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A Disability is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment

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A DISABILITY IS NOT A TRUMP CARD:¹ THE AMERICANS WITH DISABILITIES ACT DOES NOT ENTITLE DISABLED EMPLOYEES TO AUTOMATIC REASSIGNMENT

I. INTRODUCTION

Imagine that Jane has twenty years of experience in a particular field and applies for a job that requires five years of experience in the same field.² Despite being well-qualified, Jane is not selected for the position. To her dismay, Jane learns that the job was offered to someone else who was significantly less-qualified than Jane and who possessed only five years of experience in the requisite field. Sufficiently puzzled, Jane then learns that although the selected individual was substantially less-qualified than she for the role, the individual was chosen because he had a disability. Bewildered, Jane contacts an employment attorney for advice. The attorney explains that Jane may have no legal recourse in disputing the employer's decision because some courts have held that an employer is *required* to hire the disabled, but less-qualified, employee under certain circumstances.³

¹ Brief Amici Curiae of the Equal Employment Advisory Council and the Employers Group in Support of Petitioner, i, 5 US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250) (arguing that the Americans with Disabilities Act of 1990 ("ADA") "stops short of providing a [']trump card['] guaranteeing a preference in job placement to an employee with a disability").

² This fictional hypothetical scenario was created by the author to illustrate the potential impact of the so-called mandatory reassignment provision of the ADA.

³ See, e.g., US Airways, Inc. v. Barnett, 535 U.S. 391, 393-94 (2002). In *Barnett*, the Court held that if a qualified, disabled employee, who is unable to perform his existing job, shows "special circumstances[.]" an employer may be required to overlook its established *seniority policy* and reassign the disabled employee to a particular vacant position for which another employee has greater seniority and is otherwise entitled. *Id.* at 394. The *Barnett* Court, thus, raised the question of the scope of an employer's duty pursuant to the ADA in providing reasonable accommodation to disabled employees. *Id.* By indicating that an employer must give preference to a disabled employee, even when doing so violates the company's established seniority policy, the Court, at least inferentially, suggested that an employer may also be required to override other established hiring policies in favor of reassigning a qualified, disabled employee, including a policy of hiring the most-qualified candidate for a position. *Id.* at 397. Moreover, in his dissenting opinion, Justice Scalia more directly raised the question as to whether the majority's reasoning applies to an employee's reassignment request that violates the employer's qualification-based hiring policy. *Id.* at 416 (Scalia, Thomas, J.J., dissenting). See also *infra* notes 52-66 and accompanying text (discussing *Barnett*); *infra* note 75 and accompanying text (discussing *Smith v. Midland Brake*).

See also Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 952 (2004) (citing *Barnett*, 535 U.S. at 397). "The Court in *Barnett* for the first time explicitly ruled that the ADA often requires

The above example sets the stage for a hotly contested issue that has received much attention in the past decade: whether Title I of the Americans with Disabilities Act of 1990 ("ADA") entitles a disabled employee, who is unable to perform his existing job, to be reassigned by his employer to a vacant position for which he is qualified, even though another candidate is more-qualified for that vacant position.⁴

It is undisputed that Title I of the ADA protects qualified individuals with disabilities from discrimination in employment.⁵ The reach of its mandate, however, is far from clear.⁶ Is a qualified, disabled employee entitled to a vacant position for which another candidate is more-qualified merely *because* he is disabled?⁷ The ADA does not answer this specific question.⁸ Furthermore, the enforcement guidelines issued by

that employers provide their disabled employees with preferential treatment." *Id.* The *Barnett* opinion gives disability rights advocates the "best vehicle" for making the case that affording preferential treatment when reassigning disabled employees to vacant positions is necessary in order to achieve equality among disabled employees and is, therefore, required. *Id.* at 990, 988-95. Ball contended that *Barnett* called into question the holding in *EEOC v. Humiston-Keeling*, in which the Seventh Circuit decided that the ADA is not a mandatory preference statute and does not require employers to violate their hiring policies when reassigning disabled employees to vacant positions. *Id.* (citing *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027-29 (7th Cir. 2000)). Ball also argued that, based on *Barnett*, and in line with the Tenth Circuit's holding in *Midland Brake*, an employer is required to afford preferential treatment when reassigning a qualified, disabled employee, even if, in doing so, the employer has to waive his typical hiring policy and reject a more-qualified candidate. *Id.* (citing *Barnett*, 535 U.S. at 397; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167-68 (10th Cir. 1999) (en banc)).

⁴ See Stephen F. Befort & Holly Lindquist Thomas, *The ADA In Turmoil: Judicial Dissonance, The Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27 (1999) (noting that whether the ADA entitles an employee, who is disabled and unable to perform his assigned job, to be automatically reassigned to a vacant position over a more-qualified person has been debated since the ADA's infancy); *infra* notes 74-75 (discussing *Huber v. Wal-Mart Stores, Inc.*, *Humiston-Keeling*, *Burns v. Coca-Cola Enters.*, *Midland Brake*, *Barnett*, and EEOC's Enforcement Guidance).

⁵ 42 U.S.C. § 12101(b)(1)-(2) (2000) (stating that the purpose of the ADA is to "eliminat[e]... discrimination against individuals with disabilities[]" and to "provide... enforceable standards [for] addressing [such] discrimination"); see also Americans with Disabilities Act of 1990 Statement by the President of the United States, 1990 U.S.C.C.A.N. 601 (1990 WL 285753) (indicating that the aim of the ADA is to prohibit discrimination against disabled persons).

⁶ See, e.g., *infra* notes 44-46, 49, 52, 54-56, 74-75, 82-83, 85-86, 88, 95-96 and accompanying text (discussing the many judicial opinions which have interpreted ambiguous terms and provisions within the ADA).

⁷ See *infra* notes 74-75 and accompanying text (discussing relevant cases and EEOC enforcement guidance).

⁸ See 42 U.S.C. § 12111(9) (2000). The provision addressing reassignment as reasonable accommodation does not delineate whether an employer is required to reassign an employee who becomes disabled. *Id.* Section 12111(9) is known as the reasonable accommodation provision. *Id.* The phrase contained within Section 12111(9)(B), mentioning reassignment, is known as the reassignment provision. *Id.* § 12111(9)(B)

the Equal Employment Opportunity Commission (“EEOC”) state that reassignment is required in such a situation, and although these guidelines do not carry the force of law, they certainly cloud an employer’s reassignment obligation.⁹ Additionally, United States Circuit

(mentioning “reassignment to a vacant position[.]” as a possible form of reasonable accommodation); *see also infra* note 42 (quoting the ADA’s reasonable accommodation provision and the reassignment provision therein). *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2000); 47 U.S.C. § 225 (2000). The ADA does not specifically state whether an employer *must* reassign a qualified, disabled employee to a vacant position when the same employee is unable to perform his assigned job. 42 U.S.C. §§ 12101–213 (2000); 47 U.S.C. § 225 (2000).

⁹ *See* 42 U.S.C. § 12116 (2000) (explicitly requiring the EEOC to issue regulations to enforce Title I of the ADA). *See also* EEOC Interpretive Guidance, 29 C.F.R. pt. 1630. The EEOC regulations include a lengthy appendix, containing guidance for interpreting Title I of the ADA. *Id.* Appendix to Part 1630, which does not carry the force of law, provides:

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship. Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.

Id. pt. 1630.2(o), App. *See also* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (2002), available at <http://eoc.gov/policy/docs/accommodation.html>. The EEOC Enforcement Guidance, presented primarily in question and answer format, states as follows:

The ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. This type of reasonable accommodation *must* be provided to an employee who, because of a disability can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.

An employee must be “qualified” for the new position. An employee is “qualified” for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation. The employee *does not need to be the best qualified individual* for the position in order to obtain it as a reassignment.

Id. at 18–19 (emphasis added) (footnote omitted). Additionally, question 29 states, “Does reassignment mean that the employee is permitted to compete for a vacant position? No. Reassignment means that the employee gets the vacant position if s/he is qualified for it.” *Id.* at 21. *See also* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 414 (2002) (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined) (citing to the then-current EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 3 BNA EEOC Compliance Manual, No. 246, p. N:2479 (Mar. 1, 1999)) (acknowledging that the majority opinion relies on the EEOC’s enforcement guidelines to support its view that, in certain circumstances, an employer should give preference to a disabled employee when reassigning that employee to a vacant position, and arguing the alternative view—that the same guidelines do *not* place such a

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Courts of Appeals have disagreed and developed varying interpretations of an employer's reassignment duty.¹⁰ Nonetheless, despite these conflicting positions, the United States Supreme Court backed away from a prime opportunity to address this precise question in 2002.¹¹ As a result, courts have continued to deliver differing opinions regarding whether an employer is required to reassign a qualified, disabled employee, who is unable to perform his assigned job, to a vacant position when a more-qualified candidate is available.¹²

In December 2007, the Court granted certiorari in *Huber v. Wal-Mart Stores, Inc.*, a controversy involving this precise issue.¹³ Commentators predicted that the Court would decide the case on its merits, thereby finally resolving the tension among the circuits.¹⁴ However, the parties settled outside of court before oral arguments were scheduled, and accordingly, the Court dismissed the case.¹⁵ Thus, the circuit split still exists concerning whether an employer is required to reassign a qualified, disabled employee over a more-qualified candidate.¹⁶

The purpose of this Note is to propose the correct analysis which leads to finding that the ADA does not require an employer to reassign to a vacant position a qualified, disabled employee who is unable to perform the essential functions of his existing job.¹⁷ When an employee

requirement on employers).

¹⁰ See *infra* note 74 and accompanying text (discussing judicial interpretation of the ADA's reassignment requirement in the Seventh and Eighth Circuits); *infra* note 75 and accompanying text (discussing judicial interpretation of the ADA's reassignment requirement in the Tenth Circuit).

¹¹ See Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans With Disabilities Act: Answers, Questions and Suggested Solutions After US Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 984 (2003) (acknowledging that the Supreme Court "passed on a golden opportunity in *Barnett* to resolve . . . significant issues[]" relating to the reassignment provision of the ADA).

¹² See, e.g., *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007) (acknowledging the circuit split, the court rejected the Tenth Circuit's view and agreed with the Seventh Circuit, holding that an employer is not required to reassign a qualified, disabled employee, who is unable to perform her current job, to a vacant position in violation of its legitimate, qualification-based hiring policy), *cert. granted*, 76 USLW 3200 (U.S. Dec. 7, 2007) (No. 07-480), *cert. dismissed*, 2008 WL 114946 (U.S. Jan 14, 2008) (NO. 07-480, R46-008).

¹³ See *id.*

¹⁴ See *infra* note 98 (noting that commentators predicted that the Court would be able to decide *Huber* on its merits, rule in Wal-Mart's favor, and resolve the circuit split).

¹⁵ See *infra* note 98 (indicating that the Court dismissed *Huber* after the parties settled outside of the court system).

¹⁶ See *infra* note 98 and accompanying text (indicating that the Court granted certiorari in *Huber*).

¹⁷ See *infra* Part IV.A (presenting model judicial reasoning for concluding that the ADA's reassignment provision does not mandate that an employer reassign a qualified, disabled employee, who is unable to perform the essential functions of his current position, over a more-qualified candidate).

becomes disabled and unable to perform his job, an employer may consider reassigning him to a vacant position, but is not required to reassign him over a better-qualified candidate.¹⁸ Thus, the appropriate outcome in the hypothetical scenario presented above is that the employer may reassign the disabled, but less-qualified, employee to fill the vacant position, but is free to hire Jane—the external candidate possessing fifteen more years of experience than the minimally qualified, disabled employee.¹⁹

First, Part II of this Note discusses how the United States Supreme Court and Circuit Courts of Appeals have interpreted the ADA's ambiguous provisions and presents the circuit split concerning whether an employer is required to reassign a qualified, disabled employee to a vacant position, where a more-qualified, non-disabled person would be his first choice.²⁰ Second, Part III describes the problems with the Tenth Circuit's approach of interpreting the reassignment provision as mandating reassignment in such a situation.²¹ Finally, Part IV proposes

¹⁸ See *infra* Part III (elaborating on why the ADA does not require an employer to reassign a qualified, disabled employee, who is unable to adequately perform his job, to a vacant position over a more-qualified candidate).

¹⁹ See *infra* Part III (analyzing why requiring an employer to choose the less-qualified, but disabled, employee conflicts with the ADA's requirements); *infra* Part IV (suggesting that a well-reasoned approach to interpreting the reassignment provision allows an employer to fill a vacant job based on merit and without regard to disability).

²⁰ See *infra* Part II.A (explaining why the ADA was enacted); *infra* Part II.B (reviewing how courts have interpreted the ADA); *infra* Part II.C (discussing the existing circuit split concerning whether an employer is required to automatically reassign a qualified, disabled employee to a vacant position). See also, e.g., *infra* note 36 (summarizing the protection provided by the ADA). While this Note focuses primarily on the portions of the ADA pertaining to Title I's employment provisions, other statutory areas are discussed to provide a general overview of the ADA's broad-based protections. See, e.g., *infra* notes 45–46 (discussing Supreme Court opinions interpreting the ADA). A sampling of cases touching various areas of the private sector are included to show that the ADA has substantially impacted many areas in the private sector. See, e.g., *infra* note 45 (discussing *PGA Tour, Inc.*, decided in the context of Title III dealing with public accommodations, in which the Court determined that a requested accommodation was reasonable accommodation pursuant to the ADA). Many judicial determinations have an effect in the employment context, even though they were decided in the context of public accommodations or telecommunications. See, e.g., *infra* note 45 (discussing *Bragdon*, decided in the context of Title II, holding that Human Immunodeficiency Virus (“HIV”) is an ADA-covered disability). When a court decides what constitutes a disability in a case involving Titles II, III, or IV, its opinion and reasoning may be binding in an employment dispute. See, e.g., *infra* note 45.

²¹ See *infra* Part III.A (analyzing the statutory text, and explaining how the Tenth Circuit's approach of mandating reassignment of a qualified, disabled employee, who is unable to perform his assigned job, to a vacant position, over a more-qualified individual goes beyond statutory requirements); *infra* Part III.B (examining the legislative history, and showing how the Tenth Circuit's approach to the ADA's reassignment provision contradicts congressional intent); *infra* Part III.C (reviewing the impracticality of the Tenth

model judicial reasoning for determining that the ADA does not require automatic reassignment.²²

II. THE BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT OF 1990

Prior to its enactment in 1990, the ADA received much support on Capitol Hill.²³ After all, the Act proposed to prohibit discrimination against a class of “discrete and insular minorit[ies]”—people with disabilities.²⁴ Few people argued that the law was unnecessary in eliminating unfair discrimination against the disabled.²⁵ In fact, many people recognized the ADA as a step in a positive direction for our country.²⁶ Thus, the well-intentioned, landmark legislation passed

Circuit’s approach to the ADA’s reassignment provision on employers and on non-disabled individuals).

²² See *infra* Part IV.A (proposing the correct rule and supporting reasoning for concluding that the ADA’s reassignment provision does *not require* an employer to forego its policy of hiring the most-qualified candidate in order to reassign a qualified, disabled employee unable to perform his existing position); *infra* Part IV.B (discussing why *Barnett*’s rebuttable presumption rule proposed in Part IV.A is the appropriate judicial approach to deciding whether an employer is required to reassign a qualified, disabled employee—unable to perform the essential functions of his job—to a vacant position over a more-qualified candidate); *infra* Part V (summarizing the need for greater predictability in reassignment cases and the proposed judicial response to the current circuit split).

²³ See Americans with Disabilities Act of 1990 Statement by President, *supra* note 5 (indicating that the Bill was part of comprehensive legislation aimed at prohibiting discrimination against disabled persons, announcing that it was initially supported by President Reagan’s Administration, and stating that it was likewise largely supported by Congress).

²⁴ Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(7) (2000). Disabled people have been

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

Id.

²⁵ See President George H. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act 1–3 (July 26, 1990), <http://www.eeoc.gov/ada/bushspeech.html> (declaring that the ADA’s prohibitions on discrimination are “long overdue[]” and that because of the pervasiveness of the barriers preventing people with disabilities from being equal citizens, “sledgehammer[ing] . . . [yet] another wall[]” is necessary to provide the “basic guarantee of life, liberty, and the pursuit of happiness[]” to all Americans) (emphasis added). *But see Review and Outlook: The Lawyers’ Employment Act*, WALL ST. J., Sept. 11, 1989, at A18 (“[M]ost Americans are instinctively sympathetic to the disabled’s problems, and are willing to make a good-faith effort to enable them to live full lives[,] [but] [t]hey . . . [should not] be sledgehammered into decency.”) (emphasis added).

²⁶ See President George Bush at the Signing, *supra* note 25 (noting the worldwide

quickly and by a wide margin in the Senate in September 1989 and in the House of Representatives in May 1990.²⁷

Part II discusses the ADA's passage, the problems that have arisen since its enactment, and the circuit split concerning its reassignment provision.²⁸ More specifically, Part II.A discusses why the ADA was enacted and what protection it provides to the disabled.²⁹ Part II.B considers the involvement of the United States Supreme Court and Circuit Courts of Appeals in interpreting the ADA.³⁰ Part II.C sets forth the current circuit split regarding whether the ADA requires an employer to reassign a qualified, disabled employee over a more-qualified person.³¹

attention generated by the ADA, and indicating that, as a result, other countries had recognized the United States as a leader in the area of human disability rights; and, correspondingly, suggesting that several international leaders expressed interest in enacting similar legislation); 136 CONG. REC. H2325-01 (1990) (statement of Rep. Neal of Massachusetts) (arguing for the passage of the ADA, and mentioning the positive impact that the law was expected to have on the economy). *Contra Review and Outlook, supra* note 25, at A18 (acknowledging that opponents of the ADA admire the good intentions behind the Bill but oppose it nonetheless because of its numerous deficiencies, such as its vague terminology, and because of the uncertainty of the costs that will be incurred by businesses and employers).

²⁷ See Americans with Disabilities Act of 1990 Statement by President, *supra* note 5 (noting that the President signed the bill into law on July 26, 1990); *House Overwhelmingly Approves Bill to Bar Employment Bias Against Disabled*, Daily Lab. Rep. (BNA) No. 100, at A-16 (May 23, 1990) (noting that just eight months after the Senate passed its version of the ADA, the House passed its version of the ADA on May 22, 1990 with 403 votes in favor of it and a mere twenty votes opposing it); *Senate Passage of Civil Rights Bill Moves Debate over Disabled to House*, Daily Lab. Rep. (BNA) No. 174, at A-5 (Sept. 11, 1989) (observing that the Senate passed its rendition of the ADA on September 7, 1989 by a vote of seventy-six to eight); *Bill to Prohibit Employment Discrimination Against Disabled Introduced into Senate, House*, Daily Lab. Rep. (BNA) No. 90, at A-7 (May 11, 1989) (indicating that the bill was introduced into Congress on May 9, 1989). The Senate passed its version of the ADA barely four months after the bill was introduced into the Senate, and President George H. W. Bush signed it into law during a grand ceremony sixty-five days after the House passed its version (less than fifteen months after it was first introduced into Congress). Americans with Disabilities Act of 1990 Statement by President, *supra* note 5; *House Overwhelmingly Approves Bill, supra*, at A-16; *Senate Passage of Civil Rights Bill, supra*, at A-5; *Bill to Prohibit Employment Discrimination Against Disabled, supra*, at A-7. See also Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 252, 230-31 (1990) (describing the ADA as "well-conceived and well-intended[]").

²⁸ See *infra* Part II (discussing why the ADA was enacted, the litigation it has spawned, and the current circuit split regarding interpreting the Act's reassignment obligation).

²⁹ See *infra* Part II.A (explaining why the ADA was passed and what protection it provides).

³⁰ See *infra* Part II.B (describing how courts have interpreted the ADA, and providing numerous examples of extensive involvement by the courts in interpreting the Act's ambiguous provisions).

³¹ See *infra* Part II.C (presenting the circuit split concerning whether an employer is

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A. *The Americans With Disabilities Act of 1990: What It Was Intended to Protect*

In 1990, President George H. W. Bush signed the ADA into law and declared that the purpose of the landmark legislation was to prohibit discrimination against people with disabilities.³² The ADA closely resembles the Rehabilitation Act of 1973 (“Rehabilitation Act”).³³ In fact, wherever possible, Congress incorporated the language and standards of the Rehabilitation Act into the ADA.³⁴ The significant difference between the two laws is that the requirements of the Rehabilitation Act apply only to federal government agencies, government contractors, and recipients of federal funds, whereas the ADA applies to enterprises in both public and private sectors.³⁵ In particular, the ADA addresses

required to waive its policy of hiring the most-qualified candidate in order to reassign a qualified, disabled employee to a vacant job).

³² Americans with Disabilities Act of 1990 Statement by President, *supra* note 5, at 601–02. In signing the ADA, President George H. W. Bush noted the nation’s history of pervasive discrimination against people with disabilities. *Id.* In his words, the ADA represented one piece of the nation’s comprehensive plan “to ban discrimination against persons with disabilities[.]” and “[to] end . . . the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.” *Id.* (emphasis added). *See also* President George Bush at the Signing, *supra* note 25. In his speech at the signing of the ADA, President Bush referred to the legislation as a “declaration of equality for people with disabilities[.]” *Id.* at 1 (emphasis added).

³³ *See* Americans with Disabilities Act of 1990 Statement by President, *supra* note 5 (noting the similarities between the Rehabilitation Act of 1973 (“Rehabilitation Act”) and the ADA).

³⁴ Americans with Disabilities Act of 1990 Statement by President, *supra* note 5 (stating that Congress incorporated much of the language from the Rehabilitation Act into the ADA to ensure that the ADA would be easily understood by those already bound by the requirements of the Rehabilitation Act). *But see* C.F.R. § 1630.1(a), App. (2000) (stating that the ADA employed the term “disabilit[y]” to replace the outdated term “handicap[.]” in the Rehabilitation Act, that the two terms are substantively equivalent, and that both laws now use the term “disabilit[y]”).

