary, the disabled employee first has the burden to "show that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases."[21] Then, an employer must reassign an individual to a *vacant*, *equivalent* position that is *equivalent* as long as the employee is *qualified* for the position—unless the employer can prove the reassignment would prove an undue hardship.[22] Each emphasized term will be defined in turn:

17. *Id.*; *see, e.g.*, Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172 (1st Cir. 1998) (holding that a modified schedule is a form of reasonable accommodation).

18. *See* H.R.REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.").

19. *See, e.g.*, Carlos S. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 953 (2004) (recognizing the controversy surrounding the reassignment provision and distinguishing reasonable accommodation from affirmative action).

20. The term "reassignment" implies the presence of an existing job that the person holds, such that the person must therefore be an existing employee, not a job applicant.

21. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002).

22. EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996).

To be "vacant," the reassignment position must be either currently available or will become available within a reasonable amount of time.[23] The employer may determine, on a case-by-case basis, whether an occupied position will become available in a short amount of time, and will be considered vacant if the employer has posted a notice or announcement seeking applications for that position.[24]

To be "equivalent," the reassignment position must offer the disabled employee opportunities comparable to the previous position.[25] The position may be comparable in various factors such as pay, status, benefits, geographical location, and opportunities for advancement.[26] Because the core purpose of the ADA is to enable an employee with a disability to enjoy equal benefits and privileges of employment,[27] it is not enough for the previous and reassignment position to have similar pay. For example, in the Ninth Circuit case *Cripe v. City of San Jose*,[28] a disabled police officer was unable to perform in his previous capacity, and was reassigned to a position with "degrading conditions" that did not offer the same opportunities for promotion, despite having comparable salaries and benefits.[29] The court held the reassignment violated the ADA, because the reassignment position was not "equivalent."[30]

To be "qualified" for the reassignment position, an employee must be able to satisfy the requisite skill, experience, education, and other job-related requirements of the position, and be able to perform the essential functions of the new position, with or without reasonable accommodation.[31] Though there is no obligation for the employer to assist the individual to become qualified, an employer must provide training that is normally provided to anyone hired for or transferred to the position.[32]

Once an accommodation, such as reassignment, is determined to be reasonable on its face, the analysis then turns to whether the

23. *Id.*

24. *Id.*

25. "Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices of facilities." Ruth Colker, *The Law of Disability Discrimination Handbook: Statutes and Regulatory Guidance* 127, (7th ed., 2011).

26. 29 C.F.R. § 1630.2(o) (2014); *see also* Norville v. Staten Island Univ. Hosp., 196 F.3d 89 (2d Cir. 1999).

27. 29 C.F.R . app. § 1630.2(o).

28. Cripe v. Cty. of San Jose, 261 F.3d 877, 893 (9th Cir. 2001).

29. *Id*. at 883.

30. *Id*. at 881.

31. 29 C.F.R. § 1630.2(m); *see, e.g.*, Fenney v. Dakota, Minn. & Eastern R. Co., 327 F.3d 707, 712 (8th Cir. 2003).

32. *Id.*

accommodation would pose an "undue hardship." To ensure the "full participation, independent living, and economic self-sufficiency" of disabled individuals, the ADA places the costs of accommodation on the employer.[33] Therefore, it is the employer's burden to prove undue hardship as a defense to an otherwise reasonable accommodation.

The inquiry into whether an undue hardship exists is a fact-intensive analysis of economic factors listed in the statute:

> (i) the nature and cost of the accommodation needed under this chapter;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[34]

An undue hardship is generally defined as "an action requiring significant difficulty or expense" or that would be substantially disruptive or would fundamentally alter the nature or operation of the business.[35] When determining whether an accommodation would constitute an undue hardship, a court could consider factors including the nature and cost of the accommodation at issue, the overall financial resources, size and impact of the accommodation on the facility involved and any applicable parent entity.[36] Thus, a large corporation may be required to make an accommodation that would be deemed unreasonable for a smaller business. Generally, only the *employer's* net costs are to be considered when

33. 42 U.S.C. §12101(a)(8); *see, e.g.*, EEOC v. Humison-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000).

34. *Id*. § 12111(10).

35. *Id*.

36. *See id*. § 12112(b)(5)(A); 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) ("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.").

determining whether provision of an accommodation would create an undue hardship, not the opportunity costs on other employees.

The standard for proving undue burden is high, such that the employer must bear more than a de minimis cost in accommodating a disabled employee.[37] For example, if the reassignment might "slow the employer's business or require the employer to hire outside employees to do the work, the accommodation comes at more than de minimis cost to the employer."[38] To mitigate against a potential undue burden, the employee may seek cost-sharing alternatives. Even if a particular reasonable accommodation would result in undue hardship, the employer must pay for the portion of the accommodation that would not cause an undue hardship so long as the employee or other source can pay for the remainder of the cost of accommodation.[39]

C. Potential Conflict Between "Neutral" Employer Policies and the Reassignment Provision

A significant part of the debate over the scope of reassignment hinges on an employer's choice to use company policies that limit the employee's right to switch jobs. Such policies include "best-qualified" merit-based transfer policies and seniority systems. The policies are considered to be "neutral" because they do not facially distinguish between employees based on disability.[40] Tension between the ADA and an employer's right to dictate the way it conducts business arises when a reassignment would conflict with the established company policy. Employees argue that employers must prove an undue hardship in order to overcome the ADA's reasonable accommodation mandate requiring employers to make modifications or exceptions to the policies.[41] Employers, on the other hand, argue there is no need to prove undue hardship in the face of a "neutral" policy.[42]

The legislative history of the ADA indicates seniority systems "may be considered as a factor" in determining whether a requested reassignment

37. H.R. REP. NO. 101-485, pt. 2., at 68 (1990); S. REP. NO. 101-116 at 36 (1989); *cf. Humison-Keeling, Inc.*, 227 F.3d at 1028 (conceding that "[i]t is true that antidiscrimination statutes impose costs on employers").

38. Muller v. Hotsy Corp., 917 F. Supp. 1389, 1416 (N.D. Iowa 1996).

39. H.R. REP. NO. 101-116, at 37 (1989).

40. Cheryl L. Anderson, *"Neural" Employer Policies and the ADA: The Implications of* U.S. Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 11 (2002).

41. *See, e.g.*, *Humiston-Keeling, Inc.,* 227 F.3d at 1027 (arguing on employee's behalf that an employer was required to reassign an employee despite "neutral" policy requiring competitive selection unless the employer could show the reassignment posed an undue hardship).

42. *See, e.g.*, Huber v. Wal-Mart, 486 F.3d 480 (8th Cir. 2007).

is a reasonable accommodation.[43] The Supreme Court made explicit that even the "neutral" seniority policy is not a determinative factor or a per se bar to reassignment accommodation.[44]

1. The Supreme Court's Precedent Dictates That "Reassignment" Requires Preferential Treatment.

The Supreme Court, for the first and only time, addressed the scope of the reassignment provision of the ADA in *U.S. Airways v. Barnett*.[45] The employer U.S. Airways enforced a well-established seniority system, electing the most senior employee bidding on a position to be transferred.[46] After ten years of employment, Barnett, an employee, became disabled after injuring his back while working in a cargo-handling position.[47] U.S. Airways temporarily allowed Barnett to utilize his seniority and transfer to a less physically demanding open position in the mailroom.[48] When U.S. Airways later decided to open the disabled employee's position to seniority bidding, several coworkers with greater seniority than Barnett applied.[49] Barnett requested to stay in his new position.[50] U.S. Airways contemplated the request for five months, but ultimately could not grant this request under the company's seniority system and fired Barnett. Barnett sued under the ADA, alleging that U.S. Airways did not provide a reasonable accommodation.

In its analysis, the Supreme Court looked to Congress's intent for the ADA's reassignment provision and boundaries of its application. The *Barnett* Court used the two-part test that governs reassignments under the ADA. First, the test requires the employee to prove that the type of accommodation sought seems ordinarily reasonable. Then, if the employee proves that the accommodation does seem ordinarily reasonable, the employer can only overcome the reassignment obligation by showing "special circumstances"—typically case specific—that demonstrate the accommodation would pose an "undue hardship" in the context of the employer's operations.[51] Each prong will be discussed, in turn.

43. *See* H.R. REP. NO. 101-485, at 63 (1990) (noting that if a collective bargaining agreement reserves certain jobs based on seniority, this may be considered as a factor in determining whether reassignment of an employee with less seniority is a reasonable accommodation).

44. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 407 (2002).

45. *Id.* at 391.

46. *Id.* at 394.

47. *Id.*

48. *Id*.

49. *Id*.

50. *Id*.

51. *Id.* at 405.

U.S. Airways argued that requiring an employer to violate a disability-neutral rule would give the employee with a disability a preference above nondisabled employees, and therefore was a valid reason to deny accommodation.[52] The United States Supreme Court disagreed.[53] Because the ultimate goal under disability law is to provide disabled individuals with equality of opportunity, the Supreme Court found preferential treatment is a legitimate and necessary component of reasonable accommodation law.[54] Justice Breyer noted that the ADA inherently expects neutral rules to be modified by turning to the definition of "accommodation."[55] By definition, the very word "accommodation" requires an employer to treat a disabled employee differently, i.e., preferentially.[56] Therefore in order to provide disabled employees with preference, employers must treat disabled employees differently from nondisabled employees because disabled individuals are systemically disadvantaged.[57]

Under the ADA, the employer cannot simply disregard the protected trait and treat the employee with that trait in the same way that the employer treats all other employees because the disabled employee is *already* not similarly situated to other employees.[58] The ADA recognizes that an accommodation is often required *in order* for an employee with a disability to be similarly situated to others.[59] The Supreme Court found that providing preferential treatment in order to reasonably accommodate a disabled employee is consistent with congressional intent and "cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[60] Moreover, neutral office assignment rules without the application of preference would not accomplish the "intended objective."[61]

Accordingly, the Supreme Court found that Barnett's request for reassignment satisfied the first prong of the test because it was reasonable on its face, even if it required providing Barnett preferential treatment over

52. *Id*. at 398.

53. Justice O'Connor's belief in a fact-specific inquiry regarding contractual enforceability suggests she thereby agreed that a disability-neutral rule does not preclude an accommodation request. *See id.* at 1526 (O'Connor, J., concurring).

54. Congress recognized that discrimination against individuals with disabilities results from action as well as inaction. H.R. REP. NO. 101-485 pt. 2 at 29; *see also* Ball, *supra* note 19, at 990.

55. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

56. *Id*.

57. *Id.*

58. Ball, *supra* note 19, at 990.

59. *Id.*

60. *Barnett*, 535 U.S. at 398 (emphasis in original).

61. *Id.*

other employees who desired the same position. In so finding, the Supreme Court established that preferential treatment is inherent in the proper application of the ADA.