³⁵ 29 U.S.C. § 794 (2000). The Rehabilitation Act applies to programs and activities that receive federal financial assistance. *Id.* *See also* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–213 (2000). Title I of the ADA applies to employers, defined as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year[.]” *Id.* § 12111(5)(a). Title II applies to public entities. *Id.* §§ 12131–65. Title III applies to owners and operators of places of public accommodation. *Id.* §§ 12181–89. Title IV applies to common carriers engaged in certain interstate and intrastate communication. 47 U.S.C. § 225. *See also* Americans with Disabilities Act of 1990 Statement by President, *supra* note 5. In his official statement accompanying the signing of the ADA, President George H. W. Bush indicated that the Rehabilitation Act had effected positive changes in the federal sector and that he was confident that the ADA would effect similar change in the private sector. *Id.*

discrimination based on disability in the areas of employment and public services, programs, activities, and accommodations.³⁶

Congressional findings at the time the ADA was enacted revealed that 43,000,000 people in the United States suffered from a disability, and that the number of disabled Americans was likely to grow.³⁷ Congress expressly acknowledged the nation's historical tendency to isolate and segregate people with disabilities.³⁸ Furthermore, Congress recognized that laws existed to protect people from discrimination based on race, color, religion, sex, national origin, and age, but similar protection was not yet available for people with disabilities.³⁹ As a result, people with disabilities continued to face widespread discrimination and inequality,

³⁶ 42 U.S.C. §§ 12101-213 (2000); 47 U.S.C. § 225 (2000). The ADA is divided into five titles. 42 U.S.C. §§ 12101-213 (2000); 47 U.S.C. § 225 (2000). Title I addresses employment. 42 U.S.C. §§ 12111-17. Title II addresses public services, including public transportation. *Id.* §§ 12131-65. Title III addresses public accommodations and services operated by private entities, including places of lodging, food establishments, places of public gatherings and education, and shopping centers. *Id.* §§ 12181-89. Title IV addresses telecommunications. 47 U.S.C. § 225 (2000). Title V addresses miscellaneous items, including statutory construction, state immunity, prohibitions against retaliation, attorney's fees, and amendments to the Rehabilitation Act. 42 U.S.C. §§ 12201-13.

³⁷ 42 U.S.C. § 12101(a)(1). *See also* S. REP. NO. 101-116, at 9 (1989). The Senate Committee on Education and Human Resources reported that sixty-six percent of disabled Americans, translating to nearly 8.2 million disabled people who were of working age but unemployed, stated that they wanted to work but were unable to secure a job. *Id.* *See also* 134 CONG. REC. S5106, S5115 (1988) (statement of Sen. Simon). A poll revealed that fifty percent of disabled people attributed their unemployment status to employment disability discrimination. *Id.*

³⁸ 42 U.S.C. § 12101(a)(2) (stating that congressional findings show that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[]").

³⁹ *Id.* § 12101(a)(4) ("[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination[] . . ."). *See also, e.g.,* The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2000). The Age Discrimination in Employment Act of 1967 prohibited discrimination in employment based on age. *Id.* *See also, e.g.,* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000). Although the Rehabilitation Act provided some protection to people with disabilities in certain government sectors, it was not nearly as expansive as the protection provided to those of other protected groups, such as race, color, religion, national origin, and age. *Id.* *See also, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000). Title VII of the Civil Rights Act of 1964 ("Title VII") prohibited discrimination in employment based on race, color, religion, sex, or national origin. *Id.* *See also, e.g.,* The Fair Housing Act of 1968, 42 U.S.C. § 3607 (2000). The Fair Housing Act of 1968 prohibited discrimination in housing based on race, color, national origin, or age. *Id.* *See also* Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 33 (2004) (noting that, advocating for the ADA, Sen. Robert Dole of Kansas referred to disabled people as the "last minority").

and Congress passed the ADA to prevent such maltreatment from continuing.⁴⁰

Once the ADA was enacted, however, concerns quickly surfaced as to the ambiguity of the statute's requirements, the cost ramifications associated with implementing certain processes, and the overall unmanageability of providing appropriate accommodations required by

⁴⁰ 42 U.S.C. § 12101. The ADA states:

- (a) Findings The Congress finds that— . . .
- (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; . . .
- (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [society's] failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
- (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; . . .
- (8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and
- (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

Id. § 12101(a). The purpose of the ADA is well-documented. *Id.* § 12101(b). The ADA's purpose statement provides as follows:

- (b) Purpose It is the purpose of this chapter—
- (1) to provide a clear and comprehensive national mandate for the elimination of *discrimination* against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing *discrimination* against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of *discrimination* faced day-to-day by people with disabilities.

Id. (emphasis added).

the statute.⁴¹ Businesses and employers sought to understand precisely what was meant by the Act's terminology, such as "qualified individual with a disability[.]" "essential functions[.]" "reasonable accommodation," and "undue hardship[.]"⁴² Entities struggled to

⁴¹ See Americans with Disabilities Act of 1990 Statement by President, *supra* note 5 (acknowledging the numerous concerns expressed by businesses and employers within the private sector, President George H. W. Bush attempted to allay those concerns by focusing first, on the similarity between the Rehabilitation Act and the ADA, second, on the flexibility of the approach to determining reasonable accommodation, and third, on the fact that the phase-in-provisions of the ADA give businesses and employers time to become familiar with the statute's requirements). See also Penn Lerblance, *Introducing the Americans With Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149, 149, 163 (1992). Lerblance outlined the substantive provisions of the ADA, discussed the substantial changes required by businesses and employers in complying with the ADA's complexities, and suggested that the key to achieving compliance with the ADA is "planning[.]" *Id.* at 163. "The challenges of compliance with the ADA for employers and businesses cannot be understated. There will be numerous questions and frustrations." *Id.* See also Barnard, *supra* note 27, at 230-31, 252 (noting how quickly the ADA was passed after being introduced by the Senate and pointing to its swift enactment after the "rapid march through Congress[]" as one reason for the law's inadequacies; additionally, while acknowledging Congress's good intentions and the inherent difficulties of addressing disability discrimination in employment, adamantly arguing that the burden that the ADA places on employers is "onerous" and suggesting that the ADA creates problems for employers that may never be effectively resolved); Paul Stephen Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, 19 TRANSP. L.J. 309, 330 (1991) (stating that many businesses were opposed to the ADA and had lobbied against it because of the high costs that were expected to accompany the requirements, and stating that one attorney claimed that the ADA would spawn a "nuclear litigation explosion"); Floyd D. Weatherspoon, *The Americans with Disabilities Act of 1990: Title I and Its Impact on Employment Decisions*, 16 VT. L. REV. 263, 298 (1991) (forecasting that much litigation would result because of the vague terminology used in Title I of the ADA, the title addressing the employment sector, and expressing concern that "frivolous claims" would "[u]ndoubtedly[]" be asserted by plaintiffs until the terms were adequately clarified); Christopher Cox, *Toward More Crippling Lawsuits*, WALL ST. J., Oct. 13, 1989, at A14, col. 4 (in which Cox, a United States Congressman from California, commented on the ADA, "[T]he legislation is one of the most poorly drafted pieces of legal work I have seen It's a model of vagueness[.]"); Glen Elsasser, *Senate OK's Sweeping Disabled-Rights Bill*, CHI. TRIB., Sept. 9, 1989, § 1, at 4 (indicating that United States Senator David Pryor, from Kansas, referred to the ADA as "a lawyer's dream" because of the volume of litigation it was expected to generate); *Review and Outlook*, *supra* note 25, at A18 (describing the ADA as the "Lawyers' Employment Act" that will most definitely benefit lawyers because it is a "swamp of imprecise language[.]"). *But see* Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 931 (1989) ("The overall cost of the . . . [ADA] to employers should be minimal[] because larger employers have two to four years to devise means of complying with the Act, while small employers will never have to comply.").

⁴² See, e.g., 42 U.S.C. §§ 12111(8)-(10) (2000). Many terms in the ADA are defined with terms that can be interpreted broadly or narrowly. *Id.*; see also, e.g., *id.* § 12102(2) (emphasis added) ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such

impairment.”); *id.* §§ 12102(2), 12111 (showing that “substantially limits” and “major life activities” are not defined).

Some phrases in the ADA are defined by terms defined in other sections; indeed, this requires referencing multiple definitions to fully ascertain the meaning of one phrase. *Id.* § 12111. For a covered employer to determine whether it must provide reasonable accommodation to an individual, it must first consider whether the individual is a qualified, disabled employee. *Id.* § 12111(8); § 12111(4) (stating, “The term ‘employee’ means an individual employed by an employer[.]”). Next, it must consider that “[t]he term ‘qualified individual with a disability’ means 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.” *Id.* § 12111(8) (emphasis added). Thus, determining whether a person is a qualified, disabled employee requires referring to the definitions of “employee[.]” “qualified individual with a disability[.]” “disability[.]” “reasonable accommodation[.]” and “essential functions[.]” *Id.* §§ 12102(2) (defining “disability”); 12111(4) (defining “employee”); 12111(8) (defining “qualified individual with a disability” and “essential functions”); 12111(9) (defining “reasonable accommodation”). Determining whether accommodation is reasonable also requires referring to the definition of “undue hardship” because

the term “discriminate” includes[.]...not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]

Id. § 12112(b)(5)(A). In discussing “essential functions[.]” the ADA sets forth the following explanation:

For the purposes of this subchapter, 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.

Id. § 12111(8) (emphasis added). The reasonable accommodation provision states as follows:

Reasonable Accommodation The term “reasonable accommodation” 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 similar accommodations for individuals with disabilities.

Id. § 12111(9) (emphasis added). The definition provided for “undue hardship” is lengthier and states:

Undue Hardship

(A) In general The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered 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 under this

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comply with the ADA's requirements, and litigation ensued, forcing courts to interpret the Act's vague language.⁴³

B. United States Supreme Court and Circuit Courts of Appeals Decisions: Interpreting the Ambiguous Provisions of the Americans With Disabilities Act of 1990

The circuit courts have disagreed greatly as to the meaning of phrases within the ADA, resulting in many circuit splits.⁴⁴ The United

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.

Id. § 12111(10) (emphasis added). See also Lerblance, *supra* note 41, at 149 (predicting that the ADA will significantly change the way employers do business); Befort & Thomas, *supra* note 4, at 71 (commenting on the lack of definitions for key terms and phrases in the ADA, including "impairment," "major life activity," and "substantially limits"). See also Charles Lane, *Justice Criticizes Congress on Disabilities Act Written in a Rush, Says O'Connor*, CHI. TRIB., Mar. 15, 2002. Even Supreme Court Justice Sandra Day O'Connor voiced her frustration with the "uncertainties" embedded in the law. *Id.* See generally Jerry Zremski, *Disabled Will Have to Enforce New Disabilities Act U.S. Plans to Hire Only 32 People to Police 660,000 Business [sic] Nationwide*, BUFFALO NEWS, Sept. 29, 1991. Zremski considered the opinions of a human resources manager, a senior vice president for operations of a bank, and an attorney, and noted that the ADA's vague terminology caused businesses and employers to worry that, despite their good intentions, they would fail to meet the ADA's requirements. *Id.*

⁴³ See, e.g., *infra* notes 44-45 49, 52, 56, 74-75 (cases cited). See also Befort & Thomas, *supra* note 4, at 29 (commenting on the many issues involving the ADA that were disputed almost immediately after the ADA was enacted, and indicating that "ADA's adoption [quickly] turned into a wail of frustration[]" and spawned a "deluge of litigation"); AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES FY 1997-FY 2007 (2007), <http://eeoc.gov/stats/ada-charges.html> (reporting that 235,465 charges were filed under the ADA from July 26, 1992 through September 30, 2006).

⁴⁴ See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005) (acknowledging and resolving a circuit split between the Fifth and Eleventh Circuits as to whether Title III of the ADA applies to foreign-flag cruise ships); *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444-51 (2003) (responding to a disagreement between the Second and Seventh Circuits as to whether shareholders are employees under the ADA).

See also, e.g., Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 76, 78 (2002) (citing Echazabal v. Chevron U.S.A. Inc., 226 F.3d 1063, 1066 & n.3 (9th Cir. 2000), *rev'd*, 536 U.S. 73 (2002); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996); Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999)). Deciding an issue in which the Seventh, Ninth, and Eleventh Circuits were split as to whether an employer could reject an applicant when the job he sought posed a danger to his own health, the Court unanimously decided that an employer may refuse to hire an applicant when the job sought poses a danger to the same applicant. *Id.* The Ninth Circuit, turning to the ADA's statutory text for guidance, held that the ADA is not a paternalistic statute, and, as such, an employer could refuse to hire an applicant only when doing so posed a health or safety risk to others. *Chevron*, 226 F.3d at 1066 & n.3. When the only health or safety risk was to the individual applying for the job, the employer could not reject him. *Id.* *But see* Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999). The Seventh Circuit upheld an employer's decision to terminate a disabled employee. *Id.* Side-stepping the plaintiff-employee's argument that the employer's decision was paternalistic, the court determined that the plaintiff could not establish a prima facie case because he could not demonstrate that he was a qualified, disabled employee, i.e., able to perform the essential functions of his job. *Id.* Because he could not demonstrate that he was qualified, he could not show that he was deserving of protection under the ADA. *Id.* *See also, e.g.,* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996). The Eleventh Circuit held that an employer could fire an employee when his disability (seizure-producing epilepsy) posed a significant safety threat to himself in his assigned job. *Id.* *See also, e.g.,* US Airways, Inc. v. Barnett, 535 U.S. 391, 393-94 (2002) (addressing the divergent views of the Fourth and Ninth Circuits as to the legal significance of seniority systems pursuant to the ADA).

See also, e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 192-93 (2002). In *Toyota Motor Mfg.*, a unanimous Court resolved the conflict that existed among the circuits and set forth the appropriate test for determining whether an individual's disability substantially limits a major life activity. *Id.* at 187, 202. The appropriate inquiry is whether the activity that is limited is of central importance to the daily lives of most people. *Id.* In determining that raising one's arms above shoulder length was not such an activity, the Court narrowed the scope of activity that qualifies as a disability according to the ADA. *Id.* At least inferentially, the Court decided that *heavy* lifting is not a major life activity, and likely, neither is lifting fifteen pounds. *See id.* *See also, e.g.,* PGA Tour, Inc. v. Martin, 532 U.S. 661, 674, 681, 691 (2001) (resolving differing views of the Seventh and Ninth Circuits as to which events are covered by Title III of the ADA); Sutton v. United Air Lines, Inc., 527 U.S. 471, 496 (1999) (resolving an issue previously decided by nine circuits, the Court established whether corrective measures should be considered in determining if a person has a qualifying disability).

See also, e.g., Bragdon v. Abbott, 524 U.S. 624 (1998). Prior to *Bragdon*, in which the Court affirmed the First Circuit's finding that HIV is a disability pursuant to the ADA, many courts disagreed as to whether reproduction was a major life activity and several courts ruled that because it was not, HIV was not an ADA-covered disability. *Id.* *See also, e.g.,* Runnebaum v. NationsBank of Maryland, N.A., 123 F.3d 156, 171-72 (4th Cir. 1997) (en banc) (holding that neither sexual relations nor reproduction were major life activities, and therefore, HIV was not a disability even though it limited those activities); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996) (citing Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 244 (E.D. La. 1995)) (considering a case involving an employee's infertility; holding that reproduction was not a major life activity, and thus, the employee was not disabled), *aff'd*, 79 F.3d 1143 (5th Cir. 1996); Cortes v. McDonald's Corp., 955 F. Supp. 541, 544-47 (E.D. N.C. 1996) (citing *Runnebaum*, 95 F.3d at 1285, 1290 (4th Cir. 1996)), *aff'd*, 123 F.3d 156 (4th Cir. 1997) (en banc); Ennis v. The Nat'l Ass'n of Bus. and Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995) (holding that a former employee did not show that

States Supreme Court, in order to resolve these circuit splits, has granted certiorari in a variety of cases and has interpreted and qualified some of the statutory text, shedding light on mystifying terms and nuances.⁴⁵ In

HIV affected a major life activity, and therefore, he was not disabled); *Zatarain*, 881 F. Supp. at 244 (considering, as a matter of first impression, whether infertility was a disability; holding, that reproduction was not a major life activity and infertility was not an ADA-covered disability).

Compare, e.g., *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539–41 (9th Cir. 1997) (citing *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996), and *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311 (8th Cir. 1996)) (holding that the employee’s inability to lift twenty-five pounds did not substantially limit a major life activity), and *Helfter v. UPS, Inc.*, 115 F.3d 613, 616–18 (8th Cir. 1997) (holding that the inability of the plaintiff-employee to lift greater than ten pounds frequently, did not substantially limit her ability to perform a major life activity), and *Glidden Co.*, 85 F.3d at 229 (deciding that the employee’s inability to perform “heavy lifting[.]” only affected a “discrete task[.]” thus, it did not substantially limit a major life activity), and *Aucutt*, 85 F.3d at 1318–20 (holding that a twenty-five pound lifting limitation did not amount to a substantial limit of a major life activity), and *Panzullo v. Modell’s Pa., Inc.*, 968 F. Supp. 1022, 1026 (E.D. Pa. 1997) (finding that the employee’s disability did not substantially limit a major life activity because it only excluded him from a narrow class of jobs), *with Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (relying on opinions of the Fourth and Fifth Circuits, and finding that *working* is a major life activity), *abrogated by Toyota Motor Mfg.*, 534 U.S. at 187, 202, and *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (recognizing that the inability to lift fifteen pounds could qualify as a disability, and therefore precluded summary judgment).

See also Befort, *supra* note 11, at 931, 932–33 (stating that many courts have considered the meaning of terms within the ADA, such as “disability” and “reasonable accommodation”). *See also* Befort & Thomas, *supra* note 4, at 30. Referring to the “wide divergence of [judicial] opinion” on a variety of issues involving the ADA and indicating that judicial response is “startlingly diverse[.]” Befort & Thomas stated as follows:

On issue after issue, the circuit courts of appeal are split and/or are in disagreement with the EEOC. These disagreements go to some fundamental concepts under the ADA, such as who is a protected “individual with a disability” and which party bears the burden of establishing the availability of a reasonable accommodation.

Id. *See generally, e.g.,* Peggy R. Mastroianni, *Recent Decisions Under the Americans With Disabilities Act*, SM027 A.L.I.-A.B.A. 221 (2006) (for educational use only). Nearly twenty years after its passage, conflicting views flourish as to the requirements that the ADA imposes on employers. *Id.* Mastroianni listed more than eighty circuit court decisions involving the ADA in the employment context that were decided during 2005 and 2006. *Id.*

⁴⁵ *See, e.g., Spector*, 545 U.S. at 129, 125, 135–36 (produced 4 separate opinions) (resolving a circuit split as to the scope of the ADA, and shedding light on language within Title III of the ADA, which exempts an entity from the requirement of providing reasonable accommodation if such accommodation is not “readily achievable[.]” and, in doing so, deciding that a cruise ship is exempt from the reasonable accommodation requirement to the extent that it shows that providing such accommodation would pose a significant safety risk to others); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51–52, 55 (2003) (unanimous opinion, except that Justice Souter took no part in the decision and Justice Breyer took no part in the consideration or the decision) (overturning the Ninth Circuit’s pro-employee ruling, and announcing that an employer may enforce an across-the-board policy to refuse to re-hire employees who previously engaged in misconduct in violation of company

policy; and, accordingly, finding that where an applicant is unable to show that the employer discriminated based on previous drug use and, thus, based on apparent record of disability, the same applicant may not prevail on a “record of” disability theory, even though he may be able to prove that he was a rehabilitated drug addict); *Clackamas*, 538 U.S. at 449, 444–51 (7-2 majority opinion) (reversing and remanding the ruling of the Ninth Circuit, and addressing the then-existing circuit split by setting forth that the appropriate approach for determining whether shareholder-director-physicians fall within the ADA’s definition of “employee[]” is to apply the six-factor inquiry established by the EEOC, thereby acknowledging the persuasiveness of the EEOC’s published guidelines); *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (unanimous opinion) (vacating a punitive damages award of \$1.2 million, and deciding that punitive damages are not permitted in private suits under the ADA); *Chevron*, 536 U.S. at 76, 78 (unanimous opinion) (acknowledging the “conflict[]” and “tension” among the circuits as to the issue presented, the Court reversed and remanded the Ninth Circuit’s opinion and held that an employer may refuse to hire a person when the job being sought would endanger that person’s health because of the person’s disability); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 393–94 (2002) (5-4 majority opinion) (produced 5 separate opinions) (addressing a circuit split, and holding that when an employer demonstrates that reassigning a disabled employee interferes with its seniority rules, the employer will usually be able to show that such a reassignment is not a reasonable accommodation, but also stating that an employee may present evidence of special circumstances that make an exception to the seniority rule reasonable in certain circumstances); *Toyota Motor Mfg.*, 534 U.S. at 187, 202 (unanimous opinion) (clarifying the meaning of “substantially limit . . . major life activities[]” by stating that, in order to fall within the ADA’s purview, the activities that are limited by a disability must be “of central importance to [the] daily lives[]” of “most people[,]” not just of the particular person in question; and, after significantly narrowing the scope of the arguably ambiguous phraseology, the Court applied its new narrow definition, deciding that an employee’s inability to raise her arms above her shoulders did not establish that she was substantially limited in a major life activity); *PGA Tour, Inc.*, 532 U.S. at 674, 681, 691 (2001) (7-2 majority opinion) (resolving a “conflict between th[e] courts[]” and holding that a professional golf tournament falls within the reach of public accommodations as intended by Title III of the ADA, and determining that the entity sponsoring a golf tournament was required to allow a disabled professional golfer to use a golf cart instead of walking the course as a means of reasonable accommodation required by the ADA); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (6-3 majority opinion) (clarifying that to comply with the anti-discrimination provision within Title II of the ADA, a state must place people with mental disabilities in community settings when the disability is the factor keeping them out of such a community and placement can be reasonably accommodated; and, in addition, stating that unjustifiably isolating a person because of his disability is discrimination prohibited by the ADA); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 558, 565–66, (1999) (unanimous opinion) (deciding that whether a person possesses a disability pursuant to the ADA must be a case-by-case determination, and in this matter, the employer properly considered the employee’s ability to control his impairment and the employer’s obligation to fully comply with Department of Transportation regulations); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 547–48 (1999) (dictum) (citing 42 U.S.C. § 1981(a)–(b) (2000)) (discussing that the Civil Rights Act of 1991 provides remedies for certain violations of the ADA); *Murphy v. UPS, Inc.*, 527 U.S. 516, 521 (1999) (7-2 majority opinion) (finding that mitigating measures, including medications taken, assist in determining whether an individual has a disability as defined by the ADA, and in this case, determining that employee-Murphy did not have a disability because when he was medicated, his high blood pressure did not substantially limit any major life activity); *Sutton*, 527 U.S. at 477, 480, 482, 495–96 (7-2 majority opinion) (ruling *against* the recommendation of the Equal Employment

addition, the Court has addressed the relationship of the ADA to the Eleventh Amendment and congressional abrogation issues.⁴⁶ Several of the Court's opinions were 5-4, with stinging dissents, proving that the ADA is not easy to decipher.⁴⁷ Because the language in the ADA is susceptible to both broad and narrow interpretations and the members of the Court have expressed widely divergent views when interpreting the Act, the Court's opinions have allowed the vicious cycle of litigation to continue.⁴⁸

Opportunity Commission and *against* eight of the nine federal circuit courts that had previously decided this issue, the Court concluded that the effect of corrective measures, in this case eyeglasses, should be considered in determining whether an individual's impairment substantially limits one or more major life activity, thus, denying, in this case, the plaintiffs' alleged disabilities); *Bragdon*, 524 U.S. at 628, 637, 641-42, 648-55 (5-4 majority opinion) (affirming the First Circuit, and holding that HIV constitutes a disability under the ADA, even before it progresses to full-blown Acquired Immune Deficiency Syndrome (AIDS) because it is a physical impairment that substantially limits the major life activity of reproduction; and, additionally, providing guidance concerning the "direct threat" provision within Title II of the ADA and how an entity should evaluate objective evidence in determining whether a person's disability poses a "direct threat[.]" thereby exempting the entity from the reasonable accommodation requirement); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998) (unanimous opinion) (clarifying that the reach of Title II of the ADA extends protection to qualified, disabled inmates in state prisons).