2. The Seniority System Exception Has a Narrow Application.

After finding that preferential treatment is inherent in the ADA, the Supreme Court turned to whether an employer could be excused from offering the facially reasonable reassignment. Though the Supreme Court did not find that Barnett's request would pose a high financial burden on U.S. Airways, the Court acknowledged U.S. Airways' argument that the reassignment would be unreasonable because the reassignment conflicted with the company's seniority system. The Court held that generally, it is not "reasonable accommodation" if an employer would be required to violate a unilaterally imposed *seniority system* in order to reassign a disabled employee to a vacant position.[62] The Supreme Court explained the underlying reason for the seniority system exception as recognizing objective elements and social elements such as uniform treatment and management of expectations of all employees.[63] The Court reasoned that employees' reliance on a fair, uniform application of a seniority system created job security and opportunities for "steady and predictable advancement based on objective standards."[64] The Court then went on to conclude the expectations created in a seniority system are comparable to property rights.[65] The idea that seniority systems "encourage employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefit in later years."[66]

Nonetheless, a seniority system is not a per se bar on the reasonable accommodation provision. If a requested accommodation involving a particular job assignment would violate rules of the seniority system, the seniority system will typically trump the reassignment *unless* the employee presents evidence of special circumstances surrounding the particular case that demonstrate assignment is nonetheless reasonable.[67] Special circumstances include situations where an employer unilaterally changes the reassignment systems with frequency or the seniority system contains

62. *Id.* at 391.

63. *Id.* at 404 ("[T]he typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment.").

64. *Id.*

65. *Id.*

66. *Id.*

67. 42 U.S.C. § 12111(9).

multiple exceptions, thereby reducing an employee's expectations that the system will be followed.[68]

Overall, the case resulted in a holding for U.S. Airways, creating a narrow exception to the ADA's reasonable accommodation obligation based on objective employee expectations and consequences of failure to fulfill those expectations. No other employer policy can trump the duty to reassign.

II. Circuit Split: Mandatory Reassignment Versus Mere Consideration for Reassignment

The lower courts disagree on the scope of the reassignment provision when the reassignment would violate a "neutral" company policy, such as those that are merit-based. The divide is based on statutory interpretation of the ADA, policy concerns, business interests, and *Barnett*'s grant of a seniority system exception. Although the Supreme Court held that it would generally be unreasonable for an employer to modify its seniority policy when faced with reassignment of a disabled employee, the lower federal courts are split on what to do with "facially neutral" employer policies that would grant the employer the right to hire the most qualified applicant for a vacant position over a minimally qualified disabled individual.

Notably, the Eighth Circuit has held an employer is "not required to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."[69] This line of reasoning suggests employers shouldn't have to ignore facially neutral policy in favor of a disabled employee. The Seventh, Tenth, and D.C. Circuits, on the other hand, have held that "reassignment" presumes some affirmative obligation on the part of the employer to actually assign the employee to a new position, not force the employee to compete against a pool of applicants for the position.[70] Mandatory reassignment would ensure the disabled employee is given the preferential treatment that *Barnett* established is inherent in the ADA.

A. The ADA's Statutory Language and Legislative History Favor Mandatory Reassignment over Mere Consideration.

When considering the two interpretations of what constitutes "reasonable accommodation" for the reassignment provision, the Seventh,

68. *Barnett*, 535 U.S. at 392.

69. Huber v. Wal-Mart, 486 F.3d 480, 486 (8th Cir. 2007).

70. *See* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012) *cert. denied* 133 S. Ct. 2743 (2013); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*).

Tenth, and D.C. Circuits hold that reassignment, when appropriate, is mandatory.[71] Accordingly, a "disabled employee has a *right in fact* to the reassignment"[72] because reasonably accommodating disabled individuals requires "something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position."[73] The ADA's reassignment mandate means that a disabled employee is entitled to placement in a vacant, equivalent position provided that the disabled employee is qualified for the job. In fact, the EEOC even stated in its guidance: "otherwise, reassignment would be of little value and would not be implemented as Congress intended."[74]

Simply allowing a disabled employee to be considered among a pool of similarly qualified applicants for a vacant position does not satisfy the reassignment requirement under the ADA, because it fails to provide the preferential treatment mandated by the *Barnett* precedent. For example, a merit-based transfer policy could allow an employer to reject the transfer application of a disabled employee in favor of an incrementally "better-qualified" nondisabled candidate. Failure to give preference to disabled employees over nondisabled employees would mark the ADA a nullity,[75] since even without the ADA an employee with a disability may have the right to compete for a vacant position.[76] The Supreme Court in *Barnett* recognized that forcing disabled employees to compete for their reassignment with those who have a natural advantage is a "thoughtless action . . . that far too often bar[s] those with disabilities from participating fully in the Nation's life, including the workplace."[77] Without this understanding, the ADA would have no enforcement weight to ensure that

71. *See* Duvall v. Georgia-Pacific Consumer Products, L.P., 607 F.3d 1225, 1260 (10th Cir. 2010) ("[The] employer must offer the employee the vacant position."); *see also United Airlines, Inc.*, 693 F.3d at 761 ("[The] ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified.").

72. *Midland Brake*, 180 F.3d at 1166 (emphasis added).

73. *Id.* at 1165; *see also Aka*, 156 F.3d at 1284.

74. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, THE U.S. EQUAL OPPORTUNITY COMMISSION (Oct. 2002), http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter *Enforcement Guidance*].

75. S. REP. NO. 101-116, at 98 (1989) ("To provide equal opportunity for a person with a disability will sometimes require additional actions and costs than those required to provide access to a person without a disability."); *see also Midland Brake,* 180 F.3d at 1167 ("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.")