⁴⁶ See, e.g., *United States v. Georgia*, 546 U.S. 151, 159 (2006) (unanimous opinion) (deciding that Title II of the ADA appropriately abrogates state sovereign immunity and creates a private cause of action against a state for violating the Fourteenth Amendment; and, ultimately, holding that a prison inmate had a valid cause of action against the state Department of Corrections and prison officials); *Tennessee v. Lane*, 541 U.S. 509, 517-44 (2004) (5-4 majority opinion) (holding that even though according to its 2001 ruling in *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001), in which it declared that under Title I of the ADA, the Eleventh Amendment prohibits a private party from seeking money damages for a state's violation, a private party *may* seek money damages for a state's violation *under Title II of the ADA*, at least as it relates to a violation of the fundamental right of access to courts); *Garrett*, 531 U.S. at 360 (5-4 majority opinion) (concluding that the Eleventh Amendment prohibits a private party from seeking money damages for a state's violation of Title I of the ADA).

⁴⁷ See, e.g., *Spector*, 545 U.S. at 125 (producing four separate opinions in response to a circuit split); *Lane*, 541 U.S. 509, 533-34 (Rehnquist, C.J., filed a dissenting opinion, in which Kennedy and Thomas, JJ., joined; Scalia, J., filed a dissenting opinion; Thomas, J., filed a dissenting opinion); *Barnett*, 535 U.S. at 393-94 (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined; Souter, J., filed a dissenting opinion, in which Ginsburg, J., joined) (producing five separate opinions in response to a circuit split); *Garrett*, 531 U.S. at 360 (Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined); *Bragdon*, 524 U.S. at 637, 639, 641-42, 648-55 (Rehnquist, C.J., filed an opinion concurring in the judgment in part and dissenting in part, in which Scalia and Thomas, JJ., joined, and in Part II of which O'Connor, J., joined; O'Connor, J., filed an opinion concurring in the judgment in part and dissenting in part); Befort, *supra* note 11, at 931 (discussing the "startling diversity of judicial interpretation on a host of key ADA issues[.]").

⁴⁸ See *Hayburn's Case*, 2 U.S. 408 (1792) (establishing that the Court must avoid rendering recommendations and advisory opinions; instead, rulings must pertain to actual

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Additionally, ADA cases involve highly fact-specific determinations; therefore, plaintiff-litigants, in cases involving alleged violations of the ADA, proceed to court hoping to demonstrate that their fact pattern is slightly different than others previously presented to the Court.⁴⁹ Given

controversies presented); Befort, *supra* note 11, at 931 (indicating that judicial disagreement concerning interpreting the ADA's language has produced a "litigation explosion," and suggesting that because the Court has a duty to limit its decision to the narrow facts before it and has been sharply divided in interpreting the ambiguities embedded in the ADA, the large number of majority, concurring, and dissenting ADA opinions produced by the Court provide plaintiffs with a foundation for litigating similar cases); Befort & Thomas, *supra* note 4, at 71-72 (noting that the phrases included in the ADA are poorly defined); *see also* Brian East, *Struggling to Fulfill Its Promise the ADA at 15*, 68 TEX. B.J. 614 (2005) (arguing that judicial opposition exists toward the ADA preventing disabled individuals from reaping its intended benefits, and citing the number of cases lost by ADA plaintiffs to support this claim); Michael H. Fox & Robert A. Mead, *The Relationship of Disability to Employment Protection Under Title I of the ADA in the United States Circuit Courts of Appeal*, 13 KAN. J.L. & PUB. POL'Y 485 (2004) (arguing that the ADA has not produced the positive results that were expected because the Court has narrowly construed the ADA and has rendered it relatively meaningless for people with disabilities). *See also* Thomas W. Snyder, *Ten Year Analysis: Is the ADA Meeting Its Goals?*, 14-NOV CBA Rec. 36, 36 (2000) (for educational use only). Referring to the extensive litigation that has ensued over the years involving Title I of the ADA, Snyder noted that courts continue to "grapple" with the requirements that the ADA imposes on employers. *Id.* One of the most frequently litigated issues is whether an employee's disability actually amounts to an ADA-covered disability. *Id.* at 37. *See also supra* Part II.B (reviewing basic issues relating to the ADA that have been debated in the courts in recent years). *But see* Snyder, *supra*, at 38 (stating that, overall, employers are following the ADA requirements and providing reasonable accommodation to employees); John L. Wodatch, Jr., *Enforcing the ADA: Looking Back on a Decade of Progress*, SF12 A.L.L.-A.B.A. 229, 232 (2001) (for educational use only) (discussing the overall positive effects that the ADA has produced, and noting, in particular, that employers are increasingly employing people with disabilities); ANNIVERSARY OF THE AMERICANS WITH DISABILITIES ACT, 2006 A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA (July 26, 2006), <http://www.whitehouse.gov/news/releases/2006/07/20060725-3.html> (reflecting on the sixteen years since the ADA's passage, and reviewing the nation's progress in removing barriers for people with disabilities); ENFORCING THE ADA: LOOKING BACK ON A DECADE OF PROGRESS (2000), <http://www.usdoj.gov/crt/ada/pubs/10thrpt.pdf> (citing examples of the ADA's successes in the area of employment).

⁴⁹ *See, e.g., Swart v. Premier Parks Corp.*, 88 F. App'x 366, 368-70 (10th Cir. 2004) (unpublished). Testing the boundaries of the ADA, a former employee argued that breast cancer caused her to lose her breast, resulting in disfigurement that substantially limited her ability to engage in reproductive and sexual activities. *Id.* To show that her employer discriminated against her pursuant to the ADA, she attempted to rely on *Sutton*, which called for an individualized determination of her impairment, and *Bragdon*, which held that reproduction is a major life activity. *Id.* However, because the plaintiff did not produce evidence that the loss of her breast actually limited her ability to reproduce, she could not show that she had a disability, and the court entered judgment for the employer. *Id.*

See also, e.g., Alberson's, 527 U.S. at 558, 565-66 (reaffirming *Sutton's* holding that the court must consider the totality of the circumstances in ADA cases). *See also, e.g., Sutton*, 527 U.S. at 483, 484 (citing 42 U.S.C. § 12102(2)). *Sutton* established that "whether a person has a disability under the ADA is an individualized inquiry." *Id.* The Court noted that a physical condition that does not substantially limit one person's ability to perform a major

the vagueness of the statutory terminology and the conflicting views of the Court, litigants hope to convince a lower court to apply a liberal interpretation of the ADA to their case.⁵⁰ Moreover, the case may eventually force the United States Supreme Court to grant certiorari and demystify another area of uncertainty within the statute.⁵¹ Undoubtedly, litigants hoped for such clarification in 2002 when the Court granted certiorari in *US Airways, Inc. v. Barnett*.⁵²

life activity may, in fact, substantially limit another person's ability to perform a major life activity. *Id.* Each person's occupation and qualifications must be considered. *Id.* Thus, one diabetic person may be disabled according to the ADA, while another diabetic is not. *Id.* See also Barnard, *supra* note 27, at 252 (explaining that the fact-sensitive nature of alleged ADA discrimination forces attorneys to play "the jury wheel of fortune[]").

⁵⁰ See Befort & Thomas, *supra* note 4, at 30 (indicating that courts are split on many issues, and suggesting that the outcomes of lawsuits involving the ADA are unpredictable). See also Lawrence D. Rosenthal, *Can't Stomach the Americans with Disabilities Act? How the Federal Courts Have Gutted Disability Discrimination Legislation in Cases Involving Individuals With Gastrointestinal and Other Hidden Illnesses*, 53 CATH. U. L. REV. 449, 451, 491-98 (2004). Rosenthal first examined the reasons courts have been reluctant to accept certain disabling conditions as disabilities pursuant to the ADA. *Id.* He next analyzed why plaintiffs are unsuccessful in establishing that they are qualified for the position in question. *Id.* Finally, Rosenthal provided guidance to plaintiffs' attorneys for "convinc[ing] the courts" to rule in their favor in future cases. *Id.* at 491. See also Ronald Turner, *The Americans With Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379, 383-84 (2004) (declaring that the uncertainty of various phrases within the ADA has encouraged parties to head to the courthouse to seek clarification).

⁵¹ See, e.g., *Spector*, 545 U.S. at 125 (responding to a split in the Fifth and Eleventh Circuits); *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444-51 (2003) (settling a circuit split in a 7-2 opinion); *Barnett*, 535 U.S. at 393-94 (deciding an issue on which the Fourth and Ninth Circuits were split); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 192-93 (2002) (resolving the tension among the circuits); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76, 78 (2002) (putting a circuit split to rest with a unanimous opinion); *PGA Tour, Inc.*, 532 U.S. at 674, 681, 691 (rendering a 7-2 opinion in response to a circuit split); *Sutton*, 527 U.S. at 477, 480, 482, 495-96 (delivering a 7-2 opinion to end differing views in the circuits); *Bragdon*, 524 U.S. at 637, 639, 641-42, 648-55 (setting forth a rule for deciding an issue that split the circuits).

⁵² See *Barnett*, 535 U.S. 391; see also *infra* note 56 and accompanying text (discussing the issue in *Barnett* as to whether an employer must violate its seniority policy in order to accommodate a disabled employee). The issue in *Barnett* was widely debated in the lower courts prior to its debut in the United States Supreme Court. See *Barnett*, 535 U.S. 391, 396. Compare, e.g., *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (acknowledging that an employer may be required to reassign a qualified, disabled employee to a vacant position, but holding that an employer is not required to do so in violation of its non-discriminatory seniority policy), and *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1020 (8th Cir. 2000) (determining that an employer may be required to reassign a qualified, disabled employee to a vacant position but is generally not required to violate a collective bargaining agreement or other non-discriminatory policy), and *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc) (addressing the question within the context of a collective bargaining unit, and recognizing that an employer may be required to reassign a qualified, disabled employee; but, noting that an

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In *Barnett*, Robert Barnett (“Barnett”), a customer service agent for US Airways, injured his back and could no longer perform the essential duties of his position.⁵³ Eventually, he lost his job and sued the company, claiming that it violated the ADA by failing to provide reasonable accommodation to him.⁵⁴ The United States Supreme Court granted certiorari to determine whether an employer must reassign a disabled employee, who is unable to perform his job, to a different position for which he is qualified, but that another employee is entitled to hold pursuant to the employer’s seniority system.⁵⁵

employer is not required to do so if it means violating a *collective bargaining agreement* or hiring policy), and *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678 (7th Cir.1998) (determining that an employer may have a duty to reassign a qualified, disabled employee but is not required to violate a *collective bargaining agreement* or *seniority system*), and *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996) (deciding that an employer may be required to reassign a qualified, disabled employee, but not if doing so would violate its *collectively bargained seniority system*), with *Barnett*, 228 F.3d 1105, 1120 (9th Cir. 2002), *rev’d*, 535 U.S. 391 (2002) (holding that an employer may be required to reassign a qualified, disabled employee, even when doing so would require it to violate its *seniority policy*), and *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167-68 (10th Cir. 1999) (en banc) (holding that an employer may be required to reassign a qualified, disabled employee, even when a more-qualified candidate is available, unless such reassignment would violate its well-established *collective bargaining seniority policy*).

⁵³ 228 F.3d at 1108 (9th Cir. 2002), *rev’d*, 535 U.S. 391 (2002). Barnett had worked for US Airways as a customer service agent for ten years when he hurt his back while performing cargo duties. *Id.* When he returned from disability leave, he invoked his rights under the company’s long-standing seniority system and transferred to a less physically demanding mailroom position. *Id.* Under the same seniority policy, the mailroom position later became open for bidding, and two employees that possessed more seniority than Barnett intended to bid on it. *Id.* at 1108-09. Barnett requested that US Airways make an exception to its seniority policy, deny the other employees the right to bid on the job, and permit him to have the mailroom position. *Id.* at 1109. US Airways allowed Barnett to remain in the mailroom position while it considered his request for reassignment. *Id.* Approximately five months after Barnett’s request, US Airways informed Barnett that it was unable to make an exception to its seniority policy. *Id.*

⁵⁴ *Id.* More specifically, Barnett argued that he was a qualified, disabled employee and that the company’s refusal to reasonably accommodate his disability violated the ADA. *Id.* Most circuits previously held that an employer was not required to reassign a disabled employee to a vacant position if doing so meant violating its collectively bargained seniority system. *Id.* The Ninth Circuit, addressing this question of first impression for the circuit, considered whether this situation should be decided differently because US Airways’s seniority system was not grounded in a collectively bargained agreement. *Id.* Ultimately, the Ninth Circuit, sitting en banc, reversed the district court’s denial of summary judgment and determined that an issue of fact existed regarding whether the requested accommodation was reasonable or posed an undue hardship on US Airways. *Id.* at 1121-23. The court noted that a seniority system does not automatically prevent a reassignment request, but instead is merely a factor in the fact-sensitive inquiry. *Id.* at 1120. See also *supra* note 52 (discussing pre-*Barnett* cases that addressed this issue).

⁵⁵ *Barnett*, 535 U.S. at 395-96. The Court acknowledged that “[t]he Circuits ha[d] reached different conclusions about the legal significance of a seniority system.” *Id.* at 396

The Court explained that the ADA states that an employer may not discriminate against a qualified, disabled employee, that the term “discriminate” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business[.]” and that “‘reasonable accommodation’ may include[] . . . reassignment to a vacant position[.]”⁵⁶ The Court held that

(citing *Barnett*, 228 F.3d at 1120 (9th Cir. 2002), *rev'd*, 535 U.S. 391 (2002); *Sara Lee Corp.*, 237 F.3d at 354). See also *supra* note 42 (quoting in its entirety the reasonable accommodation provision, § 12111(9), and the reassignment provision contained therein, § 12111(9)(B)).

See also *Barnett*, 228 F.3d 1105 (9th Cir. 2002), *rev'd*, 535 U.S. 391 (2002); *Sara Lee Corp.*, 237 F.3d at 350–54. When the Fourth Circuit addressed the issue that the Ninth Circuit had previously decided in *Barnett*, it disagreed with the Ninth Circuit’s determination and held that the ADA does not require an employer to waive its non-discriminatory seniority policy in favor of a disabled employee. *Sara Lee Corp.*, 237 F.3d at 350–54. The facts in *Sara Lee Corp.* closely resembled *Barnett*. *Id.*; *Barnett*, 228 F.3d at 1108–09 (9th Cir. 2002), *rev'd*, 535 U.S. 391 (2002). The employee was employed by her employer for eight years, compared to ten in *Barnett*. *Sara Lee Corp.*, 237 F.3d at 350–54; *Barnett*, 228 F.3d at 1108 (9th Cir. 2002), *rev'd*, 535 U.S. 391 (2002). The employer’s seniority policy had existed for decades, just like the policy in *Barnett*, and the employee requested that her employer allow her to have a position that a more senior employee had a right to hold. *Sara Lee Corp.*, 237 F.3d at 350–54; *Barnett*, 228 F.3d at 1108–25 (9th Cir. 2002), *rev'd*, 535 U.S. 391 (2002). Unlike the Ninth Circuit, the Fourth Circuit refused to adopt the notion that an employer is sometimes required to ignore its bona fide and well-established seniority policy. *Sara Lee Corp.*, 237 F.3d at 354–56.

See also Vikram David Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 GREEN BAG 2d 361, 362 (2002) (noting that *Barnett* represents the Court’s first attempt to make sense of an employer’s obligation to provide reasonable accommodation); John W. Parry, *Supreme Court Agrees to Review “Disability” and Seniority Rights Under ADA Title I*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 303, 304 (2001) (commenting on the Court’s decision to grant certiorari in *Barnett*, and noting that it is the first time that the Court will directly address the reasonable accommodation provision in the employment context).

⁵⁶ 42 U.S.C. §§ 12112(b)(5)(A), 12111(9) (2000). See also *Barnett*, 535 U.S. at 395–96. In determining whether an employer is obligated to reassign an employee who becomes disabled in order to fulfill its ADA-duty of providing reasonable accommodation, the Court considered four provisions within the ADA:

First, the ADA says that an employer may not “discriminate against a qualified individual with a disability.” 42 U.S.C. § 12112(a). Second, the ADA says that a “qualified” individual includes “an individual with a disability who, *with* or without *reasonable accommodation*, can perform the essential functions of” the relevant “employment position.” § 12111(8) (emphasis added). Third, the ADA says that “discrimination” includes an employer’s “*not making reasonable accommodations* to the known physical or mental limitations of an otherwise qualified . . . employee, *unless* [the employer] can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business.” § 12112(b)(5)(A) (emphasis added). Fourth, the ADA says that the term “‘reasonable accommodation’ may

reassignment is generally not “reasonable[]” when it conflicts with a seniority system, but that an employee may show special circumstances to make a seniority rule exception reasonable in a particular case.⁵⁷

The Court’s 5-4 ruling in *Barnett* consisted of five separate opinions and left many questions unanswered as to the scope of the holding and the types of situations to which it applies.⁵⁸ One major problem with *Barnett* is the vagueness and the apparent unmanageability of the “special circumstances” language.⁵⁹ In holding that an employer *may* be

include . . . reassignment to a vacant position.” § 12111(9)(B) [sic].

Id. at 396.

⁵⁷ *Id.* at 394. The majority opinion first *rejected* the argument asserted by US Airways—that requiring an employer to violate its seniority policy would *always* pose an undue burden on the employer. *Id.* at 398–406. The Court reasoned that the ADA often requires employers to make exceptions to work rules in order to provide reasonable accommodation. *Id.* at 397–98. For instance, an employer may be required to give a disabled person extended breaks beyond what is permitted in the employer’s policy, or an employer may be required to exceed the established furniture budget to accommodate a disabled employee’s request for a particular type of desk. *Id.* Thus, the Court concluded that, by itself, the fact that an employer would need to make an exception to a work rule does not make a request for accommodation unreasonable. *Id.* at 398.

The Court next *rejected* *Barnett*’s argument that reassignment would *always* amount to reasonable accommodation. *Id.* at 398–99. Eliminating discrimination against people with disabilities may require an employer to engage in affirmative conduct, but the ADA limits such conduct to what is reasonable. *Id.* at 399–402. Congress employed the word “reasonable[]” to establish a limit on the action that an employer must take. *Id.* at 401. Therefore, to say that an employer is required to reassign a qualified, disabled employee to a vacant position—no matter what policies it must violate in so doing—would expand the scope of the ADA beyond what Congress articulated. *Id.*

In holding that an employee remains free to show that special circumstances warrant an exception to an employer’s seniority rule, the Court gave two examples to illustrate how an employee might show that his requested accommodation is reasonable. *Id.* at 405–06. The plaintiff could show that either (1) the employer has often changed the seniority system, thereby reducing employees’ expectations that it will be strictly followed, or (2) the system includes built-in exceptions, such that allowing for another exception will cause minimal disruption. *Id.*

⁵⁸ See *infra* note 59 (discussing the problem with *Barnett*’s “special circumstances” language); *infra* notes 61–62, 66 (explaining that it is unknown whether *Barnett* applies to an employee’s request for a reassignment to a vacant position when such request conflicts with an employer’s hiring policy, i.e., a policy other than a seniority-based policy).

⁵⁹ See *Barnett*, 535 U.S. at 394, 398 (majority opinion). The Court noted that in many cases, an employer may no longer prevail at the summary judgment stage by merely showing that an accommodation would violate a company’s seniority policy. *Id.* at 394. The Court further noted, “The plaintiff remains free to present evidence of special circumstances that make ‘reasonable’ a seniority rule exception in the particular case. And such a showing will defeat the employer’s demand for summary judgment.” *Id.* As mentioned previously, the Court expressly invited plaintiffs to demonstrate evidence of special circumstances, for example, that the employer has previously changed the seniority policies, thereby reducing employees’ expectations that the policies will not be altered, or that the seniority policies allow for exceptions to be granted, thereby making one more exception only minimally troublesome. *Id.* at 405–06. To this Justice Scalia responded, “I

required to violate its seniority policy if “special circumstances” exist, the Court noted other instances, pursuant to the ADA, in which an employer must make exceptions to its work rules; but, in so doing, Justice Scalia argued in dissent that by issuing such a vague rule, the Court would be paving the way for other actions involving alleged ADA violations to be brought by plaintiffs desiring to test the limits of this so-called “special circumstances” exception.⁶⁰

Another problem with *Barnett* is that the Court’s holding appears to apply only to requests for accommodation that conflict with seniority systems, but if interpreted liberally would apply to other employment policies as well.⁶¹ In keeping with the Court’s precedent of insulating

have no idea what this means.” *Id.* at 418 (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined). *See also* *Barnett v. U.S. Air, Inc.*, 228 F.3d at 1125 (9th Cir. 2002), *rev’d*, 535 U.S. 391 (2002) (Trott, J., dissenting, with whom O’Scannlain, J., and Kleinfeld, J., join). Judge Trott, dissenting to an aspect of the majority’s opinion that the United States Supreme Court later adopted—that a seniority system would not always preclude an employer from reassigning a disabled employee to a vacant position—stated as follows:

I am troubled by the regrettable position in which we leave employers, employees, and the lawyers who advise them in connection with these important and possibly costly decisions. To require them to deal with a seniority system as “merely one factor” leaves them with no guidance, none at all. This default portends litigation in every case where a seniority system blocking the accommodation is respected[] What to do with seniority systems in this context is a policy question for Congress, one which we as judges have no authority or ability to resolve. We are left with legislation by litigation, and we become a nation not of laws, but of lawyers.