76. 42 U.S.C. § 12111(9)(b); 29 C.F.R. pt. 1630 app. § 1630.2(o). *See* S. REP. NO. 101-116, at 33 (1989) ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, 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.").

77. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

employers remain accountable for their duty to accommodate their disabled employees' special needs. Moreover, granting that mere consideration given by merit-based policies and interpreting the statute as not to require preference would render the ADA meaningless.

A closer look at the statutory language and legislative history reveals that reasonable reassignment means an employee is entitled to a reassignment and does not need to compete for it.[78] The Supreme Court has noted that "[j]udges should hesitate to read statutory provisions as 'surplusage,'" and thus, an analysis of the plain meaning of the words used to construct the statute is relevant to determine the intended meaning.[79] When interpreting the language of the statute, the Tenth and D.C. Circuits focused on the word "reassign." Those courts stated, "the word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else . . . [T]he core word 'assign' implies some active effort on the part of the employer."[80] The D.C. Circuit explained that an employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned."[81] Reassignment implies *employer* action—appointing the employee to the position.[82] Competition implies *employee* action—getting the job through his own power.[83] An employer who truly reassigns a disabled employee has placed him in a new position, with no consideration of other applicants, more or less qualified.[84] Thus, the plain meaning of "[re]assign" supports the conclusion that Congress must have meant something more than a disabled employee's ability to compete equally for another position on the same terms as any other member of the general public.[85]

The ADA's inclusion of the term "qualified," rather than "best-qualified," requires an employer to set aside a qualification-based system for the purpose of the reassignment provision. As discussed previously in this Note, the term "qualified" simply requires an employee to be able to perform the essential functions outlined in the employer's job description. Requiring anything more than the minimum requirements set by the employer, such as requiring the reassigned employee to be the best

78. *Aka*, 156 F.3d at 1304.

79. Ratzlaf v. United States, 510 U.S. 135, 140 (1994); *see also* Bd. of Trustees v. Roche Molecular Sys., 131 S. Ct. 2188, 2196 (2011).

80. *Midland Brake*, 180 F.3d at 1164 (quoting *Aka*, 156 F.3d at 1304).

81. *Aka*, 156 F.3d at 1302.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1304. *See Enforcement Guidance*, *supra* note 74; *see also* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895, 902–03 (D. Ariz. 1997) ("[A]llowing the plaintiff to compete for jobs open to the public is no accommodation at all.").

qualified employee for the vacant job, is "judicial gloss unwarranted by the statutory language or its legislative history."[86] Allowing "mere consideration" would amend the statutory phrase "qualified individual with a disability" into "best qualified individual, notwithstanding the disability."[87] An employer's conflicting transfer policy does not excuse the employer from providing mandatory reassignment to a disabled employee because the ADA does not require that the employee be the "best qualified" employee for the vacant position.[88]

A disabled employee need only be minimally qualified for mandatory reassignment to be reasonable. The Tenth Circuit held in *Smith v. Midland Brake*, that an employee has a right to reassignment so long as the disabled employee is minimally qualified to perform the position's essential functions.[89] In that case, Robert Smith worked for Midland Brake, Inc. for nearly seven years in the company's light assembly department, putting together and testing small air valve components of air brakes for large vehicles.[90] Smith developed chronic dermatitis due to his frequent contact with various chemicals, solvents, and irritants.[91] Midland Brake fired Smith because it could not accommodate Smith's chronic skin sensitivity in the light assembly department.[92] Smith asserted there were various other positions he was qualified for but were instead offered to other applicants.[93]

The Tenth Circuit noted that Congress defined discrimination to include failure to accommodate disability, including failure to reassign to a vacant position.[94] It characterized the "right to compete" approach as rendering the reassignment provision "a hollow promise."[95] So long as Smith was minimally qualified for a position, reassignment should have been mandatory to avoid termination.[96] The Circuit established that reassignment under the ADA requires automatically awarding a position to a qualified disabled employee, despite the merits of other applicants and despite an employer's policies to select applicants based on those merits.[97]

86. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1169 (10th Cir. 1999).

87. *Id.* at 1167–68.

88. 56 Fed. Reg. 35726, 1991 WL 304269 (July 26, 1991).

89. *Midland Brake*, 180 F.3d at 1160.

90. *Id.* at 1164.

91. *Id.* at 1160.

92. *Id.*

93. *Id.*

94. *Id.* at 1168–69.

95. *Id.* at 1176 (explaining "a hollow promise" means requiring only consideration for vacant positions).

96. *Id*. at 1164.

97. *Id*.

Since the employer sets the qualification requirements, the ADA still requires the disabled employee to be minimally qualified for the position per the employer's chosen standards. The qualification provision "intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers."[98] The ADA honors an employer's rights to choose employment standards by noting that "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."[99] A disabled employee is eligible for mandatory reassignment because so long as the employee can perform the essential functions, the transfer does not erode an employer's ability to select and maintain a highly skilled workforce.