Id.

⁶⁰ *See supra* note 59 (discussing the majority’s rebuttable presumption rule, including the special circumstances exception, and Justice Scalia’s response to the special circumstances exception).

⁶¹ *See Barnett*, 535 U.S. at 391–424. As to the scope of its holding, the majority expressly stated that the case involved a conflict with the employer’s *seniority system*; thus, the Court’s holding appears to apply only to situations involving seniority systems. *Id.* at 402. In fact, the Court initially summarized the issue by asking, “In such a case, does the accommodation demand trump the seniority system?” and answered its question by specifically addressing the relationship between seniority systems and the request for accommodation. *Id.* at 394. Leading the majority, Justice Breyer stated:

In our view, the seniority system will prevail in the run of cases. As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not “reasonable.” Hence such a showing will entitle an employer/defendant to summary judgment on the question—unless there is more. The plaintiff remains free to present evidence of special circumstances that make “reasonable” a seniority rule exception in the particular case. And such a showing will defeat the employer’s demand for summary judgment.

Id.

In support of a narrow holding, Justice O’Connor wrote a separate concurring opinion

in which she stated that the issue could even be more narrowly characterized than the majority suggested. *Id.* at 408 (O'Connor, J., concurring). She contended that the issue as to whether a seniority system affects an employer's duty under the ADA to provide reasonable accommodation and reassign a qualified, disabled employee depends solely on whether the seniority system was a legally enforceable program, providing employees with contractual rights to hold positions. *Id.* In her view, under legally enforceable seniority systems, positions never become vacant; thus, reassignment is not a reasonable accommodation because it would involve bumping employees out of positions that they (legally) possess. *Id.* at 408-10. Pointing to legislative history, she indicated that Congress did not intend for reasonable accommodation to include bumping employees out of positions. *Id.* at 409-10 (citing H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345; S. REP. NO. 101-116, at 32 (1989)). In seniority systems that are not legally enforceable, though, employees do not have contractual rights to immediately possess positions. *Id.* Moreover, in such systems, an employer's policies probably contain caveats, exceptions, or disclaimers that make it likely that the employer will be required to make an exception to its policy and reassign a qualified, disabled employee to a vacant position as a way of providing reasonable accommodation pursuant to the ADA. *Id.* at 410-11. Justice O'Connor would have liked for the majority to conclude that reassigning a qualified, disabled employee to a vacant position is per se unreasonable when such reassignment conflicts with the employer's bona fide *legally enforceable* seniority system. *Id.* at 408-12 (emphasis added). She stated:

"Were it possible for me to adhere to [this belief] in my vote, and for the Court at the same time to [adopt a majority rule]," I would do so. . . . "The Court, however, is divided in opinion[.]" . . . [I]n order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns.

Id. at 408 (internal citation omitted). The majority opinion, and especially Justice O'Connor's concurring opinion, suggested a narrow holding that applies only to seniority systems, i.e., when a request for accommodation conflicts with a seniority system, the accommodation is generally not reasonable. *Id.* at 396-406 (majority opinion), 408-11 (O'Connor, J., concurring opinion).

However, the other three opinions in *Barnett* raise questions as to the narrowness of the Court's holding. *Id.* at 406-08 (Stevens, J., concurring), 411-20 (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined), 420-24 (Souter, J., dissenting, with whom Ginsburg, J., joins). First, Justice Stevens was compelled to pen a concurring opinion in which he posed a number of questions and indicated that the answers to such questions could impact the Ninth Circuit's decision on remand. *Id.* at 407-08 (Stevens, J., concurring). He stated:

Among the questions that I have not been able to answer on the basis of the limited record that has been presented to us are: (1) whether the mailroom position held by respondent became open for bidding merely in response to a routine airline schedule change, or as the direct consequence of the layoff of several thousand employees; (2) whether respondent's requested accommodation should be viewed as an assignment to a vacant position, or as the maintenance of the status quo; and (3) exactly what impact the grant of respondent's request would have had on other employees. As I understand the Court's opinion, on remand, respondent will have the burden of answering these and other questions in order to overcome the presumption that petitioner's seniority system justified respondent's discharge.

Id. 407-08 (footnotes omitted). In his concurring opinion, Justice Stevens took the focus

seniority systems, a narrow reading of the holding seems appropriate.⁶² In fact, Justice O'Connor, the tiebreaker for the Court, emphasized that in

away from the company's seniority system, and placed it on factors that were likely to determine whether reassignment was a reasonable accommodation or an undue burden. *Id.* His opinion, thus, at least inferentially, suggested that these same considerations apply when a request for reassignment to a vacant position by a qualified, disabled employee conflicts with other hiring or transfer policies. *See id.* Thus, the Court's holding—that reassignment is not reasonable in the run of cases, but can be reasonable when the employee shows special circumstances—may not be limited to conflicts involving seniority policies. *Id.*

Second, Justice Scalia stated that the majority's opinion suggested that employers must make exceptions to "all employment rules and practices—even those which (like a seniority system) pose no *distinctive* obstacle to the disabled[.]" *Id.* at 412 (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined). According to the majority, an employer may be required to eliminate obstacles wholly unrelated to the employee's disability and reassign the disabled employee to a vacant position, even if, for example, another candidate is more-qualified and would typically be chosen. *Id.* at 414–16. Justice Scalia interpreted the majority's opinion broadly; in doing so, he demonstrated how the majority opinion advances great "uncertainty" concerning the ADA. *Id.* at 412, 413–20.

Finally, Justices Souter and Ginsburg dissented. *Id.* at 420–24 (Souter, J., dissenting, with whom Ginsburg, J., joins). Because this case dealt with reassignment that would conflict with a seniority system that was "*noncontractual and modifiable at will*," Justice Souter stated, "there is no reason to think that Barnett's accommodation would have resulted in anything more than minimal disruption[.]" *Id.* at 424 (emphasis added). This opinion, focusing not on the content of the seniority policy but instead on its noncontractual quality, called into question other policies, such as hiring or transfer policies. *Id.* Indeed, the opinion stated that "there is no reason to think that" any non-contractual policy would ever provide an employer with a valid reason for refusing to automatically reassign a qualified, disabled employee to a vacant job. *Id.* Justices Souter and Ginsburg agreed that, pursuant to the ADA, US Airways should have granted Barnett's request to be reassigned. *Id.* at 420–24.

See also Cheryl L. Anderson, "*Neutral*" Employer Policies and the ADA: *The Implications of US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 3 (2002). Anderson noted that the Court "muddied the waters" when it stated that an employee can present evidence of special circumstances that make a seniority rule exception reasonable in a particular case. *Id.* at 27. Anderson explained that *Barnett* left many issues ill-addressed, and, if interpreted broadly, *Barnett* could impact the way courts rule in situations where an employee's request for reassignment conflicts with other employment policies, such as transfer policies. *Id.* at 3; *see also* Befort, *supra* note 11, at 960 (noting that *Barnett* left much uncertainty in its wake).

See also supra note 57. In *Barnett*, in rejecting the argument posited by US Airways—that the ADA never requires an employer to violate its seniority policy—the Court specifically noted other policies as examples of situations when the ADA requires an employer to make exceptions to its policies. *See also supra* note 57. Because the *Barnett* Court discussed the benefits of seniority systems, such as fulfilling employee expectations for fair treatment, although the Court narrowly defined the issue as involving a reassignment request in conflict with a seniority system, it raised uncertainty regarding whether its holding would apply to reassignment requests in conflict with other transfer or hiring policies. *See also supra* note 57.

⁶² *See supra* note 61. As described in the first two paragraphs, *Barnett's* majority opinion, and Justice O'Connor's concurring opinion, both suggest a narrow holding. *Supra* note 61.

a legally enforceable seniority system, positions never become “vacant” because employees have contractual rights to immediately possess positions, and because Congress certainly did not intend for employees to be bumped out of positions in favor of reassigning disabled employees.⁶³ Moreover, in *Barnett*, the Court specifically discussed the importance of seniority systems and their role in fostering good employee-management relations, and in addition, Title VII expressly provides that bona fide seniority systems are afforded special protection.⁶⁴ However, the Court has previously determined that despite the importance of seniority systems, such systems must sometimes be ignored.⁶⁵ Therefore, dissenting in *Barnett*, Justice Scalia argued that the lack of a bright-line rule regarding whether an employer is required to make an exception to its seniority policy would merely foster litigation and, additionally, that, like seniority policies, other hiring policies also play an important role in fostering good employee-management relations, yet the majority’s opinion in *Barnett* did not resolve whether *Barnett*’s rebuttable presumption reasoning would extend to other hiring policies.⁶⁶

Indeed, in line with Justice Scalia’s predictions, after *Barnett*, disabled plaintiffs who were denied reassignment because of seniority policies sued employers, hoping to demonstrate that special

The majority even acknowledged the important role that seniority systems have historically played in maintaining strong employee-management relations. *Supra* note 61.

⁶³ See *supra* note 61 (summarizing Justice O’Connor’s concurring opinion in the second paragraph).

⁶⁴ *Barnett*, 535 U.S. at 404 (2002). The Court gave several reasons why accommodations will usually be unreasonable when they conflict with seniority systems, but left many questions unanswered. *Id.* at 403–05.

⁶⁵ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). Section 703(h) of Title VII states that only bona fide seniority systems are afforded special protection. *Id.*

⁶⁶ See *Barnett*, 535 U.S. at 412 (Scalia, J., filed a dissenting opinion, in which Thomas, J., joined). Thus, while the Court decided *Barnett* within the context of seniority policies, it indirectly raised the question as to whether its holding applies to other workplace policies; and, for this reason, Justice Scalia criticized the majority for “[i]ndulging its penchant for eschewing clear rules that might avoid litigation[.]” *Id.* More particularly, Justice Scalia argued that the majority’s opinion left plaintiffs and their attorneys wondering if the same reasoning applies when a qualified, disabled employee’s request for reassignment to a vacant position violates the employer’s qualification-based hiring policy. *Id.* at 414–15. He contended that the majority’s opinion encourages plaintiffs to bring suit against their employers every time employers refuse to make exceptions to their transfer and reassignment policies. *Id.* at 411–19 (citing *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028–29 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc)). Justice Scalia also argued that allowing employees with disabilities to benefit, merely because of their disabilities, transforms the ADA’s accommodation requirement into a “standardless grab bag[.]” necessarily requiring plaintiffs to continually head to court for clarification. *Id.* at 414, 412–14.

circumstances existed to make an exception to the seniority system reasonable.⁶⁷ In addition, other plaintiffs challenged policies other than seniority policies, forcing courts to determine whether *Barnett* applied to other employment policies, such as a merit-based policy of hiring the

⁶⁷ See, e.g., *EEOC v. Dillon Cos., Inc.*, 310 F.3d 1271, 1272 (10th Cir. 2002). In *Dillon*, the Tenth Circuit decided whether the EEOC's subpoena requesting information from the defendant concerning its job vacancies was enforceable. *Id.* The court determined that it was enforceable because the requested information could potentially provide the former employee-plaintiff with information to demonstrate that *special circumstances* existed that required the employer to make an exception to its reassignment policy. *Id.* at 1272, 1276-77. The court cited to its previous decision in *Midland Brake* and to *Barnett* and reasoned that even the company's well-established collectively bargained seniority system did not create an absolute defense for the defendant to withstand the subpoena. *Id.* (citing *Barnett*, 535 U.S. at 398; *Midland Brake*, 180 F.3d at 1167-68). At the summary judgment stage, an employee is free to show special circumstances that make an exception to a seniority policy reasonable. *Id.* (citing *Barnett*, 535 U.S. at 394, 398). At trial, the employer is free to defend itself by asserting that its well-entrenched seniority system precluded it from reassigning the plaintiff. *Id.* at 1277. However, the court held that at this early stage, the employer must comply with the EEOC's subpoena for information. *Id.*

See also, e.g., *Dilley v. SuperValu, Inc.*, 296 F.3d 958, 963 (10th Cir. 2002) (citing *Barnett*, 535 U.S. at 398; *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1272 n.5 (10th Cir.1998); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir.1995)). In *Dilley*, the Tenth Circuit acknowledged that an employer is not usually required to violate its seniority system in order to reassign a qualified, disabled employee to a vacant position. *Id.* However, the court cited to *Barnett* for the proposition that *a seniority system does not act as an absolute bar* to reassigning an employee who becomes disabled. 296 F.3d at 963 (citing *Barnett*, 535 U.S. at 394). More to the point, the court recognized that the conflict that the seniority system raised was only a potential conflict. *Id.* The court distinguished *Barnett* on its facts because, in this case, no other employee covered by the collective bargaining agreement had bid on the vacant job at issue. *Id.* Therefore, the court determined that the company could have easily assigned the disabled employee to the vacant job. *Id.* Even if someone else with greater seniority subsequently bid on that job, the employer would not have to violate its seniority policy. *Id.* at 963-64. The court reasoned that in such a case, the company could simply refuse to bump the disabled employee from a non-vacant position. *Id.* Based on narrowly defining the holding in *Barnett* to apply only to a situation where a direct conflict existed, the court concluded that the disabled employee in this case was entitled to be reassigned to the vacant position despite the potential conflict with the company's well-established seniority system. *Id.*

See also, e.g., *Hines v. Chrysler Corp.*, 231 F. Supp. 2d 1027 (D. Colo. 2002). In *Hines*, the court was asked to determine whether a qualified, disabled employee was required to show that a vacant job existed to survive summary judgment on a claim alleging that the employer discriminated pursuant to the ADA's reassignment provision. *Id.* Claiming to decide the narrowly defined issue as a matter of first impression within the Tenth Circuit, the court looked to *Midland Brake* for guidance, referring to *Smith* as "the seminal Tenth Circuit ADA reassignment case." *Id.* at 1038. The court made no mention of *Barnett*, even though *Barnett* had been decided five months earlier and dealt directly with reassignment of a disabled employee in the context of a motion for summary judgment. *Id.* at 1031-53. The court ultimately held that at the trial stage, a plaintiff alleging discrimination pursuant to the reassignment provision must prove that a vacancy existed, but at the summary judgment stage, a similarly situated plaintiff is not required to tender such proof. *Id.* at 1053.

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most-qualified candidate for a vacant job.⁶⁸ Thus, in addressing one circuit split, the Court cultivated another.⁶⁹

C. *Does the Americans With Disabilities Act of 1990 Require an Employer to Reassign a Qualified, Disabled Employee to a Vacant Position over a More-Qualified Candidate?*

In interpreting the ADA's requirements for employers, the principal debate boils down to one question: is the ADA grounded in ensuring equality, or conversely, in requiring preferential treatment?⁷⁰ The

⁶⁸ See, e.g., *infra* note 74 (discussing *Huber*). See also, e.g., *Peebles v. Potter*, 354 F.3d 761 (8th Cir. 2004). In *Peebles*, an employee, *Peebles*, became disabled and took disability leave. *Id.* at 764. After returning from leave, *Peebles* could no longer perform his job. *Id.* He failed to comply with the employment policy dictating the steps that he needed to take to be considered for an alternate position in the company. *Id.* The company subsequently terminated *Peebles*, and *Peebles* alleged that the company discriminated against him pursuant to the ADA. *Id.* *Peebles* sued, claiming that the company should have made an exception to its policy and reassigned him to a different position because he was disabled. *Id.* The court cited to *Barnett* and noted that the plaintiff did not show *special circumstances* to make an exception reasonable. *Id.* at 768-69. Interpreting *Barnett* to apply to a policy other than seniority, the court granted summary judgment in favor of the employer. *Id.* at 769.

See also, e.g., *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1145, 1159 (9th Cir. 2003). In *Giebeler*, decided in the context of Title II of the ADA, the Ninth Circuit clung to the portion of the *Barnett* opinion that noted that *preferences are often necessary* under the ADA. *Id.* John *Giebeler*, the plaintiff, became disabled when he fell ill with AIDS. *Id.* at 1114. Because of his disability, he was unable to continue in his job and began drawing social security disability insurance, which left him with much less income than he previously earned. *Id.* at 1144-45. He needed to move into an apartment that charged lower rent and attempted to rent an apartment near his mother, so that she would be nearby to help him with his daily living needs. *Id.* However, the rental company denied *Giebeler's* rental application because even though he had previously met the minimum income requirement prior to becoming disabled, he no longer met the requirement. *Id.* *Giebeler* requested that the company allow his mother—who met the minimum income requirement—co-sign for him, but the company refused to make an exception to its policy against allowing co-signers. *Id.* at 1145. The court, citing to *Barnett*, found that *Giebeler's* inability to meet the income requirement was *solely because of his disability*. *Id.* at 1150-51 (citing *Barnett*, 535 U.S. at 394, 398). The court rejected the defendant's argument that *Giebeler* should not be granted an exception to the policy solely because of his disability. *Id.* (citing *Barnett*, 535 U.S. at 397-98). Instead, according to *Barnett*, the court indicated that the rental company was required to make an exception if *Giebeler* showed *special circumstances*. *Id.* Thus, based on the facts, the court held that the company was required to make an exception to its policy against allowing co-signers as a way of reasonably accommodating *Giebeler* under the special circumstances. *Id.* at 1159.

⁶⁹ See *infra* Part II.C (discussing the circuit split concerning whether an employer *must* waive its policy of hiring the most-qualified candidate in order to reassign a disabled employee unable to perform his existing job).

⁷⁰ See *Anderson*, *supra* note 61, at 7 (stating that some courts analyze an employer's obligation under the ADA's reassignment provision by emphasizing principles of equality and others focus on principles of affirmative action, and noting that this results in differing

specific question explored in this Part is whether an employer is required to reassign a qualified, disabled employee to a vacant position when a more-qualified candidate is available for that vacant position.⁷¹ Is an employer required to violate its written or implicit policy of hiring the most-qualified candidate in favor of reassigning a disabled employee?⁷² The circuit courts are currently split on this issue.⁷³ The Seventh and Eighth Circuits hold that an employer is not required to reassign a qualified, disabled employee when a more-qualified candidate exists.⁷⁴

views expressed by the courts).

⁷¹ See Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 439–40, 442, 447–49 (2002). Befort noted that reassignment is one of the most troublesome areas within the ADA’s reasonable accommodation provision. *Id.* The reassignment issue presents itself either when an employee becomes disabled while employed or an employee’s pre-existing disability worsens and prevents the employee from being able to continue performing his assigned position. *Id.* Befort explained that the reassignment provision has been problematic because it tends to impose greater burdens on non-disabled employees in the workplace than other forms of reasonable accommodation. *Id.* For instance, when an employer provides a specific type of equipment to a disabled employee or modifies a disabled employee’s work schedule, it usually has minimal impact on the disabled employee’s co-workers. *Id.* However, when an employer reassigns a disabled co-worker to a vacant position, it “necessarily deprives other employees of the possibility of filling that position.” *Id.* at 448.

⁷² See Befort, *supra* note 11, at 983. Befort agreed with the narrow holding in *Barnett*—that in many cases, an employer is not required to violate its *seniority policy* to reassign a qualified, disabled employee to a vacant job. *Id.* However, Befort stated that, regrettably, the *Barnett* Court failed to address how its holding applies in the context of other transfer and reassignment policies. *Id.* Thus, while commentators speculate as to how the Court will rule in the future, the circuits will remain split on this issue until the Court resolves the controversy. *Id.*

⁷³ See *infra* note 74 (reviewing the view of the Seventh and Eighth Circuits—that the ADA does *not* require an employer to reassign a qualified, disabled employee over a more-qualified candidate); *infra* note 75 (reviewing the view of the Tenth Circuit—that the ADA *requires* an employer to reassign a qualified, disabled employee, even where a more-qualified candidate is available, unless the employer demonstrates an undue hardship).

⁷⁴ See, e.g., *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2007) (citing *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027–29 (7th Cir. 2000)) (holding that an employer that has a non-discriminatory hiring policy of selecting the most-qualified candidate for a position is *not* required to reassign a qualified, disabled employee to a vacant position, when doing so would require the employer to waive its qualification-based hiring policy and overlook a more-qualified candidate), *cert. granted*, 76 USLW 3200 (U.S. Dec. 7, 2007) (No. 07-480), *cert. dismissed*, 2008 WL 114946 (U.S. Jan 14, 2008) (NO. 07-480, R46-008); *Humiston-Keeling*, 227 F.3d at 1027–29 (holding that an employer that has an established non-discriminatory merit-based hiring policy is *not* required to reassign a qualified, disabled employee to a vacant position if doing so would require violating such policy); *Burns v. Coca-Cola Enters.*, 222 F.3d 247, 257 (6th Cir. 2000) (citing *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678–79 (7th Cir. 1998)) (stating that an employer with a legitimate, non-discriminatory hiring policy is *not* required to reassign a qualified, disabled employee over a more-qualified candidate, where the disabled employee failed to abide by the employer’s transfer policy that required him to *apply* for a transfer). See also *Terrell v.*

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Conversely, the Tenth Circuit holds that an employer may be required to reassign a qualified, disabled employee.⁷⁵ These two opposing views are discussed in turn.⁷⁶

USAir, 132 F.3d 621, 627 (11th Cir. 1998). In *Terrell*, the court concluded:

[E]mployers are only required to provide "alternate employment opportunities reasonably available under the employer's existing policies." . . . We cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers. . . . USAir did not fail to make reasonable accommodations . . . especially given that, when part-time reservations agent positions again became available at USAir, it promptly notified Plaintiff and allowed her to fill one of those positions.

Id. See also *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995). The *Daugherty* court determined:

[W]e do 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. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.

Id. See also *infra* note 98 and accompanying text (indicating that the Court granted certiorari in *Huber* and was expected to decide the case on its merits, but the parties settled outside of court before oral arguments).