Mandatory reassignment is required even if reassignment would prevent a more qualified applicant from being hired.[100] The Seventh Circuit's holding in *Aka v. Washington Hospital Center* requires an employer to reassign the disabled employee over more qualified nondisabled employees.[101] In that case, Etim Aka ("Aka") had been employed for over nineteen years as an orderly at Washington Hospital Center.[102] Aka underwent a heart bypass surgery, and was told by his doctor that he could not work at a job that required more than a light or moderate level of extension.[103] Aka was subsequently unable to perform the essential job functions of an orderly, such as transporting patients and medical supplies, which required heavy lifting and pushing.[104] Aka, equipped with a college degree, master's degree in business, and public administration in health service management, applied to several vacant positions at the company.[105] The company required Aka apply to open positions within the company for transfer.[106] Aka applied to vacant File Clerk positions, for which he was minimally qualified, but was rejected in favor of more qualified applicants.[107] The Court held that Aka was entitled to the positions in which he was at least minimally qualified, regardless of the qualifications other applicants may possess because he need not compete for the position. The D.C. Circuit reasoned that the ADA already

98. H.R. REP. NO. 101-485, pt. 2 at 55 (1990).
99. 42 U.S.C. § 12111(8).
100. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1286 (D.C. Cir. 1998) (*en banc*).
101. *Id*.
102. *Id.* at 1286.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1287.
107. *Id.*

prohibits discrimination based on disability in job application procedures, which would render the reassignment provision redundant if it is read merely as permission to apply for the vacant position.[108] These courts conclude that Congress has already placed restrictions on the scope of the duty to reassign that are designed to ensure that the employer's business is not unduly disrupted, and "[i]f further limitations are to be sought, they must come from Congress."[109]

To temper the obligations of employers when faced with providing reassignment to a disabled employee, Congress included other specific terms in the ADA to serve as statutory safeguards for the employer in order to mitigate any claim of hardship. In the House of Representative's 1990 Report, the Committee made clear that the "vacancy" requirement does not means the employer is required to "bump" another employee out of a position to create a vacancy.[110] Had Congress intended that disabled employees be treated exactly like other job applicants, there would have been no need for the report to go on to explain that "bumping" another employee out of a position to create a vacancy is not required.[111] Therefore, a nondisabled employee is not in jeopardy of losing his or her current position in order to accommodate a disabled employee. Additionally, vacant implies the position is already established within a company, such that the employer is not required to create a new position to accommodate the disabled employee.

Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of duties, status, and benefits. While reassignment may not be used to force employees with disabilities into undesirable positions,[112] the employer only has to reassign a disabled employee to the most reasonable of the positions available. On the one hand, an employer may be liable for failure to accommodate an employee if it had only offered her positions that would have reduced her salary and benefits or her seniority despite evidence that a comparable position was available. On the other, an employer may reassign a disabled employee to a vacant position with lower pay if the only other position available was that of the CEO, for example. The flexibility of the "equivalent" term, weighed on a case-by-case basis, takes into account the

108. *Id.* at 1304.

109. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1170 (10th Cir. 1999) (summarizing statutory limitations on the duty to reassign, including vacancy of position sought, qualification of the employee, and defense of undue hardship).

110. H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

111. *Aka,* 156 F.3d at 1304.

112. EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o).

employer's scope to accommodate a disabled employee that would not interfere with the integrity of the company structure.

B. "Best Qualified" Is Not Equivalent to a Seniority Exception.

An employer's "neutral" competition-based transfer policy is not the same as a seniority system. While employers often prefer to hire the applicant that is best qualified for the particular position, "the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy."[113]

However, the Eighth Circuit disagrees. In *Huber v. Wal-Mart*, Pam Huber was a grocery order filler until she became permanently disabled when she injured her arm while at work. She then sought reassignment to an open position as a router.[114] Huber and Wal-Mart both agreed the router position was a vacant position within the company, and was comparable to the filler position she previously held.[115] Wal-Mart had a "policy to fill vacant job positions with the most qualified applicant,"[116] and though Huber was qualified, a more qualified coworker also wanted the position.[117] Wal-Mart refused to reassign Huber, and instead gave the vacant position to the more qualified employee per Wal-Mart's Associate Job Transfer Program. Wal-Mart placed Huber in an alternate position, which was lesser in pay, paying $6.20 per hour as opposed to her former $13.00 per hour. The Eighth Circuit ruled in favor of the employer.

The *Huber* court[118] rationalized its holding that the ADA's reassignment provision requires the employer to *consider* reassignment—not effectuate it, by comparing the qualification-based system to *Barnett*'s seniority exception.[119] It held that as with seniority systems, when a reassignment conflicts with a qualification-based transfer policy, employees must disprove the presumption that the reassignment is unreasonable.[120] The court reasoned that undermining qualification-based policies "subvert[s] other, more qualified applicants for the job."[121]

113. EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012) *cert. denied* 133 S. Ct. 2743 (2013).

114. Huber v. Wal-Mart, 486 F.3d 480, 481 (8th Cir. 2007).

115. *Id*.

116. *Id*.

117. *Id.*

118. *Id*.

119. *Id*.

120. *Id*. at 484.

121. *Id.*

The holding compared seniority policies that were granted as a very narrow exception to the ADA in *Barnett* to merit-based policies. In *Barnett*, the Court said that the advantages of a seniority system are that it "provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment . . . these benefits include job security and an opportunity for steady and predictable advancement based on objective standards."[122] In fact, "the length of time an employee is associated with a particular company, divisions, or position provides a fair, objective alternative criterion for making" decisions that can be understood and respected by employees and management.[123] For example, the seniority rights create "due process" for employee expectations about management decisions, by mitigating arbitrary decisions and nepotism in the workplace.[124] The seniority system can also provide "property rights" by ensuring economic security in times of layoffs or workplace reorganization.[125]

The Eighth Circuit attempted to stretch the advantages of a seniority system to apply equally to qualification-based transfer policies, such that qualification-based policies tie to the flourishing of a business in terms of profits, overall performance, and protection for employees.[126] It would then follow that a best-qualified transfer policy goes further in protecting employees than a seniority system because it guarantees that employees are awarded based on merit and skill. The holding in *Huber* suggests that frustrating competition-based policies negatively affects individual employees who are best qualified for positions,[127] because employees under these systems have an expectation that they will receive uniform and predictable treatment when they apply for a position.[128] Along that line of analysis, employees rely upon this safeguard to ensure transparent

122. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 404 (2002) (internal quotations omitted).