⁷⁵ *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167–68 (10th Cir. 1999) (en banc) (citing *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc); *Mengine v. Runyon*, 114 F.3d 415, 418 (3d Cir. 1997); *Gile v. United Air Lines, Inc.*, 95 F.3d 492, 496–99 (7th Cir. 1996); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114–15 (8th Cir. 1995), and *Community Hosp. v. Fail*, 969 P.2d 667, 678 (Colo. 1998); *Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 902–03 (D. Ariz. 1997)). The *Midland Brake* court cited to numerous circuit court opinions for the proposition that the ADA requires an employer to do more than merely allow a disabled employee, unable to perform his assigned job, to compete for a vacant position. 180 F.3d at 1167–68. Citing to the Equal Employment Opportunity Commission's Enforcement Guidance, the court explained that an employer *may be required to reassign a qualified, disabled employee* to a vacant position, even though a more-qualified candidate is available. *Id.* The qualified, disabled employee *need not be the most-qualified for the vacant position*. *Id.* at 1169.

See also *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405–06 (2002). The Court held that when a qualified, disabled employee shows special circumstances, an employer *may be required to reassign the disabled employee* to a vacant position even when doing so would require the employer to breach its seniority policy. *Id.* Primarily through its dissenting opinion, *Barnett* raised the question as to whether an employer may similarly be required to make an exception to a policy that dictates hiring the most-qualified candidate. *Id.* at 416 (Scalia, Thomas, J.J., dissenting).

See also, e.g., *Boykin v. ATC/Vancom of Colorado, L.P.*, 247 F.3d 1061 (10th Cir. 2001). Courts have determined that an employer may be required to reassign an employee who becomes disabled and unable to perform his assigned job to a vacant position, even though they were not faced with the specific inquiry concerning whether an employer is required to reassign such a disabled employee over a more-qualified candidate in violation of a qualification-based hiring policy. See also *id.* at 1065 (citing *Hoskins*, 227 F.3d 719; *Monette*, 90 F.3d 1173). In *Boykin*, the court looked to *Hoskins* and *Monette* and stated that an employer *is required to reassign an employee who becomes disabled* to a position that becomes

1. The Seventh and Eighth Circuits: An Employer Is *Not Required* to Reassign a Qualified, Disabled Employee to a Vacant Position When a More-Qualified Candidate Is Available

In 2007, in *Huber v. Wal-Mart Stores, Inc.*, as a matter of first impression in the Eighth Circuit, the Eighth Circuit Court of Appeals considered whether an employer is required to reassign a qualified, disabled employee, who is unable to perform her existing job, to a vacant position, even though a more-qualified candidate is available.⁷⁷ In *Huber*, Pam Huber (“Huber”) injured her right arm and hand and could

available within a reasonable amount of time. *Id.* The court noted that the determination of what constitutes a reasonable amount of time must be decided on a case-by-case basis in the totality of the circumstances. *Id.* See also *Hoskins*, 227 F.3d at 729 (citing *Monette*, 90 F.3d at 1187). In *Hoskins*, the court acknowledged that an employer *may be required to reassign an employee who becomes disabled* and unable to perform his assigned position to a vacant position or to a position that becomes vacant within a reasonable amount of time. *Id.* The court determined that a position that became available well over a year after the employer learned of the employee’s disability did not constitute a reasonable amount of time. *Id.* at 729. Therefore, the employer’s obligation to reassign had expired. *Id.* See also *Monette*, 90 F.3d at 1187. In *Monette*, applying broad meaning to the term “vacant[.]” the court determined that an employer *is required to reassign an employee who becomes disabled to a position that is expected to become available within a short period of time.* *Id.*

See also EEOC Enforcement Guidance (2002). The section of the EEOC’s Enforcement Guidance that addresses reassignment states that reassignment is “reasonable accommodation [that] *must* be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.” *Id.* (emphasis added). The Enforcement Guidance acknowledges that a disabled employee must meet the minimum qualifications of the new position, but explains that “[t]he employee *does not need to be the best qualified individual* for the position in order to obtain it as reassignment.” *Id.* (emphasis added). An employee who becomes disabled does not need to compete for a vacant position because “[r]eassignment means that the employee gets the vacant position if s/he is qualified for it.” *Id.* Citing *Barnett* for support, the EEOC notes that an employer might need to make an exception to its transfer policy to ensure that a disabled employee, unable to perform his assigned job, is reassigned to a vacant position pursuant to the requirements of the ADA. *Id.* Furthermore, the guidance stresses that an employer must provide to the employee any training that it would typically provide to a new incumbent of that type of job. *Id.*

⁷⁶ See *infra* Part II.C.1 (presenting the view of the Seventh and Eighth Circuits—that the ADA does *not require* an employer to waive its non-discriminatory policy of hiring the best-qualified candidate because the ADA is not a mandatory preference statute); *infra* Part II.C.2 (presenting the view of the Tenth Circuit—that the ADA *requires* an employer to waive such a non-discriminatory hiring policy in favor of reassigning a qualified, disabled employee).

⁷⁷ 486 F.3d 480, 482 (8th Cir. 2007). The court acknowledged the existing circuit split between the Seventh and Tenth Circuits concerning whether an employer is required to reassign to a vacant position a qualified, disabled employee unable to perform her assigned position because of her disability. *Id.*

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no longer perform the essential duties of her job.⁷⁸ She requested reassignment to another position—a router job—and Wal-Mart allowed her to apply for that position.⁷⁹ However, Wal-Mart filled the router position with a candidate more-qualified than Huber, and Huber initiated a lawsuit, claiming that Wal-Mart violated the ADA when it refused to grant her reassignment request.⁸⁰

Huber agreed that the employee selected for the router position was more qualified than she for that job, but she contended that Wal-Mart should have nonetheless placed her in the router position because she was disabled and unable to perform her existing job, she was minimally qualified for the router position, and the router position was vacant.⁸¹ Adopting the view that the Seventh Circuit Court of Appeals expressed in *EEOC v. Humiston-Keeling, Inc.* and rejecting the opposing view that the Tenth Circuit Court of Appeals expressed in *Smith v. Midland Brake, Inc.*, the Eighth Circuit Court of Appeals determined that an employer is not required to reassign a disabled employee when a more-qualified candidate exists—where the employer has a non-discriminatory policy of selecting the most-qualified candidate.⁸²

⁷⁸ *Id.* at 481. Huber worked as a dry-order grocery-filler for Wal-Mart, earning \$12.50 per hour. *Id.*

⁷⁹ *Id.* When Huber could no longer perform the duties of her order-filler job, she requested reassignment to a router position, and Wal-Mart allowed Huber to apply and compete with other applicants for the router position. *Id.*

⁸⁰ *Id.* Wal-Mart conceded that Huber had an ADA-covered disability and was qualified for the router position because she met the minimum qualifications of the router job, but Wal-Mart asserted that it placed a non-disabled employee into the router position pursuant to its policy of hiring the most-qualified candidate. *Id.* at 481–82. Huber later accepted a different position with Wal-Mart, earning \$6.20 per hour. *Id.* at 481.

⁸¹ *Id.* at 482. Wal-Mart contended that it was not required to violate its bona fide non-discriminatory policy of hiring the most-qualified candidate in favor of hiring Huber merely because she was disabled. *Id.* Although sometimes the qualifications listed for a particular job are subjective and are challenged because they require an incumbent to be more-qualified than what is needed to perform the job sufficiently, thereby unfairly excluding people with disabilities, that issue is beyond the scope of this Note. Here, Huber did not question whether the required job qualifications were appropriate pursuant to the router job. *Id.* at 481–82. See also Yesenia Salcedo, *Wal-Mart Settles Disability Case* (Jan. 16, 2008), <http://insidecounsel.com/section/labor/1613> (noting that at the time Huber settled this dispute with Wal-Mart outside of court, in 2008, she was employed by Wal-Mart).

⁸² *Huber*, 486 F.3d. at 484 (citing *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027–28 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc)). The court in *Huber* did not address whether an employer’s policy may be implicit or must be written, because Huber did not contest the legitimacy of Wal-Mart’s policy. *Id.* Instead, Huber argued that Wal-Mart discriminated by refusing to make an exception to its policy. *Id.* See also *Humiston-Keeling*, 227 F.3d at 1026. Nancy Cook Houser (“Houser”) worked as a picker in a warehouse when she injured her right arm. *Id.* When her injury prevented her from performing the frequent lifting associated with the picker job, her employer attempted to provide reasonable accommodation by rigging an apron in a way

Following the Seventh Circuit's lead, the Eighth Circuit Court of Appeals held that the ADA permits reassignment decisions based on merit, pursuant to an employer's legitimate hiring policies.⁸³ In so doing, the Eighth Circuit Court of Appeals cited to *Barnett*, which held that employers are not generally required to waive seniority policies in favor of reassigning a qualified, disabled employee.⁸⁴ The court also relied on previously established principles relating to reasonable accommodation and undue hardship.⁸⁵ Currently, the Seventh and

that was intended to help her transport products from one location to another. *Id.* When the experiment failed, Humiston-Keeling reassigned Houser to a greeter position at a temporary construction site. *Id.* When the temporary position expired, Houser applied for other positions with Humiston-Keeling. *Id.* at 1026-27. She met the minimum qualifications for the jobs she sought, but Humiston-Keeling selected other candidates for the jobs and ultimately fired Houser. *Id.* Houser conceded that she was not the most-qualified candidate for the jobs she sought, but argued that her employer had an ADA-duty to reassign her because she had a disability, her disability prevented her from performing her existing job, and she met the minimum qualifications for the jobs she sought. *Id.* at 1027. Conversely, Humiston-Keeling contended that the ADA did not require it to reject a superior applicant in favor of hiring Houser merely because Houser was disabled and minimally qualified. *Id.* The Seventh Circuit considered the view that the Tenth Circuit expressed in *Midland Brake* (that an employer may be required to waive its policy of selecting the best candidate in favor of reassigning a disabled employee), but ultimately disagreed with the Tenth Circuit. *Id.* In contrast, the Seventh Circuit held that an employer is not required to violate its non-discriminatory policy of hiring the most-qualified applicant in favor of reassigning a disabled employee to a vacant position. *Id.*

⁸³ *Huber*, 486 F.3d at 483 (citing *Humiston-Keeling*, 227 F.3d at 1028). The *Huber* court reasoned:

The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and co-workers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.

Id. at 483 (internal quotation omitted) (quoting *Humiston-Keeling*, 227 F.3d at 1028). "[T]he [ADA] is not a mandatory preference act." *Id.*

⁸⁴ *Id.* at 483-84 (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002)); see also *supra* notes 52-66 (discussing *Barnett*).

⁸⁵ *Huber*, 486 F.3d at 484 (citing *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000) (per curiam); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011, 1020 (8th Cir. 2000); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996)). See also, e.g., *Huber*, 486 F.3d at 484 (citing *Kellogg*, 233 F.3d at 1089). In its decision seven years earlier, the Eighth Circuit stated in dicta, "[A]n employer is not required to make accommodations that would subvert other, more-qualified applicants for the job." *Id.* (citing *Cravens*, 214 F.3d at 1020). An employer is not required to provide the employee's preferred accommodation, as long as the accommodation provided is reasonable. *Id.* at 484, 484 n.3 (citing *Turco*, 101 F.3d at 1094). The Fifth Circuit stated, "The [ADA] does not require affirmative action in favor of individuals with disabilities. It merely prohibits employment discrimination against qualified individuals with disabilities, no more and no less." *Id.*

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Eighth Circuits hold that the ADA does not require employers to disregard their non-discriminatory hiring policies in favor of reassigning a qualified, disabled employee.⁸⁶ The Tenth Circuit's opposing view is examined next.⁸⁷

2. The Tenth Circuit: An Employer *May Be* Required to Reassign a Qualified, Disabled Employee to a Vacant Position, Even When a More-Qualified Candidate Is Available

In 1999, in *Midland Brake*, the Tenth Circuit Court of Appeals, deciding the issue as a matter of first impression among the circuits, concluded that an employer may be required to reassign a qualified, disabled employee, who is unable to perform his current job, to a vacant position, even when a more-qualified candidate exists, unless the employer can prove that doing so would pose an undue hardship.⁸⁸ The court acknowledged that an employer may be able to demonstrate that certain employment policies make it unreasonable for the employer to reassign a disabled employee, providing as an example a well-entrenched seniority system giving rise to legitimate expectations by

⁸⁶ See *Huber*, 486 F.3d at 484; *Humiston-Keeling*, 227 F.3d at 1027-29. The Seventh Circuit explained:

[T]here is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group. That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing.

Humiston-Keeling, 227 F.3d at 1028-29. See also *infra* note 98 (noting that the Supreme Court likely would have resolved the circuit split if it had decided *Huber*).

⁸⁷ See *infra* Part II.C.2 (reviewing the Tenth Circuit's position that an employer may be required to reassign to a vacant position a qualified, disabled employee who is unable to perform his assigned job because of his qualifying disability, even where a more-qualified candidate is available, unless the employer can demonstrate that such reassignment presents an undue hardship).

⁸⁸ 180 F.3d 1154, 1167-68 (10th Cir. 1999) (en banc). The court explained that the scope of an employer's reassignment obligation is subject to certain limitations that have been established by the circuit courts. *Id.* at 1170-08. For instance, the court noted that reassignment is required only when the employer is unable to provide accommodation to enable the employee to remain in his current job. *Id.* at 1170-71. Additionally, reassignment is limited to existing vacancies; thus, the employer is not under a duty to create a new job or bump another employee in order to reassign a disabled employee. *Id.* at 1174-75.

other employees.⁸⁹ However, the court added that an employer may have to modify *other policies* in order to fully accommodate disabled employees and in order to carry out the ADA's reassignment obligation.⁹⁰ The resulting opinion turns on what constitutes an undue hardship, though the court does little to answer the question, other than to suggest that a showing is made on a case-by-case basis and to conclude that making an exception to a policy of hiring the most-qualified candidate for a vacancy would not rise to such a hardship.⁹¹

In *Midland Brake*, Robert Smith ("Smith"), a custodial and assembly worker for Midland Brake, developed a chronic skin condition that prevented him from performing the essential duties of his job.⁹² Midland Brake was unable to identify an alternate position which would accommodate Smith's disability, and as a result, Midland Brake eventually terminated Smith.⁹³ Smith brought an action against Midland

⁸⁹ *Id.* at 1175-76.

⁹⁰ *Id.* The court noted, "On the other hand, *other policies* of an employer might have to be subordinated to an employer's reassignment obligation under the ADA because to do otherwise would essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation." *Id.* at 1176 (emphasis added). Citing to relevant decisions of federal district courts and the Equal Employment Opportunity Commission Guidance, the court concluded that an employer must modify its policies to reassign a qualified, disabled employee to an existing vacant position, unless the employer demonstrates an undue hardship. *Id.* See also Sid Steinberg, *Employee Must Compete for Position as Reasonable Accommodation* (Aug. 8, 2007), <http://www.postschell.com/docs/publications/301.DOC> (last visited Aug. 14, 2008) (proposing that the reassignment debate seems to focus on whether transferring a less-qualified, but disabled employee, over a non-disabled person amounts to an undue hardship).

⁹¹ See, e.g., *infra* note 165 (noting Befort's position on reassignment of a qualified, disabled employee). In line with the holding of *Midland Brake*, some commentators have argued that an employer should be required to relax its legitimate, non-discriminatory hiring requirements in favor of reassigning a qualified, disabled employee to a vacant position. See *infra* note 165. These commentators have contended that when an employer has an opportunity to reassign a qualified, disabled employee to a vacant job, it should give preference to the disabled employee over non-disabled employees because the non-disabled workers are already more employable than the disabled employee. See *infra* note 165.

⁹² 911 F. Supp. 1351, 1355 (D. Kan. 1995), *rev'd*, 180 F.3d 1154, 1167-68 (10th Cir. 1999) (en banc). Smith worked for Midland Brake for six years in various custodial and assembly jobs before developing chronic dermatitis which allegedly resulted from ongoing exposure to chemicals in the assembly department. *Id.* Midland Brake attempted to accommodate Smith by providing protective gloves for Smith to wear while he worked. *Id.* However, Smith's skin condition persisted, and he subsequently notified Midland Brake that his physician had determined that he should refrain from continued exposure to the chemicals. *Id.*

⁹³ *Id.* When Smith told Midland Brake that he could no longer work in the assembly department, Midland Brake told Smith that it was unable to identify an alternate means of reasonable accommodation. *Id.* After Midland Brake determined that it was unable to

Brake, claiming that Midland Brake failed to comply with the ADA when, instead of reassigning Smith to another position, Midland Brake fired him.⁹⁴ The Tenth Circuit Court of Appeals examined the ADA's text, legislative history, prior judicial opinions, and the EEOC's interpretive guidance.⁹⁵ In its en banc opinion, the Court held that an employer may be required to reassign a qualified, disabled employee to

accommodate Smith, the company informed Smith that it would pay him \$20,000 to settle his open worker's compensation claim. *Id.* Then, later that same day, Midland Brake informed Smith that it was terminating his employment because the company was unable to accommodate him. *Id.*

⁹⁴ *Id.* Despite the company's initial attempts to accommodate Smith by providing protective gloves, Smith filed a complaint in the United States District Court of Kansas, alleging that Midland Brake unlawfully discriminated against him pursuant to the ADA. *Id.*

⁹⁵ *Id.* at 1160-70. In response to Midland Brake's claim that Smith was not a qualified, disabled employee because he could not perform the duties of his existing job, the court focused on critical terminology employed within Title I of the ADA. *Id.* at 1160-61. First, Title I prohibits discrimination against "'a qualified individual with a disability[.]'" defined 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.*" *Id.* at 1161 (quoting Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2000)). The court reasoned that the plain statutory language places an ADA-duty on an employer to provide reasonable accommodation to a disabled employee who can perform another job within the company. *Id.* Next, the court noted that reasonable accommodation includes "'reassignment to a vacant position[.]'" not "'consideration of a reassignment to a vacant position.'" *Id.* at 1164 (emphasis added). Finally, the court examined the word "'reassignment[.]'" stating that the "'re'" in "'reassignment'" implies that it refers to an existing employee, and "'assign'" implies that the employer must do something more than simply allow a disabled employee to compete for an alternate position. *Id.* at 1164-65. Therefore, because an employer is required to provide reasonable accommodation and reassignment is a form of reasonable accommodation, an employer *must* reassign an employee who becomes disabled and can no longer adequately perform in his existing job to a job that he desires. *Id.* The court also determined that the legislative history showed that Congress intended for reassignment to be required. The House Committee on Education and Labor stated:

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.

Id. at 1162 (citing H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345).

Additionally, the court cited more than ten cases decided by nine different circuits to support its conclusion that the reassignment duty applies to individuals already employed by the employer. *Id.* at 1162-64. Finally, the court considered the Equal Employment Opportunity Commission's interpretive statement, "Reassignment means that the employee gets the vacant position if s/he is qualified for it." *Id.* at 1166-67 (quoting EEOC Enforcement Guidance (1999) at 44).

a vacant position, even when it means rejecting a more-qualified individual.⁹⁶

⁹⁶ *Midland Brake*, 180 F.3d at 1164–69. The court rejected the dissent’s argument that an employer should be able to reject a qualified, disabled employee in favor of hiring the best candidate for an open position. *Id.* 1167–68. The majority explained:

The dissent would write in an additional exception to the effect that an employer need not make the reasonable accommodation of reassignment if it can find a better qualified employee to take the place of the otherwise qualified individual with a disability.

Id. at 1167.

One wonders whether the dissent would similarly allow an employer to escape its duty to offer the other enumerated reasonable accommodations to keep a disabled employee in his or her existing job by the same expedient of finding a more-qualified person to fulfill that job. For example, if an otherwise qualified disabled person asks for a reasonable “modified work schedule” or “modification of equipment” to keep his or her existing job, could the employer find a more-qualified employee to fill the job, and then assert that it was thereby absolved of its obligation to offer a reasonable accommodation to the disabled employee? To ask the question is to answer it, yet it points out how the dissent seeks to single out one listed reasonable accommodation—reassignment to a vacant position—and denigrate it to second-class status.

Id. at 1167–68 n.6.

In so doing, the dissent would further judicially amend the statutory phrase “qualified individual with a disability” to read, instead, “best qualified individual, notwithstanding the disability.” However, these are not the words as Congress wrote them, and our duty is to enforce Congress’ [sic] definition of discrimination.

Id. at 1167–68.

The unvarnished obligation derived from the statute is this: an employer *discriminates* against a qualified individual with a disability if the employer fails to offer a reasonable accommodation. If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.

Id. at 1169.

Not a single case cited by the dissent holds that an employer may abrogate its ADA obligation to offer reassignment as a reasonable accommodation by the simple expedient of finding another job applicant that the employer regards as more-qualified. To the extent the dissent attempts to read language in any of these cases so broadly, we believe it would conflict with the employer’s statutory duties under the ADA.

Id. at 1169–70. The court also applied broad meaning to the term “vacant[.]” stating, “[A] vacant position’ includes not only positions that are at the moment vacant, but also includes positions that the employer reasonably anticipates will become vacant in the fairly

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In summary, the view shared by both the Seventh and Eighth Circuits contradicts the view of the Tenth Circuit concerning whether an employer is required to reassign a qualified, disabled employee, who is unable to perform the functions of his assigned job, to a vacant position when doing so results in rejecting a more-qualified candidate.⁹⁷ The circuit split as to whether an employer must forego its non-discriminatory policies in favor of reassigning a qualified, disabled employee will press forward, and, perhaps expand, until the Court settles the debate.⁹⁸

immediate future." *Id.* at 1175 (citing *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996)).

⁹⁷ See *supra* notes 74-75 (setting forth the cases establishing the circuit split—*Huber*, (Eighth Circuit); *Humiston-Keeling*, (Seventh Circuit); and *Midland Brake*, (Tenth Circuit)); *supra* notes 74, 77-85 (discussing *Huber*); *supra* notes 82-83, 86 (discussing *Humiston-Keeling*); *supra* notes 88-96 (discussing *Midland Brake*).