123. Susan Gardner & James F. Morgan, *The Supreme Court to Decide: Seniority Rights or Reasonable Accommodation Under the Americans with Disabilities Act (ADA)*, 52 LABOR L.J. 234, 235 (2001).

124. Carl Gersuny, *Origins of Seniority Provisions in Collective Bargaining*, 33 LABOR L.J. 518, 519 (1982).

125. Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962).

126. *See* Taylor Brooke Concannon, *Don't Throw the Baby Out with the Bathwater: Taking the Seventh Circuits Decision in* EEOC v. United Airlines, Inc. *Too Far*, 52 WASHBURN L.J. 613, 638. *See also* Fischbach v. D.C. Dept. of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996) (emphasizing that "the court must respect the employer's unfettered discretion to choose among qualified candidates").

127. Concannon, *supra* note 126, at 638.

128. *Id*.

decision-making and fair chances for advancement[129] and undermining qualification-based transfer policies hurts the workforce.

Despite the Eighth Circuit's conclusion, an employer's neutral merit-based policy is far too attenuated in that it does not grant employees the same significant benefits seniority systems provide in the workplace, including pay increases, promotions, and job assignments that provide certain employee rights and expectations.[130] The benefits present under a seniority system "which justify the presumption that seniority rules trump the right to reassignment, are either not present, or are sufficiently diminished," with respect to other neutral selection processes.[131] Simply because a policy is legitimate does not mean it is entitled to a heightened deference, if such heightened deference fails to reflect the text, specific intent and spirit of the ADA.

Compared to objective criteria under a seniority system, a "best qualified" process is susceptible to multiple levels of subjectivity.[132] Awarding a position based on merit and skill is an inherently subjective analysis, in which one person's evaluation may differ from another's. Therefore, the merit-based policy fails to provide consistent expectation rights. For these reasons, among others, the lone Eighth Circuit's attempt to insert a qualification-based policy under *Barnett*'s narrow seniority exception is an inadequate application of the ADA.

Moreover, the Eighth Circuit based much of its rationale on the Seventh Circuit's then-standing opinion in *EEOC v. Humiston-Keeling, Inc.*[133] In *EEOC v. Humiston-Keeling, Inc*., plaintiff Nancy Houser originally worked for employer, Humiston-Keeling, in a warehouse position requiring employees to pick health and pharmaceutical products off an assembly line. She subsequently injured her right arm and could no longer perform the essential functions of the picker position, even with accommodations. Houser then applied and was interviewed for a total of eight office jobs within the company. The positions were vacant and comparable to her previous position. Yet, in each case the employer selected another employee to transfer into the position.

129. *Id*.

130. Gardner, *supra* note 123, at 235.

131. Jared Hager, *Symposium, The Interface Between Intellectual Property Law and Antitrust Law: Picking up the Seven Ten Split by Pinning Down the Reasonableness of Reassignment After* Barnett, 87 MINN. L. REV. 2063, 2090 (2003).

132. John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 731–42 (2000).

133. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000).

The *Huber*[134] court's reliance on the Seventh Circuit's reasoning in *Humiston-Keeling*,[135] which was decided before *Barnett*, that emphasized the "legitimate and nondiscriminatory" or neutral nature of a policy to hire the most qualified candidate, is misplaced. *Humiston-Keeling* was overturned by the 2012 post-*Barnett* decision of EEOC v. United Airlines.[136] The Seventh Circuit expressly reversed its decision in *Humiston-Keeling* in light of the Supreme Court's ruling in *Barnett*, holding that the "ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified."[137] Therefore, a merit-based transfer policy cannot fit into the narrow seniority policy of *Barnett*.

C. A Call for Supreme Court Review

The Supreme Court nearly had an opportunity to resolve the circuit split regarding mandatory reassignment under the ADA. On December 7, 2007, the Supreme Court granted certiorari in the *Huber* case, limiting the issue to whether the employer should mandatorily reassign a disabled employee, or require her to compete with other applicants for the vacant position.[138] Unfortunately, the Court dismissed the writ after Huber and Wal-Mart settled the dispute, and employers are left to struggle with remaining issues of the circuit split.[139] If left unresolved, the circuit split may encourage businesses to adopt inconsistent reassignment policies if they operate in multiple states across different circuits.[140] For example, if a company fails to reassign a minimally qualified disabled employee in the Seventh, Tenth, or D.C. Circuit, then it would have discriminated against the employee. However, if the same company made the same decision in the Eight Circuit, its decision would not violate the ADA. Ultimately, if a company operates in multiple circuits, the split may result in forum shopping or "vigorous jurisdiction-based legal battles."[141] Given the continuing circuit split, it is likely the Supreme Court will eventually need to address the tension between an employer's right to create and adhere to

134. Huber v. Wal-Mart, 486 F.3d 480, 483 (8th Cir. 2007).

135. *Id.*

136. EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012) *cert. denied* 133 S. Ct. 2743 (2013).

137. *Id*. ("[W]e now make clear that *Humiston-Keeling* did not survive *Barnett*.").