⁹⁸ See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 76 USLW 3200 (U.S. Dec. 7, 2007) (No. 07-480), *cert. dismissed*, 2008 WL 114946 (U.S. Jan 14, 2008) (No. 07-480, R46-008); see also Befort, *supra* note 11, at 984-85 (predicting that the Court will undoubtedly have an opportunity in the near future to provide additional clarity concerning the scope of an employer's reassignment obligation pursuant to the ADA); *Court Takes Wal-Mart Disability Case*, AFX UK FOCUS, Dec. 7, 2007 (noting that the Court granted certiorari in *Huber*, and, before the case was dismissed, predicting that the *Huber* Court would determine "how far employers must go under the [ADA] to accommodate disabled employees[]"); Editorial, *Disabling Fairness: Time for Equal Justice*, PITTSBURGH-TRIB. REV., Dec. 15, 2007, at COMMENTARY Section, available at http://www.pittsburghlive.com/8000/x/tribunereview/opinion/archive/s_542821.html (referring to the EEOC's current position on the ADA's reassignment obligation as "absurd[,] calling it a "muddled mandate[.]" and arguing, before the Court dismissed *Huber*, that the Court should uphold Wal-Mart's hiring policy). See also Judy Greenwald, *High Court to Hear Case on ADA Job Applicants; Lower Courts Divided on Whether Employers Must Hire Disabled, Less-Qualified Workers*, BUS. INS., Dec. 17, 2007, at 1. This article contains commentary provided by attorneys before the parties in *Huber* settled regarding how the *Huber* Court should rule. *Id.* One lawyer observed, "[I]t would be a dangerous precedent to write affirmative action into the ADA by saying you don't have to hire the most-qualified person for a position[]" because hiring the best candidate for a vacant job is "one of the cornerstones of employment law[.]" *Id.* Another lawyer, commenting on the recent history of the Court opined that the Court would likely rule for Wal-Mart. *Id.* See also *Wal-Mart Discrimination Case Headed to High Court*, TIMES UNION, Dec. 8, 2007, § NEWS, at B12 (noting, before the Court dismissed *Huber*, that the *Huber* Court would have a chance to clarify the parameters of an employer's ADA reassignment duty); James O. Castagnera, Patrick J. Cihon & Andrew M. Morriss, *Eighth Circuit Holds Employer Does Not Have to Reassign Disabled Employee to Vacant Position*, 23 No. 8 TERMINATION OF EMPLOYMENT BULLETIN 3 (Aug. 2007) (for educational use only) (remarking that the Eighth Circuit's holding in *Huber* was appropriate considering the facts involved in the case and prior judicial decisions within the Seventh and Eighth Circuits); Mark H. Anderson, *US High Court To Rule On Wal-Mart Transfer Of Disabled Worker*, <http://www.easybourse.com/bourse-actualite/marches/news-354784?p=1&NewsDate=2007-12-07&en=0> (last visited Aug. 15, 2008) (reporting that Wal-Mart stated that it followed its standard hiring procedures when considering *Huber* for a transfer, that it did not give *Huber* the job she sought because she was not the most-qualified candidate, and that *Huber's* disability did not factor into the decision); *Court To*

III. ANALYSIS: THE TENTH CIRCUIT MISINTERPRETED THE AMERICANS WITH DISABILITIES ACT OF 1990

Requiring employers to choose disabled employees over more-qualified candidates, based solely on employees' disabilities, is inconsistent with the ADA's requirements.⁹⁹ Interpreting the ADA to require an employer to reassign a qualified, disabled employee gives the disabled employee, in essence, a trump card over more-qualified candidates.¹⁰⁰ This Part first analyzes why the approach adopted by the

Rule On Wal-Mart Transfer Of Worker with Disabilities (Dec. 10, 2007), <http://affirmact.blogspot.com/2007/12/court-to-rule-on-wal-mart-transfer-of.html> (last visited Aug. 25, 2008) (noting, after the Court granted certiorari in *Huber*, that the case could have resulted in a 4-4 tie because Justice Breyer recused himself from the case because of owning Wal-Mart stock). See also Jon Hyman, *Supreme Court grants cert petition in Huber v. Wal-Mart Stores*, <http://ohioemploymentlaw.blogspot.com/2007/12/supreme-court-grants-cert-petition-in.html> (last visited Nov. 8, 2008). After summarizing the facts in *Huber*, the author stated:

A ruling for the employee in this case would undermine one of the most important commandments of employment law – **Though shalt hire the most qualified person.** . . . When you don't hire the best person, it could lead a court to second-guess your judgment and question why a member of a protected class was overlooked in favor of the second/third/fourth/whatever best person. Which illustrates another important principle of employment law . . . – when you're explaining, you're losing.

Id. (emphasis omitted). See also Allen Smith, *Supreme Court To Review Wal-Mart Policy of Hiring Only the Best* (Jan. 2, 2008), http://www.shrm.org/law/library/CMS_024080.asp (last visited Aug. 25, 2008) (noting that while management employment attorneys were fairly confident that the Court would rule in Wal-Mart's favor in *Huber*, especially in light of liberal Justice Breyer having recused himself from the case, the Court could have surprised employers and sided with *Huber*); *Supreme Court Dismisses Huber v. Wal-Mart from its docket*, <http://ohioemploymentlaw.blogspot.com/2008/01/supreme-court-dismisses-huber-v-wal.html> (last visited Nov. 8, 2008) (asserting, after the Court dismissed *Huber*, that employers will simply have to use their best judgment when making reassignment decisions because until the Court settles the circuit split, the law will vary across jurisdictions).

⁹⁹ See *supra* note 40 (quoting the congressional findings and the ADA's four-prong purpose); *supra* note 42 (quoting specific requirements within the ADA); *supra* notes 23, 32 (noting the President's statements concerning the purpose of the ADA); *infra* Part III.A (discussing how requiring employers to reassign disabled employees over more-qualified candidates is incongruent with the ADA's text).

¹⁰⁰ See Brief Amici Curiae of the Equal Employment Advisory Council and the Employers Group in Support of Petitioner, *i*, 5, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250) (arguing that requiring an employer to reassign a qualified, disabled employee to a vacant position gives the disabled employee a trump card over more-qualified candidates); Brief of Amicus Curiae Society for Human Resources Management in Support of Petitioner, 6, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250) (noting that requiring an employer to reassign a qualified, disabled employee to a vacant position gives a disabled employee an unfair "advantage" over others in the workforce); *supra* notes 74, 83, 85-86 (noting that cases such as *Huber*, *Humiston-Keeling*, *Burns*, *Dalton*, *Terrell*, *Daugherty*, *Kellogg*,

Tenth Circuit is ill-founded and overly burdensome on employers and on non-disabled individuals, and next examines why the alternate approach—adopted by the Seventh and Eighth Circuits—fits squarely within congressional intent and is therefore more appropriate.¹⁰¹

More particularly, Part III.A discusses why a plain reading of the text of the ADA shows that an employer is *not required* to reassign a disabled employee, who is unable to perform his current job, to a vacant position if doing so requires it to violate its established policy of hiring the most-qualified candidate.¹⁰² Second, Part III.B explores how legislative history supports that view.¹⁰³ Finally, Part III.C initially illustrates why the Tenth Circuit's approach to interpreting the ADA as requiring reassignment of qualified, disabled employees is impractical for employers and overly burdensome on non-disabled individuals, and then summarizes why the alternate approach of the Seventh and Eighth Circuits is more appropriate and practical.¹⁰⁴

A. *The Tenth Circuit Misinterpreted the ADA's Text: An Employer Is Not Required to Reassign a Qualified, Disabled Employee to a Vacant Position over a More-Qualified Candidate*

Contrary to the Tenth Circuit's position on reassignment, an employer is not required to reassign a qualified, disabled employee, who is unable to perform his existing job, if doing so requires that it violate its non-discriminatory, merit-based hiring policy.¹⁰⁵ First, although the

Cravens, and *Turco* have determined that the ADA was not intended to mandate affirmative action, mandate preferential treatment, or require reassignment of qualified, disabled employees to vacant positions), and, in particular, note 86 (noting that the court in *Humiston-Keeling* stated that requiring employers to violate their qualification-based hiring policies in order to reassign disabled employees to vacant positions *because of* the employees' disabilities is "affirmative action with a vengeance[']").

¹⁰¹ See *infra* Part III (examining why the Tenth Circuit's view of the ADA's reassignment provision—that an employer must reassign a qualified, disabled employee to a vacant position over a more-qualified candidate—is incongruent with the ADA's text and history and unduly burdens employers and non-disabled individuals).

¹⁰² See *infra* Part III.A (analyzing the ADA, and explaining why the Act does not require an employer to ignore its non-discriminatory merit-based hiring policy in favor of reassigning a qualified, disabled employee).

¹⁰³ See *infra* Part III.B (discussing how the ADA's legislative history demonstrates that Congress did not intend for the ADA to require an employer to forego its non-discriminatory policy of hiring the best candidate in favor of reassigning a qualified, disabled employee who is unable to perform his assigned job).

¹⁰⁴ See *infra* Part III.C (arguing that the Tenth Circuit's approach to reassigning a qualified, disabled employee fails to appropriately balance public policy concerns, and that the Seventh and Eighth Circuit's approach strikes the proper balance of these concerns).

¹⁰⁵ See *infra* Part III.A (explaining how the Tenth Circuit's interpretation of the ADA's reassignment provision conflicts with the ADA).

ADA's core goal is eliminating discrimination against disabled individuals and the reasonable accommodation provision requires that employers treat disabled individuals differently than non-disabled individuals (often resulting in preferential treatment to the disabled), the ADA does *not require* that the disabled be given special preference *over* the non-disabled.¹⁰⁶ Second, the ADA merely lists reassignment as a *possible* reasonable accommodation, not a requirement.¹⁰⁷ The ADA's text is explored in greater detail in the following three paragraphs.¹⁰⁸

First, the ADA states in plain terms that its purpose is to eliminate discrimination against people with disabilities—*not* to give special preference to disabled people at the expense of non-disabled people.¹⁰⁹ To comply with the ADA, an employer must do more than simply refrain from making an adverse employment decision based on a person's disability.¹¹⁰ An employer must provide reasonable accommodation when such accommodation would enable a disabled person to perform the job.¹¹¹ Moreover, when an employer fails to provide reasonable accommodation to an individual, the employer

¹⁰⁶ See *infra* Part III.A (discussing that the ADA's purpose is eradicating unfair discrimination against disabled people, not promoting affirmative action-like practices that favor people with disabilities).

¹⁰⁷ See *infra* Part III.A (explaining that reassignment of a qualified, disabled employee unable to perform his current job to a vacant position is a *possible* reasonable accommodation but will not always be reasonable).

¹⁰⁸ See *infra* Part III.A (explaining that the ADA's purpose is to eliminate discrimination against disabled individuals, *not to afford special preference* to them over non-disabled individuals, and explaining that the ADA merely lists reassignment as an *example* of a *possible* reasonable accommodation, not a requirement).

¹⁰⁹ See *supra* note 40 (quoting the four-prong purpose of the ADA, and noting that three of the four provisions discussing the purpose of the ADA expressly mention the importance of addressing disability discrimination).

¹¹⁰ See EEOC Enforcement Guidance (2002) (explaining that reasonable accommodation was necessarily incorporated into the ADA because of the nature of disability discrimination, such as unwillingness of employers to modify workspace configurations); *supra* note 42 (quoting relevant provisions of the ADA, and noting an employer's obligation to provide reasonable accommodation). See also Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1047-49 (2000). Because of the nature of disabilities, the ADA requires more of businesses and employers than traditional anti-discrimination laws require. *Id.*

¹¹¹ See *supra* note 42 (quoting the ADA's reasonable accommodation provision, and indicating that an employer has an obligation to provide reasonable accommodation to a qualified, disabled individual). See also Befort & Donesky, *supra* note 110, at 1047-49. An employer must do more than avoid overt discrimination to comply with the ADA. *Id.* If, for example, the only thing preventing a disabled employee from performing a job is a slight adjustment to a work environment, then the employer may be required to make the adjustment, so long as it is reasonable and does not present an undue hardship on the employer. *Id.*

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discriminates against that individual unless the employer demonstrates that an accommodation poses an undue hardship.¹¹² In other words, the ADA serves to ensure that an employer does not avoid hiring a disabled person merely because the employer would have to provide accommodation.¹¹³ Thus, the ADA's text emphasizes that an employer has a duty to make decisions free from discrimination, but the text makes no mention of a duty to make decisions with preference in mind.¹¹⁴

Second, the ADA lists reassignment as a possible reasonable accommodation, not a requirement, which further supports the notion that an employer is not required, in all circumstances, to automatically reassign a qualified, disabled employee to a vacant position.¹¹⁵ The ADA's reasonable accommodation provision lists eight types of

¹¹² See *supra* note 42 (quoting the ADA's reasonable accommodation and undue hardship provisions, and explaining that an employer engages in discrimination pursuant to the ADA by not providing reasonable accommodation to a qualified, disabled individual). See also Befort & Donesky, *supra* note 110, at 1090. Befort and Donesky describe undue hardship as an "escape valve" that relieves an employer of his duty to provide reasonable accommodation to a disabled individual. *Id.* To keep an employer's accommodation duty from becoming too burdensome, the undue hardship clause serves to limit the kind of action required by an employer. *Id.*

¹¹³ See *supra* note 42 and accompanying text (discussing the scope of conduct considered discriminatory according to § 12112(b)(5)(A)); *infra* note 131 (quoting the legislative record in which Congress stated that an employer may not disqualify a disabled person as a way of shirking its duty to provide reasonable accommodation).

¹¹⁴ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1181 (10th Cir. 1999) (en banc) (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined). To the extent that eliminating discrimination against disabled individuals assures access to equal opportunities, equality hopefully results. *Id.* However, the ADA does not guarantee equal results. *Id.* The ADA requires that equal consideration be given, without regard to disability, to a disabled individual who competes for a job; it does not guarantee that the job be given to the disabled individual. *Id.* Congress intended to create "a level playing field[.]" not to mandate results. *Id.* at 1185. See also 29 C.F.R. pt. 1630, App. (2000) (stating that the ADA seeks to attain access to equal opportunities "based on merit[.]" (emphasis added)). See also Brief of Amicus Curiae Society for Human Resources Management in Support of Petitioner, 3, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250). The ADA does not call for quotas or special preference favoring disabled individuals. *Id.* To be sure, assuring equality of treatment for people with disabilities is not the same thing as affording special preference to ensure that equality results. *Id.* See also *supra* note 40 (quoting the ADA's purpose of eliminating discrimination); *supra* notes 74, 83, 85-86 (indicating that *Huber*, *Humiston-Keeling*, *Burns*, *Terrell*, *Daugherty*, *Cravens*, and *Turco* hold that the ADA emphasizes eliminating discrimination, not mandating affirmative action); *supra* notes 23, 32 (referring to statements by President George H. Bush, noting that the focus of the ADA is on eradicating discrimination). But see *Midland Brake*, 180 F.3d at 1168 (quoting 42 U.S.C. § 12101(a)(8)) (suggesting that a primary purpose of the ADA is to assure equality for disabled individuals).

¹¹⁵ *Supra* note 40 (quoting § 12111(9), the ADA's reasonable accommodation provision); *infra* notes 116-21, 122-27 and accompanying text (explaining that reassignment may be a possible accommodation, not a requirement).

accommodation that might fit within the term “reasonable accommodation[.]” and significantly, the provision states, “‘reasonable accommodation’ *may* include[.]”¹¹⁶ The term “may” indicates that the subsequent list provides eight examples of accommodation that could be reasonable.¹¹⁷ The provision does not set forth accommodations that are mandatory in every situation.¹¹⁸ If Congress intended for eight types of accommodation to be mandatory, it would have used language indicating such a requirement.¹¹⁹ For example, the section discussing discrimination states, “No covered entity *shall* discriminate . . .”¹²⁰ Because different terms—“may” and “shall”—are employed throughout the Act, different meanings must be inferred from each term.¹²¹

In sharp contrast, the Tenth Circuit Court of Appeals determined that the term “may” was used to introduce the list of nonexclusive

¹¹⁶ See *supra* note 40 (quoting § 12111(9), the ADA’s reasonable accommodation provision).

¹¹⁷ *Midland Brake*, 180 F.3d at 1181 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (noting that the measures listed in the reasonable accommodation provision are examples of reasonable accommodation); BLACK’S LAW DICTIONARY 1407 (8th ed. 2004) (defining “may” as meaning, “[t]o be permitted to . . . To be a possibility[.]”); *supra* note 40 (quoting § 12111(9), the ADA’s reasonable accommodation provision); *infra* note 122 (quoting the majority opinion in *Midland Brake*, noting that the listed accommodations are only examples of possible accommodations).

¹¹⁸ See *Midland Brake*, 180 F.3d at 1184 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (“[M]ay include reassignment to a vacant position’ cannot mean ‘shall include reassignment to a vacant position.’”) (emphasis added); *supra* note 42 (quoting § 12111(9), the ADA’s reasonable accommodation provision); *infra* note 122 (quoting the majority opinion in *Midland Brake*, noting that the accommodations listed are examples of accommodations that may or may not be appropriate in all instances).

¹¹⁹ See *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (indicating that where different terms are used within a statute, it should be presumed that Congress intended the words to have different meaning); *Midland Brake*, 180 F.3d at 1181 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (“Courts must resist the temptation to ‘improve’ upon Congress’s work.”); *supra* note 42 text (noting the use of the word “may” within the ADA); *infra* note 120 (noting the use of the word “shall” within the ADA).

¹²⁰ Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2000) (emphasis added) (“No covered entity *shall* discriminate against a qualified individual with a disability because of the disability of such individual 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.”); see also BLACK’S, *supra* note 117, at 1407 (defining “shall” as meaning, “[h]as a duty to; more broadly, is required to . . .”).

¹²¹ See, e.g., *Ratzlaf*, 510 U.S. at 140 (requiring different meaning to be assigned to differing terms used throughout the statute); *supra* note 42 (quoting § 12111(9), the ADA’s reasonable accommodation provision, which employs the term “may”); *supra* note 117 (defining “may”); *supra* note 120 (quoting § 12112(a), which employs the term “shall[.]” and defining “shall”).

accommodations because not every listed accommodation would be appropriate in every circumstance.¹²² However, in its one sentence explanation, the court admitted that the circumstances of the situation must be considered and that not all accommodations will be appropriate in every case.¹²³ This acknowledgement actually works against the court's position that Congress intended reassignment to be required.¹²⁴ More significantly, it works against the court's specific contention that an employer must reassign a disabled employee to a vacant position, even when doing so means that it must violate its policy of hiring the best-qualified candidate.¹²⁵ As the Tenth Circuit conceded, the facts and circumstances of a situation must be considered.¹²⁶ Thus, pursuant to the

¹²² *Midland Brake*, 180 F.3d at 1168 n.7. The majority stated:

The dissent argues that our interpretation of the ADA would read out the words "may include" that precede the nonexclusive list of examples of reasonable accommodations found in 42 U.S.C. § 12111(9). Our interpretation does nothing of the sort. *The words "may include" precede the nonexclusive list of examples of reasonable accommodation precisely because the list is nonexclusive and various accommodations may or may not be appropriate depending upon the disability and other circumstances of employment.*

Id. (emphasis added). The court argues that the word "may" does not prevent the provision from requiring mandatory reassignment. *Id.* See also Brief for Respondent, 33, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250) (arguing that Congress must have intended for the ADA to require an employer to reassign a qualified, disabled employee to a vacant position because it added reassignment language into the ADA that did not previously exist in the Rehabilitation Act); *supra* note 95 (discussing that the majority in *Midland Brake* also emphasized that the ADA does not employ the phrase "consideration of a reassignment to a vacant position").

¹²³ See *Midland Brake*, 180 F.3d at 1168 n.7; *supra* note 122 (quoting, in italics, the court's one-sentence argument, suggesting that an accommodation must be considered in the totality of the circumstances).

¹²⁴ See *supra* note 122 (quoting the court's one-sentence argument, and noting in the italicized portion of the quote that not all of the accommodations listed are required in every case).

¹²⁵ Compare *supra* note 122 (quoting the court's one-sentence argument from *Midland Brake*, noting the italicized portion of quote), with *Midland Brake*, 180 F.3d at 1167-68 (determining that an employer is required to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position, even if it has a policy of hiring the best-qualified candidate and the disabled employee is not the most-qualified candidate).

¹²⁶ See also *Midland Brake*, 180 F.3d at 1180-81 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (explaining that the examples listed in the reasonable accommodation provision are not mandatory in every situation); *supra* note 122 (quoting the court's one-sentence argument in italics). Thus, reassignment may be appropriate in certain situations; however, it may be inappropriate in others, such as when it requires an employer to breach its well-established hiring policy and turn away a more-qualified individual. *Supra* note 122; *supra* note 74 (discussing *Huber*, *Humiston-Keeling*, and *Burns*, recognizing that an employer may be required to reassign a disabled employee in certain situations, but holding that an employer is not required to violate its legitimate, qualification-based hiring policy to do so). *But see supra*

ADA, an employer is not required to reassign a qualified, disabled employee, who is unable to perform his current job, to a vacant position in violation of its non-discriminatory policy of hiring the most-qualified candidate for the job.¹²⁷ Indeed, the legislative history of the ADA supports this textual view and is discussed next in Part III.B.¹²⁸

B. The Tenth Circuit Misinterpreted the ADA's Legislative History: An Employer is Not Required to Reassign a Qualified, Disabled Employee to a Vacant Position over a More-Qualified Candidate

The ADA's legislative history provides a glimpse into congressional intent concerning the ADA's goals.¹²⁹ Two references in the legislative record are particularly relevant and show that Congress did not intend for an employer to be required to reassign a disabled employee to a vacant position.¹³⁰ In the first reference, Congress noted that if a disabled individual is able to perform the essential functions of his or her job, with or without reasonable accommodation, an employer may not disqualify the employee because of the disability.¹³¹ On the other hand,

notes 90–91, 96 (discussing the majority's view in *Midland Brake*—that an employer may not assert a hiring policy as a reason for not reassigning a qualified, disabled employee to a vacant position).

¹²⁷ See *supra* note 42 (quoting the ADA's reasonable accommodation provision); note 74 (discussing *Huber*, *Humiston-Keeling*, and *Burns*, in which the court held that an employer is not always required to reassign a qualified, disabled employee to a vacant position). *But see* John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 742 (2000) (arguing that requiring a qualified, disabled employee unable to perform his assigned job to compete for a vacant position "eviscerates" the ADA's reassignment provision); *supra* note 75 (discussing the Equal Employment Opportunity Commission's interpretation of the ADA's reassignment provision—that an employer is required to reassign to a vacant position a qualified, disabled employee unable to perform his assigned job because of his disability and that an employer must not require such employee to compete with other applicants because reassignment means that he is automatically reassigned to a vacant position).

¹²⁸ See *infra* Part III.B (examining the ADA's legislative history, which demonstrates that an employer is not required to reassign to a vacant position a qualified, disabled employee unable to perform his assigned position).

¹²⁹ See *infra* notes 123–46 and accompanying text (discussing how the legislative history shows that Congress did not intend for the ADA to require an employer to reassign a qualified, disabled employee to a vacant position).

¹³⁰ See *infra* notes 131, 134 (quoting references to the legislative history).

¹³¹ H.R. REP. NO. 101-485, pt. 2, at 55–56 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 337–38. The Committee stated:

[T]he Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

Thus, under this legislation an employer is still free to select

“[an] employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.”¹³² Thus, legislative history indicates that an employer is *not required* to reassign a disabled employee to a vacant position, and an employer is certainly not required to do so in violation of its legitimate policy of hiring the most-qualified applicant.¹³³

In another instance, the legislative record likewise supports the concept that reassignment of a qualified, disabled employee to a vacant position is not mandated by the ADA.¹³⁴ In discussing reassignment as a

applicants for reasons unrelated to the existence or consequence of a disability. For example, suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual who types 75 words per minute. The employer is permitted to choose the applicant with the higher typing speed, if typing speed is necessary for successful performance on the job.

On the other hand, if the two applicants are an individual with a hearing impairment who requires a telephone headset with an amplifier and an individual without a disability, both of whom have the same typing speed, the employer is not permitted to choose the individual without a disability because of the need to provide the needed reasonable accommodation to the person with the disability.

In the above example, the employer would be permitted to reject the applicant with a disability and choose the other applicant for reasons not related to the disability or to the accommodation or otherwise not prohibited by this legislation. In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.

Midland Brake, 180 F.3d at 1182, 1181 n.1 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (quoting H.R. REP. NO. 101-485, pt. 2, at 55-56 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 337-38) (indicating that requiring preferences conflicts with Congress's "clear statement[]").

¹³² See *supra* note 131 (quoting the legislative history, specifically noting in the last sentence of the quoted material that an employer does not have to show preference to a disabled applicant over non-disabled applicants).

¹³³ See *supra* note 131 (quoting the legislative history, in particular, the last sentence in which the Committee stated that an employer is not required to afford preference to applicants with disabilities).

¹³⁴ See H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345. The Committee stated:

Reasonable accommodation may also include reassignment to a vacant position. 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. Efforts should be made, however, to accommodate

reasonable accommodation, Congress indicated that this should be a last resort and should be contemplated only after it becomes apparent that accommodating the person in his existing job is not possible.¹³⁵ Because Congress described the duty to reassign as one that should be considered, not required, and *not* as the preferred accommodation, but merely an option, the legislative history shows that the ADA may require an employer to *consider* reassignment, but does not mandate that an employer ignore its qualification-based hiring policy in order to reassign a disabled employee to a vacant position.¹³⁶

Despite these excerpts from the record, the Tenth Circuit Court of Appeals concluded that Congress intended to require an employer to reassign a disabled employee and turned to the same legislative history to support its contention.¹³⁷ In *Midland Brake*, the majority claimed that when Congress said an employer is not required to give a disabled individual preferential treatment in the hiring process, Congress was referring specifically to qualified, disabled applicants and not qualified, disabled employees.¹³⁸ Furthermore, the Tenth Circuit Court of Appeals

an employee in the position that he or she was hired to fill before reassignment is *considered*. The Committee also wishes to make clear the reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.

Id. (emphasis added); see also *Midland Brake*, 180 F.3d at 1184 & n.3 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (quoting H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345) (arguing that the legislative record shows that Congress intended for reassignment to be *considered*, not required).

¹³⁵ See *supra* note 134 (quoting the legislative history, noting that efforts should be made to accommodate the individual in his current job before reassignment is considered, and referencing the dissenting opinion in *Midland Brake*, which states that an employer has a duty only to *consider* reassignment).

¹³⁶ See *supra* note 134 (quoting the legislative history in which Congress noted that an employer has a duty only to *consider* reassignment, and noting that the dissent's view in *Midland Brake* supports this interpretation).

¹³⁷ *Midland Brake*, 180 F.3d at 1168 & n.8 (quoting H.R. REP. NO. 101-485, pt. 2, at 55-56 (1990), as reprinted in 1990 U.S.C.C.A.N. 337-38; H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345); see also *supra* notes 131, 134 (quoting the legislative history to which the majority in *Midland Brake* referred).

¹³⁸ 180 F.3d at 1168 (quoting H.R. REP. NO. 101-485, pt. 2, at 62-65 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 344-46). In response to the dissent's interpretation of the legislative record, the majority reasoned:

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 record clearly distinguishes between the affirmative action of modifying the essential functions of a job (which

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maintained that Congress intended for employers to do more than merely consider reassignment.¹³⁹ The court's contention fails, however, because it is misplaced.¹⁴⁰ Although the terms "reassignment" and "assign" apply to incumbents, for the reasons explained in the preceding two paragraphs, reassigning a disabled employee is still merely an option, not a requirement.¹⁴¹

The Tenth Circuit Court of Appeals additionally turned to the portion of the legislative record in which Congress noted that reassignment could provide a means of keeping a disabled worker employed.¹⁴² However, this reasoning fails for the same reason:

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).

Id.

¹³⁹ *Id.* at 1164. The majority rejected the dissent's interpretation that an employer need only consider reassigning a qualified, disabled employee unable to perform his assigned position to a vacant position. *Id.* The majority turned to the statutory text and stated, "We reject this narrow definition of reassignment, both because it does violence to the literal meaning of reassignment and because it would render the reassignment language in 42 U.S.C. § 12111(9) a nullity." *Id.* at 1164, 1165. To support its argument, the court discussed the fact that the term "reassignment" necessarily refers to an incumbent, not an outside applicant, and the core term "assign" likewise implies that an employer is required to take specific action. *Id.* at 1164. The majority determined that the dissenting opinion incorrectly asserted that the duty of an employer is merely to consider reassignment. *Id.* The majority concluded:

First as to the literal language, the ADA defines the term "reasonable accommodation" to include "reassignment to a vacant position." The statute does not say "consideration of a reassignment to a vacant position." Moreover, "reassignment" must mean something more than the mere opportunity to apply for a job with the rest of the world.

Id. at 1164; see also *supra* note 95 (discussing the majority's interpretation of "reassignment" and "assign").

¹⁴⁰ See *infra* note 141 and accompanying text (explaining why *Midland Brake* is incorrect).

¹⁴¹ See *supra* note 95 (discussing *Midland Brake's* interpretation of "reassignment" and "assign"); *supra* notes 105-36 and accompanying text (explaining that the majority's view in *Midland Brake* is incorrect for the following reasons: (1) the phrase "reasonable accommodation" in the ADA's reassignment provision is followed by the phrase "may include[.]" and the use of the term "may" preceding reassignment means that Congress intended for it to be an option, not a mandate; (2) in the majority's own words, a request for accommodation must be considered in view of the circumstances; (3) Congress stated that hiring decisions should be made without considering whether an employee is disabled and made no reference to giving preference to a disabled employee over non-disabled applicants; and (4) the legislative record shows that an employer may be required to consider reassigning a qualified, disabled employee unable to perform his assigned job to a vacant position but is not required to do so in every situation); *supra* notes 130-36 (explaining why reassignment is an option — not a requirement).

¹⁴² *Midland Brake*, 180 F.3d at 1161-62 (quoting H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345); see also *supra* note 134 (quoting the legislative history, in which Congress acknowledged that reassigning a qualified, disabled employee

reassignment *may* be appropriate in certain situations, and in those cases reassignment will keep a disabled worker employed.¹⁴³ Nevertheless, as discussed previously, in situations where reassignment is not reasonable or poses an undue hardship, it is not required.¹⁴⁴ Congress merely noted that reassignment to a vacant position might keep a disabled employee from being unemployed, not that reassignment would be appropriate in every situation.¹⁴⁵ Therefore, the legislative record supports the view that the ADA does not require an employer to forego its legitimate hiring policy and reassign a qualified, disabled employee at the expense of a more-qualified candidate.¹⁴⁶ The impracticality of mandatory reassignment also supports this proposition and is discussed next.¹⁴⁷

C. *The Tenth Circuit's Approach Unduly Burdens Employers and Non-Disabled Individuals: The ADA Should Not Be Interpreted to Require an Employer to Reassign a Qualified, Disabled Employee to a Vacant Position over a More-Qualified Candidate*

Not only is the Tenth Circuit's approach to reassignment ill-founded, it is also impractical because it unduly burdens employers and non-disabled individuals.¹⁴⁸ According to the Tenth Circuit, even if an

unable to perform his assigned job to a vacant position could enable a disabled employee to remain employed).

¹⁴³ See *supra* Part III.A (explaining that whether an accommodation is reasonable depends on the situation).

¹⁴⁴ 29 C.F.R. § 1630.1(c)(2)(2000); EEOC Enforcement Guidance (2002); *supra* note 42 (referencing the ADA's reasonable accommodation and undue hardship provisions); see also *supra* notes 130-36 (explaining why reassignment is an option, not a requirement); *supra* 141 and accompanying text (summarizing why the majority's view in *Midland Brake* is incorrect).

¹⁴⁵ See *supra* note 134 (quoting the legislative history, in which Congress acknowledged that reassigning a disabled employee unable to perform his assigned job to a vacant position could keep a disabled worker employed).

¹⁴⁶ See *supra* notes 129-45 and accompanying text (explaining that reassigning a qualified, disabled employee to a vacant position is an *option* that an employer *may* exercise to prevent losing a valuable employee).

¹⁴⁷ See *infra* Part III.C (reviewing the inappropriateness of requiring an employer to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position over a more-qualified candidate).

¹⁴⁸ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1185 (10th Cir. 1999) (en banc) (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (noting that the majority view, requiring reassignment of a qualified, disabled employee unable to perform his assigned job over a more-qualified candidate, presents an unreasonable burden on employers); Brief Amici Curiae of the Equal Employment Advisory Council and the Employers Group in Support of Petitioner, 18, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250) (arguing that requiring reassignment to a vacant position of qualified, disabled employees unduly burdens employers); Brief of Amicus Curiae Society for Human Resources Management in Support of Petitioner, 3, *US*

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employer has an established, non-discriminatory policy of reviewing employees' qualifications and selecting the most-qualified candidate for a vacancy, it must forego such a policy in favor of hiring a minimally qualified, but disabled, employee, unless it shows that foregoing its policy presents an undue hardship.¹⁴⁹ Such an approach places excessive burdens on employers and on non-disabled individuals.¹⁵⁰

First, when an employer is forced to turn away employees or external candidates who possess more experience in favor of hiring the less-qualified, disabled employee, the employer initially suffers in a very basic way—by being required to maintain a minimally qualified employee and, thus, potentially, a minimally qualified workforce.¹⁵¹

Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250) (stating that requiring employers to pass over more-qualified employees in favor of selecting disabled employees for vacancies is “unreasonable on its face[.]”); Thomas F. O’Neil III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 360 (2001) (“Requiring an employer to select a less-qualified disabled employee is an accommodation that is unreasonable on its face.”); *supra* note 83 and accompanying text (discussing the view that the *Huber* court expressed in relying on the majority’s view in *Humiston-Keeling*—that requiring an employer to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position, merely because he is disabled and minimally qualified, unreasonably burdens employers).

¹⁴⁹ *Midland Brake*, 180 F.3d at 1167–68; *see also supra* note 75 (discussing the EEOC’s interpretation of the ADA’s reasonable accommodation provision—that a qualified, disabled employee unable to perform his assigned job is entitled to an *automatic* transfer to a vacant position). *But see supra* note 83 (noting that both *Huber* and *Humiston-Keeling* held that the ADA allows decisions to be made based on merit).

¹⁵⁰ *See Midland Brake*, 180 F.3d at 1184 & n.3 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (suggesting that the majority’s opinion—placing a duty on an employer to reassign a disabled worker even if a more-qualified employee exists—will either result in more lawsuits because of the uncertainty it fosters, or fewer lawsuits because employers may simply err on the side of caution and reassign disabled employees unable to perform their assigned jobs to vacant positions over more-qualified candidates to avoid charges of disability discrimination); Brief Amici Curiae of the Equal Employment Advisory Council, 535 U.S. 391 at 18 (stating that requiring an employer to make an exception to its policy of hiring the most-qualified candidate and to offer a vacant position to a less-qualified, but disabled, employee places an employer in an “untenable” position); Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 11 (explaining that requiring an employer to violate its policies creates an unmanageable dilemma for human resources professionals); *infra* notes 151–69 and accompanying text (discussion).

¹⁵¹ *See Midland Brake*, 180 F.3d at 1181–82 (Kelly, J., filed an opinion, concurring in part and dissenting in part, and Baldock and Brorby, J.J., joined) (citing H.R. REP. NO. 101-485, pt. 2, at 55–56 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 337–38) (stating that requiring an employer to reassign a minimally qualified, disabled employee unable to perform his assigned position to a vacant position over a more-qualified employee ignores Congress’s statement); O’Neil III & Reiss, *supra* note 148, at 347 (noting the long-term business consequences of selecting candidates who are minimally qualified but not the best-qualified, these authors argue that an employer should never be forced to turn away a more-qualified candidate in favor of hiring a disabled employee); *supra* note 131 (quoting

Second, an employer's decision to reject more-qualified employees negatively affects employee-management relations, and the EEOC's guideline requiring an employer to maintain confidentiality concerning employees' disabilities compounds that negative impact.¹⁵² To illustrate, if an employer discloses to non-disabled employees that they were not selected despite their greater seniority and experience, records of high performance, and other qualifications because the selected employee was disabled, the employer risks breaching the ADA's confidentiality requirement.¹⁵³ On the other hand, not explaining to non-disabled employees why they were not selected can be detrimental to employee morale and can lead to lost productivity and increased turnover.¹⁵⁴

the legislative history, noting in the first quoted sentence that Congress did not intend for the ADA to undercut an employer's ability to maintain a qualified workforce).

¹⁵² See EEOC Enforcement Guidance (2002), *supra* note 9. Concerning an employer's duty to maintain confidential information related to a disabled employee's disability, the EEOC Enforcement Guidance states:

May an employer tell other employees that an individual is receiving reasonable accommodation when employees ask questions about a coworker with a disability?

No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy.

Id. at No. 42 (citing Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (1997)) (internal footnote omitted). See also Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 8. When a disabled employee's disability is not visible or obvious, it can be especially problematic for employers when forced to select the disabled employee over a more-qualified worker. *Id.* Non-selected employees may not realize that the employer's hand was forced, and the ADA's confidentiality requirement inhibits an employer from explaining why the disabled, less-qualified employee was chosen. *Id.* at 8-9. See also Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863, 911 (2003) (discussing disruptive effects, such as decreased productivity, that poor management decisions can have in the workplace).

¹⁵³ See *supra* note 152 (quoting the EEOC's Enforcement Guidance and explaining how the ADA's confidentiality requirement limits what an employer can communicate to candidates not selected for a position).

¹⁵⁴ See Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 8-9. The non-selected employees are likely to conclude that the decision was arbitrary and capricious, in violation of the employer's policy, or, worse, discriminatory. *Id.* Some may

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Forcing an employer to violate its established policies and preventing the same employer from communicating the reasoning behind its decision to those individuals affected inhibits the employer's ability to mitigate damage to employee-management relations.¹⁵⁵

Third, requiring an employer to reject a highly qualified employee and instead select a minimally qualified, disabled worker exposes the employer to legal liability.¹⁵⁶ If any non-selected individual is a member of a class protected by federal, state, or local law—such as race, religion, gender, or national origin—he may file a charge or initiate a lawsuit, alleging discriminatory treatment.¹⁵⁷ Thus, even if the ADA's confidentiality requirement allowed an employer to communicate its reasoning for selecting a disabled employee over a non-disabled individual and such would be a legitimate, non-discriminatory reason, the employer still would not be able to eliminate charges of discrimination by non-selected individuals.¹⁵⁸ Requiring an employer to choose between being accused of disability discrimination and being

decide to resign and accept alternate positions elsewhere either because of ill-feelings toward the employer or simply because of a desire for more money or a more challenging position, which they would have received if they had not been rejected from the position they sought. *See id.* The impact on employee-management relations and on employment staffing levels is significant. *See id.* *See also supra* note 152 and accompanying text (discussing the ADA's confidentiality requirement and how it can affect employee-management relations).

¹⁵⁵ *Supra* note 154 and accompanying text.

¹⁵⁶ *See infra* notes 157–59 and accompanying text (discussing how requiring an employer to reject a qualified candidate in favor of choosing a less-qualified, but disabled employee, subjects an employer to legal liability).

¹⁵⁷ *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000). Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin. *Id.* § 2000e-2 (2000). In addition, if any non-selected employee has previously complained pursuant to Title VII or assisted with another employee's Title VII complaint, he may file a charge with the EEOC, alleging retaliatory treatment. *Id.* § 2000e-3 (2000). *See also, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2411–16 (2006). In *Burlington*, the Court clarified that an employee who is not a member of any protected class has a Title VII claim if he can show that his employer retaliated against him for opposing any practice forbidden by Title VII. *Id.* An employee may show any type of retaliatory action by the employer, whether taken in the workplace or away from the workplace, that caused material harm to the same employee, i.e., the harm would have dissuaded a reasonable employee from making or supporting a Title VII claim. *Id.* at 2411–18. *But see* Befort & Donesky, *supra* note 110, at 1089 (arguing that a non-disabled employee lacks standing to sue under the ADA when the employer chooses a disabled employee for a vacant job).

¹⁵⁸ *See supra* note 157 and accompanying text (discussing that any individual not selected for a vacant position may file a charge of discrimination, and such action is particularly likely when that same individual is more-qualified than the chosen employee).

accused of discrimination on another basis is unduly burdensome on employers.¹⁵⁹

Fourth, in addition to being impractical for an employer, the Tenth Circuit's approach forces non-disabled individuals to bear an undue burden.¹⁶⁰ According to the Tenth Circuit, an employee who possesses

¹⁵⁹ Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 4, 9, 10. Moving the focus of the hiring decision away from merit, in essence, requires an employer to "choose between two potential lawsuits." *Id.* at 9. An employer may be forced to choose between hiring a disabled employee unable to perform his assigned job and a more-qualified, non-disabled individual who is a member of another protected class. *Id.* Alternatively,

Suppose two employees with medical impairments apply for a transfer. Which one should the employer choose? Either employee could be a "person with a disability" under the Act, but it is also possible that neither one is. Under the EEOC's... approach, the employer faces a Hobson's choice. If the employer awards the position to one of the employees as an accommodation, the other may sue and claim that the first employee has no disability. Under the ADA's confidentiality requirements, the rejected employee may not even learn about the accommodation aspects of the selection until after litigation ensues. In the worst case scenario, a court will be forced to choose between two disabled employees, and the employer will be forced to suffer the costs of litigation.

Id. at 9–10. See also K. Tia Burke, *Violence in the Workplace: Why Employers Are Caught in the Middle*, 21 PA. LAW. 18, 18 (1999) (describing the tension that exists when an employer's responsibility to protect others and the rights of a mentally ill employee converge); Jennifer J. Hamilton & Anne N. Walker, *Walking the ADA Tightrope Between Being Too Careful and Not Careful Enough*, 7 No.5 CONN. EMP. L. LETTER 2 (1999) (discussing the connection between workplace violence and certain categories of mental illness); Georgia A. Staton & Greg J. Thompson, *A Practical Perspective on Employee Violence and the Americans With Disabilities Act*, 35 ARIZ. ATT'Y 32, 32 (1999) (posing an employer's dilemma of wanting to screen out applicants who display violent tendencies for certain positions but being unable to do so within the confines of the ADA). See also Burke, *supra*, at 18 (explaining that a third party could bring a negligent hiring claim against an employer for injuries resulting from problems associated with a minimally qualified employee—problems that could have been avoided by hiring a more-qualified person); Hamilton & Walker, *supra* (same); Staton & Thompson, *supra*, at 32 (same). See also Matthew J. Heller, A review of the 10 legal decisions of 2007 that will have the greatest impact on the workplace in the coming year and beyond., WORKFORCE MGMT., Dec. 10, 2007, at § NEWS, Part 2 of 2, at 33. Heller summarizes a case decided in 2007 by the Ninth Circuit, holding that where an employee shows a causal connection between her disability-produced conduct—in this case a violent outburst—and an adverse employment action that she suffered, a jury must be told that it may find that the employer's action constituted disability discrimination. *Id.* The author also discussed a separate case decided in 2006 in which a Massachusetts Supreme Court ruled that an employer is permitted to terminate an employee for misconduct, even if such conduct is a direct result of a visible or known disability. *Id.* Considering the wide judicial divergence on this issue, employers are caught in a catch twenty-two situation, and whether their well-intentioned action will be upheld depends on in which court their case is litigated. *Id.*

¹⁶⁰ See *infra* notes 161–69 and accompanying text (discussing the impact on non-disabled

far superior qualifications than what the job requires, including a record of high performance with the same employer, may be turned away from a vacant job solely because a minimally qualified employee has a disability and is unable to perform his current job as a result of that disability.¹⁶¹ This approach illogically and unduly burdens non-disabled employees who, for example, possess particular expertise that is not required for the position but is beneficial to the employer or to the job sought.¹⁶² Such an approach strips highly qualified, non-disabled employees of opportunities that they have “every reason to expect[,]” and could prevent them, for example, from moving into more challenging jobs or to more desirable shifts, or from earning more money, merely because another employee possesses a disability.¹⁶³ Forcing an employer to disregard non-disabled employees’ records of excellent work performance and prior work experience when making hiring decisions leads to decreased job satisfaction for non-disabled employees.¹⁶⁴

individuals).

¹⁶¹ See *supra* note 96 (quoting the majority’s view in *Midland Brake*, noting that an employer may be required to reassign a qualified, disabled employee who is unable to perform his assigned job to a vacant position, unless doing so presents an undue burden, and emphasizing that the disabled employee *need not be the most-qualified for the vacant job*).

¹⁶² See *infra* note 159 (showing how choosing less-qualified, but disabled, employees places an undue burden on non-disabled employees).

¹⁶³ See Brief Amici Curiae of the Equal Employment Advisory Council and the Employers Group in Support of Petitioner, 18, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (No. 00-1250). Requiring an employer to reject a more-qualified employee in favor of reassigning a less-qualified, disabled employee unable to perform his assigned job, strips highly qualified employees of opportunities that they have “every reason to expect.” *Id.* For example, an employee may have previously worked as a sales person for a competitor in a similar industry for fifteen years and, thus, possesses a keen knowledge of the employer’s vacant sales position along with extensive contacts within the sales market. See *id.* According to the Tenth Circuit, the employer must turn away the highly qualified employee from the vacant sales job and instead hire the minimally qualified, disabled employee unable to perform his assigned job. See *id.* This is true even when the disabled employee has fewer years of experience, possesses none of the desired qualifications of the job, and has a record of mediocre performance with the employer. See *id.* The Tenth Circuit’s view could prevent highly qualified employees from moving to a more challenging job, moving to a more desirable shift, or earning more money merely because another employee possesses a disability. *Id.* See also Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 3 (suggesting that the Tenth Circuit’s view of reassignment unfairly gives brand new, minimally competent employees rights over more-senior, more-competent employees). In the Tenth Circuit’s irrational view, the minimally qualified, disabled employee unable to perform his assigned job would apparently be entitled to the vacant job over the more-qualified employee, even if the disabled employee was employed for less than one month, or even for only one day. *Id.* at 3, 5 n.4.