138. Huber v. Wal-Mart Stores, Inc., 552 U.S. 1074 (2007).

139. Huber v. Wal-Mart Stores, Inc., 552 U.S. 1136 (2008).

140. Nicholas A. Dorsey, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 468 (2009).

141. *Id*. Multi-jurisdictional businesses, like Wal-Mart, could be sued in a jurisdiction where the disabled employee works, or at the corporate headquarters. *Id.* This makes it difficult for a business to predict its exposure to liability. *Id.*

neutral hiring policies and a disabled employee's rights to reasonable accommodation under the ADA.

III. Debunking the Threat of Mandatory Reassignment's "Affirmative Action" Rhetoric

The statutory text and legislative history of the ADA makes clear preferential treatment is an inherent component of the statute's mandatory reassignment provision. Criticism, however, has focused on the lingering social consequences of mandatory reassignment. 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.[142] By mandating reassignment, the interests of fellow employees are necessarily affected. Some courts have noted that mandatory reassignment creates a missed opportunity for a nondisabled employee, i.e., a disabled employee would automatically be given a reassignment over a nondisabled employee who also desired the reassignment position.[143] Or, if an employee knows she or he may not be able to obtain a vacant position because a disabled employee will be reassigned to that position, the nondisabled employee may be discouraged from applying for the vacant positions because their expectations of uniform, consistent treatment have been upset. [144]

Accordingly, a central argument against mandatory reassignment relies on "affirmative action" rhetoric, suggesting mandatory reassignment would morph the ADA into an affirmative action statute.[145] The crux of the affirmative action argument under the ADA is that mandatory reassignment would give disabled employees positions purely on the basis of their disability. Requiring an employer to reassign a minimally qualified individual because he or she is disabled is "giving a job to someone solely on the basis of his status as a member of a statutorily protected group."[146] The argument continues by asserting this "favoritism" gives unwarranted advantages to disabled employees that go beyond the accommodations

142. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002).

143. *See, e.g.*, Huber v. Wal-Mart, 486 F.3d 480, 484 (8th Cir. 2007).

144. Edward Hood Dawson, III, *Mandated Reassignment for the Minimally Qualified*, 117 W. VA. L. REV. 735, 762 (2014).

145. *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, 1048–49 (2000) (noting that "(n)egative affirmative action rhetoric has begun to creep into recent ADA decisions, particularly when the accommodation at issue is reassignment to a vacant position")*; see also Huber*, 486 F.3d at 484 (The "ADA does not require [the employer] to turn away a superior applicant for [the position] in order to give the position to [the disabled employee]" because doing so would be "affirmative action with a vengeance.").

146. *Huber*, 486 F.3d at 484 (quoting *Humiston-Keeling*, 227 F.3d at 1029) (*overruled by* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012)).

within the scope of the ADA. At a basic level, the ADA affirmative action rhetoric is: But for the disability, a position given to a disabled individual would have otherwise gone to a nondisabled individual. This argument interprets the statutory rights under the ADA in a way parallel to Title VII, but is not quite right. Such an argument blindly ignores important differences between mandatory reassignment and the constitutional issues of affirmative action.

To begin, we must recognize the difference between obligations placed on state actors and private employers. When a state actor gives a preference, affirmative action becomes a constitutional issue under the equal protection clause of the Fourteenth Amendment.[147] Under the Equal Protection Clause, "affirmative action" represents a broad array of government policies, ranging from government expenditures to assist certain underrepresented races to preferential treatment in hiring or admissions.[148] Public actors must take extraordinary care when acting in accordance with the "core purpose of the Fourteenth Amendment" to "do away with all governmentally imposed discriminations based on race."[149] For a state actor's race-based hiring policy, for example, to be constitutional it must pass the muster of a stringent standard to justify the "means chosen by a state to accomplish its race-conscious purposes."[150] Even if an affirmative action plan is found to be constitutional, it can only be enacted for a predetermined set of time.[151]

When a private employer chooses to use affirmative action policies under Title VII to make up for an imbalance in the workplace, it's not necessarily a constitutional issue,[152] though these plans must also be temporary in nature so as not to violate Title VII.[153] Generally, private employers are given larger leeway than government actors to implement policies and hiring practices that provide preference to a certain underrepresented classes of race or gender.[154] A private employer seeking to justify adoption of affirmative action plan need not point to its own prior

147. U.S. CONST. amend. XIV.

148. Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*,18 LAW & INEQ. 85, 87 (2000).

149. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

150. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279 (1986).

151. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2346 (2003).

152. United Steelworkers of Am. v. Weber, 443 U.S. 193, 204–05 (1979).

153. *Id*. at 208.

154. *Id*. at 206–07 (suggesting Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible); *see also* Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616 (1987) (upholding a hiring decision made pursuant to an affirmative action plan directing that sex or race be considered for purpose of remedying underrepresentation).

discriminatory practices, but only to conspicuous imbalance in traditionally segregated job categories.[155] So long as a private employer can show there is a "manifest imbalance" related to a "traditionally segregated job category," a private employer may implement affirmative action policies to provide assurance that both gender and race will be "taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed."[156]

The statutory commands of the ADA do not raise constitutional affirmative action issues, and unlike the predetermined endpoints of affirmative action plans, the statutory duty of reasonable accommodation never expires.[157] Though the ADA also asks private employers to ignore disability just as the Fourteenth Amendment and Title VII asks employers to ignore color, race, sex or national origin, the ADA conceives solutions to the underrepresentation of disability differently than the way the Constitution and Title VII conceive of race and gender.

First, reasonable accommodation requires an individualized assessment of an employer's enabling of equal opportunity for disabled employees, whereas affirmative action is a class-based remedy that does not require individualized assessments. Conventional affirmative action programs aim to increase the proportion of a historically discriminated or underrepresented group by setting predetermined numerical goals or quotas.[158] Conversely, reassignment as an accommodation focuses on the opportunities of individuals *already* employed by the business, i.e., those who are not new applicants. Further, reassignment occurs on an individualized basis. Individualized assessment means the beneficiaries of the preferential treatment are not fungible or interchangeable simply because they may also be disabled and therefore part of the same class. Hence, the individualized nature of the ADA's reasonable accommodation doctrine requires an analysis of whether the preferential treatment is both necessary and reasonable given an employer's business practices.

Second, Title VII prohibits discrimination "because of" certain listed characteristics, such as race or gender.[159] This use of an "equal treatment" approach to discrimination compels employers to make employment

155. *Id*. at 630.

156. *Id*. at 632.

157. Kenneth R. Davis, *Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systematic Racial Discrimination Cases*, 107 DICK. L. REV. 503, 519–20 (2003).

158. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 17 (1996) (describing conventional affirmative action plans).

159. 42 U.S.C § 2000e-2(a). Title VII also protects against discrimination on the basis of color, religion, or national origin. *Id.*

decisions without consideration of a protected trait. Unlike the premise of Title VII, the ADA uses a different approach to discrimination based on the trait of "disability." The ADA recognizes that accommodation is required in order for an employee with a disability *to be* similarly situated to other employees. This means that different treatment is sometimes necessary to "level the playing field"[160] and allow an individual to become similarly situated to others.

Third, no employee is at risk of losing employment as a result of reassignment, because the reassignment is to an already vacant position and the employer must already employ all applicants for the transfer.[161] Traditional affirmative action operates under a pre-hire evaluation, reserving employment opportunities for an otherwise unemployed individual on the basis of a protected trait. This hire would be to the detriment of an unprotected applicant, who may be deprived the opportunity of being employed. The reassignment provision of the ADA, on the other hand, operates with the understanding that it can only be used as a post-hire mechanism. Therefore the residual social costs placed on nondisabled employees are minimized by the narrow application of the reassignment provision.[162] For example, an employer may refer to reassignment to retain the services of a current employee, without displacing or rejecting employment of another employee as a result of the job transfer.

Ultimately, the benefits of reasonably accommodating a disabled individual through mandatory reassignment outweigh the perceived unfairness. Consider the fates of two employees applying for reassignment to the same vacant position. One applicant is disabled and the other is nondisabled. For the disabled employee, reassignment represents a last resort for a chance at accommodation—the last chance to remain employed with the employer. The nondisabled applicant, on the other hand, merely suffers the deferment of an opportunity to work in that vacant position, but is not threatened by unemployment as a result. The nondisabled employee remains in his or her current position. The disparity illustrates the justification for preferential treatment required to level the playing field: Preferential treatment is required to provide disabled employees with a

160. *See, e.g.*, *Ransom*, 983 F. Supp. at 901 (reasoning that the reassignment provision does not render the ADA an affirmative action statute because it merely levels the playing field between disabled and nondisabled employees; however the court noted the ADA's purpose of "reduc[ing] societal costs of dependency and nonproductivity," moves beyond traditional formal equality arguments for "leveling the field"). *Id*.

161. 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, 969 (2003).

162. *See generally* 42 U.S.C. 12111(10)(A).

meaningful chance of receiving an equal opportunity in the workforce, which already exists for nondisabled individuals. The nondisabled workforce is more capable of shouldering residual burden because it's reasonable to presume that as a whole, they are in a better position to get another job, transfer to another position that perhaps could not accommodate disabled employees and receive promotions. The benefit of continued employment for a disabled individual trumps the minor "loss" of a nondisabled employee's inability to gain promotion at a given time. For the disabled employee, the reassignment is necessary to remain employed with the company. Whereas a disabled employee may have everything to lose if reassignment were optional, a nondisabled employee may only have something to gain. Accordingly, residual social consequences placed on nondisabled employees are justified.

Conclusion

The ADA's reassignment provision has been a source of controversy among the circuit courts, and will likely remain one until the Supreme Court makes a definitive ruling. Such a ruling should adhere to the ADA's mandate for preferential treatment in order to provide equality of opportunity to individuals with disabilities. The reassignment provision in particular reflects Congressional acceptance of the view that different treatment may be necessary in order to achieve equality. Treating a disabled employee "exactly like all other candidates . . . no better, no worse" ignores the Supreme Court's statement in *Barnett* that "preference will sometimes prove necessary to achieve the Act's basic equal opportunity goal."[163] Mandatory reassignment is a form of preferential treatment that simply levels the playing field so that people with disabilities are no longer disadvantaged by the fact that the workplace ignores their needs. Moreover, failure to provide preferential treatment through mandatory reassignment becomes a form of discrimination itself.[164]

Until Congress makes explicit, or the Supreme Court makes clear, disability advocates will be armed with statutory language, Congressional intent, and majority circuit precedent—all of which indicate that mandatory reassignment is an appropriate form of preferential treatment to accomplish basic equality goals of the ADA. Despite the possibility of social imbalances, the social costs on the nondisabled workforce do not negate the fundamental drivers behind the ADA's enactment. Accordingly, Congress's purpose for enacting the ADA need not be muddied by negative implications of affirmative action.

163. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

164. Ball, *supra* note 19, at 953.