¹⁶⁴ See Brief of Amicus Curiae Society for Human Resources Management, 535 U.S. 391, at 9 (noting that management decisions perceived by employees as unfair tend to produce

Additionally, pursuant to the Tenth Circuit's view that the ADA entitles a qualified, disabled employee to be automatically reassigned to a vacant position, candidates not already employed by an employer must also be rejected, even when they possess extraordinarily impressive credentials and are better-qualified for the vacant position than the disabled employee.¹⁶⁵ This result is inappropriate based on traditional merit-based hiring practices, whereby highly qualified candidates have a reason to expect a job over less-qualified candidates applying for the same position.¹⁶⁶ According to the Tenth Circuit's position, non-disabled individuals may be forced to remain unemployed or may be forced to stay in a less-challenging job or on a less-desirable work shift and may be forced to earn significantly less money merely because a person with a disability is already employed by the company and is unable to perform his existing job.¹⁶⁷ This is true even when the disabled employee is employed for only one day.¹⁶⁸ Nonetheless, the Tenth Circuit requires an

unhealthy employee-management relations and can have devastating effects on workplace morale for all employees, which can ultimately result in decreased productivity and increased turnover).

¹⁶⁵ See *Smith v. Midland Brake, Inc.* 180 F.3d 1154, 1164-75 (10th Cir. 1999) (en banc). Based on the Tenth Circuit's view, highly qualified external candidates who are unemployed must remain unemployed instead of being selected for a position, merely because a disabled person, already employed by the employer, is *minimally qualified* for the job. See *id.* at 1164-69. See also Befort & Donesky, *supra* note 110, at 1089 (arguing that the scale should tip in the disabled employee's favor *because* he is less-qualified, and thus, less likely than non-disabled applicants to gain employment elsewhere); Befort, *supra* note 11, at 983 (arguing the same); *supra* note 96 (discussing *Midland Brake* which concluded that requiring a qualified, disabled employee unable to perform his assigned job to be the best-qualified for a vacant position is incongruent with the ADA).

¹⁶⁶ *Supra* note 163. See also *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 484 (8th Cir. 2007), *cert. granted*, 76 USLW 3200 (U.S. Dec. 7, 2007) (No. 07-480), *cert. dismissed*, 2008 WL 114946 (U.S. Jan 14, 2008) (NO. 07-480, R46-008). Wal-Mart rejected Huber even though she was disabled, minimally qualified for the job, and unable to perform in her existing position; indeed, the court correctly held that the employer did not violate the ADA by hiring the most-qualified person for the job. *Id.* See also note 83 and accompanying text (discussing the Seventh Circuit's view that giving a disabled employee a position over a more-qualified employee is unfounded and inappropriate).

¹⁶⁷ See also O'Neil III & Reiss, *supra* note 148, at 359-60. According to the Tenth Circuit's opinion in *Midland Brake*, external candidates are either not considered or rejected, despite possessing the precise, and perhaps unique, experience required for a particular vacant job. *Id.* The authors argued that the ADA should not be construed to force an employer's hand into hiring a minimally qualified, disabled employee who is unable to perform his assigned job over a more-qualified candidate. *Id.* It may be difficult for such a non-disabled person to gain a similar job because of the uniqueness of the job sought and the lack of such available positions in the relevant labor market. *Id.* The ADA should not be construed to produce such an unreasonable result. *Id.*

¹⁶⁸ See *supra* note 163 (discussing how a non-disabled employee may be unfairly burdened by the Tenth Circuit's approach of automatically reassigning a qualified, disabled employee over a more-qualified candidate).

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employer to reject these candidates who have remarkable credentials, in favor of reassigning a minimally qualified, disabled employee to a vacant position.¹⁶⁹ For all of these reasons, requiring an employer to overlook superior candidates who demonstrate excellent qualifications has unfortunate consequences for both employers and non-disabled individuals.¹⁷⁰

In summary, the Tenth Circuit's approach to interpreting the ADA's reassignment provision misinterpreted the ADA and its legislative history.¹⁷¹ Moreover, requiring automatic reassignment of a minimally qualified, disabled employee to a vacant position, unless the employer can show that such reassignment poses an undue hardship, is not only ill-founded, but it is also impractical for employers and overly burdensome on non-disabled individuals.¹⁷² For these reasons, the Seventh and Eighth Circuits correctly interpreted the ADA by holding that an employer is not required to breach its non-discriminatory policy of hiring the most-qualified candidate in order to reassign a qualified, disabled employee.¹⁷³ Nonetheless, a circuit split will exist until the Supreme Court clarifies an employer's obligations relating to reassignment.¹⁷⁴

¹⁶⁹ See *Midland Brake*, 180 F.3d at 1169 (stating that when a qualified, disabled employee cannot perform his current job, he should be reassigned to a vacant position; he need not be the most-qualified candidate for that vacant position); *supra* note 75 (discussing the EEOC's interpretation of the ADA's reassignment provision—that an employer must reassign to a vacant position a qualified, disabled employee unable to perform his assigned job without considering whether a more-qualified individual is available). *But see supra* note 86 (referring to the type of approach that requires an employer to reassign a qualified, disabled employee without regard to merit, as “affirmative action with a vengeance[]”).

¹⁷⁰ See *supra* notes 148–69 and accompanying text (showing how interpreting the ADA as mandating reassignment of a qualified, disabled employee to a vacant position over a more-qualified candidate, as the Tenth Circuit does, negatively impacts employers and non-disabled individuals).

¹⁷¹ See *supra* Part III.A (explaining how the Tenth Circuit's view misinterprets the ADA); *supra* Part III.B (explaining how the Tenth Circuit's view misinterprets the legislative history).

¹⁷² See *supra* Part III.C (discussing how the Tenth Circuit's position on an employer's ADA-duty to reassign is impractical for employers and significantly burdens non-disabled individuals).

¹⁷³ See *supra* Part III (discussing why the Seventh and Eighth Circuit's approach to reassignment—that an employer is not required to waive its legitimate, non-discriminatory policy of hiring the most-qualified candidate in order to reassign a qualified, disabled employee—is superior to the Tenth Circuit's approach).

¹⁷⁴ *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007), *cert. granted*, 76 USLW 3200 (U.S. Dec. 7, 2007) (No. 07-480), *cert. dismissed*, 2008 WL 114946 (U.S. Jan 14, 2008) (NO. 07-480, R46-008); *supra* note 98 (noting that the circuit split will exist until the Court resolves it, and predicting that the Court will have a chance to address this circuit split in the near future); *supra* notes 74–75 (setting forth the cases establishing the circuit split concerning whether an employer is required to reassign to a vacant position a qualified,

IV. PROPOSED RULE AND JUDICIAL REASONING FOR CONCLUDING THAT THE
AMERICANS WITH DISABILITIES ACT OF 1990 DOES NOT REQUIRE
REASSIGNMENT

The ADA requires an employer to provide reasonable accommodation to a disabled individual so long as such accommodation does not pose an undue hardship on business operations.¹⁷⁵ An individualized inquiry is required to determine whether an accommodation is reasonable, or conversely, whether it presents an undue hardship.¹⁷⁶ Such a particularized assessment necessitates that in some instances, reassigning a qualified, disabled employee to a vacant position *is* reasonable accommodation.¹⁷⁷ In other instances, however, such as when a more-qualified candidate is available to fill a vacant position, reassigning a disabled employee in violation of a qualification-based hiring policy is *not reasonable* and poses an undue hardship.¹⁷⁸

disabled employee unable to perform his assigned position when a more-qualified individual could be available to fill the vacant job).

¹⁷⁵ See *supra* notes 110–12 and accompanying text (explaining an employer’s duty to provide reasonable accommodation); *supra* note 42 (quoting the ADA, particularly § 12112(b)(5)(A), located in the second paragraph, which states that an employer discriminates against a disabled person under the ADA if it fails to provide reasonable accommodation, unless such accommodation poses an undue hardship on the employer’s operations).

¹⁷⁶ See *supra* note 49 and accompanying text (noting that *Sutton* established that ADA cases require individualized inquiries); *supra* note 45 (discussing *Albertson’s*, which called for case-by-case determinations in ADA cases).

¹⁷⁷ See *supra* note 134 (quoting the legislative record, in which Congress stated that reasonable accommodation *may* include reassignment); *supra* notes 129–46 and accompanying text (discussing that the ADA’s legislative history shows that reassignment of a disabled individual *can* be a reasonable accommodation in certain circumstances); *supra* notes 115–21 and accompanying text (explaining that the listed accommodations in the ADA’s reasonable accommodation provision are *possible* accommodations).

¹⁷⁸ See *supra* note 148 (noting that requiring an employer to forego its policy of hiring the most-qualified candidate is unreasonable on its face); *supra* note 134 (quoting the legislative record, in which Congress stated that reasonable accommodation may include a reassignment to a vacant position, but not in every instance); *supra* note 131 (quoting the legislative record, in which Congress stated that an employer is not required to prefer a disabled applicant over non-disabled applicants for a vacant job); *supra* note 126 (noting that reassignment is not always *reasonable* accommodation); *supra* notes 123–46 and accompanying text (discussing that legislative history shows that reassignment of a disabled individual can be a reasonable accommodation in certain circumstances, but is not required); *supra* note 122 and accompanying text (quoting the majority in *Midland Brake*, acknowledging that the listed accommodations in the Act’s reasonable accommodation provision may not be reasonable in every circumstance); *supra* notes 105–21 (explaining that the listed accommodations in the ADA’s reasonable accommodation provision are possible accommodations, not requirements); *supra* notes 82–83, 86 (discussing *Humiston-Keeling*—that the ADA does not require an employer to reassign to a vacant position a disabled employee unable to perform his assigned job over a more-qualified, non-disabled

Accordingly, this Part proposes the correct analysis for finding that the ADA's reassignment obligation does *not require* an employer to waive its legitimate, non-discriminatory hiring policy in order to accommodate a disabled employee who is unable to perform his assigned job because of a qualifying disability.¹⁷⁹ In keeping with stare decisis, Part IV.A proposes that the Court should apply *Barnett's* rebuttable presumption rule when an employer refuses to reassign a disabled employee because of its policy of hiring the most-qualified candidate.¹⁸⁰ Because the holding in *Barnett* was problematic, Part IV.B examines why *Barnett's* rule should be extended in cases involving such a policy of hiring the best candidate.¹⁸¹

A. *Barnett's Rebuttable Presumption Rule: The Correct Approach to Deciding Whether an Employer Is Required to Reassign a Qualified, Disabled Employee to a Vacant Position over a More-Qualified Candidate*

Barnett's rebuttable presumption rule (dealing with an employer's seniority system) is appropriately applied to an employer's policy of hiring the best-qualified candidate for a position.¹⁸² *Barnett's* rule, with proposed language extending the rule to a merit-based hiring policy noted in italics, is as follows:

[Reassignment of a qualified, disabled employee is generally not "reasonable" when it] conflicts with [an employer's] *legitimate, non-discriminatory, qualification-based hiring policy*, . . . [but] [t]he plaintiff remains free to

employee); *supra* notes 74, 77-85 (discussing the holding in *Huber*—that the ADA does not require an employer to reassign to a vacant position a minimally qualified, disabled employee unable to perform his assigned job over a more-qualified candidate); *supra* note 49 (stating that *Sutton* held that an individualized inquiry is imperative in ADA cases, and noting, as an example, that one diabetic person may be disabled pursuant to the ADA, while another diabetic fails to be covered by the ADA because he is not substantially limited in his ability to perform a major life activity).

¹⁷⁹ See *infra* Part IV.A (recommending a proposed rule and judicial reasoning for concluding that the ADA does not require an employer to automatically reassign a qualified, disabled employee over a more-qualified candidate).

¹⁸⁰ See *supra* note 57 and accompanying text (quoting *Barnett's* rebuttable presumption rule); *infra* Part IV.A (proposing the appropriate rule and reasoning for determining that an employer is not required to reassign a qualified, disabled employee over a more-qualified candidate).

¹⁸¹ See *infra* notes 201-13 (discussing why *Barnett* dictates the proper result when a proposed accommodation conflicts with a legitimate, non-discriminatory policy of hiring the most-qualified candidate to fill a vacant position); *infra* Part IV.B (discussing why the rule is appropriate, even though a similar rule was unsuccessful in *Barnett*).

¹⁸² See *supra* text accompanying note 57 (stating the rebuttable presumption rule announced in *Barnett*).

present evidence of special circumstances that make . . . a[n] . . . exception [to the policy “reasonable”] in the particular case. And such a showing will defeat the employer's demand for summary judgment.¹⁸³

Where an employer would have to waive its hiring policy in order to reassign a disabled employee, *Barnett's* rule upholds the hiring policy, as long as the policy is legitimate and non-discriminatory, but *Barnett's* rule also allows an employee to demonstrate that the situation warranted an exception to the hiring policy.¹⁸⁴

Merit-based hiring policies are similar to seniority policies because both create expectations for employees concerning how vacant positions will be filled.¹⁸⁵ There is an even stronger reason for upholding merit-

¹⁸³ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002); see *supra* note 57 and accompanying text (stating the rebuttable presumption rule announced in *Barnett*); *supra* Part III.A-B (discussing how an approach that gives way to preferring disabled individuals at the expense of non-disabled individuals exceeds the statutory requirements and Congress's intent). See also Long, *supra* note 152, at 905-11. One commentator, Long, proposed a similar approach, making reassignment to a vacant position of a qualified, disabled employee unreasonable whenever it resulted in violating the contractual rights of another employee or otherwise resulted in adverse employment action for another employee. *Id.* That approach is commendable and addresses a reassignment conflict in which the interest of a non-disabled *employee* is at stake. *Id.* However, that solution stops short of addressing a conflict involving a minimally qualified, disabled employee and an individual not currently employed by the employer. *Id.* For example, using Long's approach, in the hypothetical scenario presented in Part I, the non-disabled candidate possessing well-beyond the required qualifications of the vacant job at issue, would not be selected. *Id.* Rather, the disabled, but significantly less-qualified, employee would be selected. *Id.* Moreover, the same result would also occur if the external candidate possessed an ADA-covered disability. *Id.* In such a case, as where two disabled people apply for a job, the employer would be required to choose the significantly less qualified employee merely because the less-qualified candidate was already employed, even though both were disabled. *Id.* That would be true, even where the less-qualified candidate was employed for only one month. *Id.* Thus, while the author's proposed solution provides a good foundation for addressing a conflict involving a disabled and a non-disabled employee competing for a vacant job, a more comprehensive solution is needed to address the broader range of possible hiring scenarios, which often involve external candidates. *Id.* Also, although Long was apparently attempting to strike a balance of the competing interests, his approach goes beyond the requirements set forth in the ADA and congressional intent.

¹⁸⁴ See *supra* note 57 and accompanying text (describing how *Barnett's* rebuttable presumption rule is applied).

¹⁸⁵ See *supra* notes 61-62 (indicating that the *Barnett* Court discussed the benefits of seniority systems in fostering employee expectations of fair treatment); *supra* notes 61, 66 (noting that Justice Scalia compared seniority policies to other employment policies and noted that important benefits stem from other policies); *supra* note 163 and accompanying text (explaining that hiring policies create expectations concerning how vacant jobs will be filled).

based policies, though, because hiring the best candidate for open positions positively impacts both short-term and long-term profit margins as well as the overall functioning of a business.¹⁸⁶ Accordingly, requiring an employer to waive such policies not only negatively affects non-disabled individuals (much like requiring an employer to waive a seniority policy does), but it negatively impacts business operations; thus, such reassignment is not only unreasonable (like requiring an employer to waive a seniority policy is), it creates an undue hardship.¹⁸⁷ *Barnett's* rebuttable presumption rule, therefore, should be applied when reassignment of a disabled employee conflicts with a merit-based hiring policy.¹⁸⁸ Such a policy will nearly always be upheld as long as it is legitimate and not discriminatory.¹⁸⁹

Barnett's rebuttable presumption rule for reassigning a qualified, disabled employee properly addresses the following considerations: (1) the ADA's requirements; (2) pertinent legislative history; and (3) the burden on employers and on non-disabled individuals.¹⁹⁰ First, *Barnett's* rebuttable presumption, which proposes to uphold a legitimate, non-discriminatory policy of hiring the most-qualified candidate for a vacant position, is in line with the ADA's requirements.¹⁹¹ The ADA focuses on eliminating discrimination against people with disabilities and says nothing about providing preference to disabled employees *over* non-disabled individuals.¹⁹² Thus, *Barnett's* rebuttable presumption favoring

¹⁸⁶ See Long, *supra* note 152, at 903 (noting that requiring an employer to forego its policy of hiring the best-qualified individual for a given position places more burden on an employer than requiring the same employer to forego its seniority policy because a seniority policy does not ensure that the most-qualified candidate will be hired for a position, only that the person who has the most seniority will be hired); *supra* note 151 (describing the business consequences that flow from following qualification-based hiring policies).

¹⁸⁷ See *supra* note 42 (defining "reasonable accommodation" and "undue hardship"); *supra* note 151 (discussing the business advantages of following qualification-based hiring policies).

¹⁸⁸ See also *supra* note 42 (defining the terms "reasonable accommodation" and "undue hardship").

¹⁸⁹ See text accompanying note 183 (stating the proposed rebuttable presumption rule for addressing a situation where reassignment of a qualified, disabled employee conflicts with a merit-based hiring policy).

¹⁹⁰ See also *supra* Part III (discussing three important considerations for determining whether the ADA requires an employer to ignore its merit-based hiring policy and give way to hiring the disabled, but less-qualified, employee).

¹⁹¹ See *supra* Part III.A (describing the ADA's requirements, and explaining why requiring an employer to reassign a qualified, disabled employee to a vacant position exceeds the ADA's requirements).

¹⁹² See *supra* text accompanying note 109; *supra* Part III.A (discussing that the ADA's purpose is to eliminate discrimination and that it makes no references to providing disabled people with advantages over non-disabled people, and showing that the ADA

a legitimate, non-discriminatory hiring policy meets the ADA's requirements.¹⁹³

Second, *Barnett's* rebuttable presumption rule appropriately considers legislative history.¹⁹⁴ Congress did not intend to debilitate employers by mandating that they maintain a minimally qualified workforce.¹⁹⁵ Instead, congressional intent supports the practice of filling a vacant position without considering a person's disability or the reasonable accommodation that a person requires because of a disability.¹⁹⁶ Therefore, deferring to an employer's qualification-based hiring policy is consistent with congressional intent.¹⁹⁷

Third, and perhaps most importantly, *Barnett's* rebuttable presumption rule favoring an employer's legitimate, non-discriminatory hiring policy of selecting the most-qualified candidate, adequately addresses competing policy concerns.¹⁹⁸ As long as an employer's policy is justifiable and non-discriminatory, it will typically be upheld, but still, a disabled plaintiff remains free to present special circumstances that

lists reassignment to a vacant position as a *possible* reasonable accommodation); *supra* notes 74, 83, 85-86 (discussing cases, such as *Huber*, *Humiston-Keeling*, *Burns*, *Dalton*, *Terrell*, *Daugherty*, *Kellogg*, *Cravens*, and *Turco*, that have concluded that the ADA's purpose is to deter discrimination, not promote affirmative action); *see also supra* note 40 (quoting the ADA's purpose statement, which expressly indicates its intent to eliminate discrimination against people with disabilities); *supra* notes 23, 32 (noting the President's statements concerning the ADA's purpose).

¹⁹³ *See supra* Part III.A (discussing the ADA's requirements in support of this position).

¹⁹⁴ *See supra* note Part III.B (quoting the ADA's legislative history, and justifying why requiring an employer to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position goes well beyond what Congress intended the ADA to require).

¹⁹⁵ *See supra* note Part III.B (quoting the ADA's legislative history, and explaining why requiring an employer to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position goes beyond congressional intent); *supra* text accompanying note 146 (indicating in the first sentence of the quoted text that Congress reaffirmed that the ADA does not force employers to hire minimally qualified, disabled workers); *supra* note 131 (same). *See also* O'Neil III & Reiss, *supra* note 148, at 365 ("[A]n employer's obligation to reassign a disabled employee should not shackle the fundamental right [of employers] to select the most-qualified individual for a vacant position.").

¹⁹⁶ *See supra* note 134 (quoting the legislative record, and noting that Congress intended for reassignment to be considered, not required); *supra* note 131 and accompanying text (quoting the legislative record, and in particular, the last two sentences in which Congress expressly stated that an employer should make hiring decisions *without considering whether an applicant has a disability*); *supra* notes 123-46 and accompanying text (discussion).

¹⁹⁷ *See supra* Part III.B (discussing the ADA's history, and arguing that requiring an employer to reassign a qualified, disabled employee to a vacant position over a more-qualified candidate goes against congressional intent).

¹⁹⁸ *See supra* Part III.C (indicating competing policy concerns involved, and explaining why requiring an employer to reassign to a vacant position a qualified, disabled employee who is unable to perform his assigned job over more-qualified, non-disabled individuals, fails to strike an appropriate balance of these concerns).

warrant an exception.¹⁹⁹ This approach—a rebuttable presumption rule that upholds a legitimate, non-discriminatory policy of hiring the most-qualified candidate for a vacant position—appropriately balances the business needs of employers and the interests of disabled and non-disabled individuals.²⁰⁰

B. *If the Rebuttable Presumption Rule Failed in Barnett in 2002, Why Should the Court Apply It in the Future? Different Court, Different Facts, Different Era.*

If *Barnett's* ruling was problematic in 2002, why should the Court apply *Barnett's* rebuttable presumption rule in the future?²⁰¹ First, the primary shortcoming of *Barnett* was that the Court did not indicate whether it was limited to seniority policies; and, so, litigants raced to the courthouses to test the holding.²⁰² The likely reason, of course, that the *Barnett* Court did not deliver a broad holding is that the members of the Court could not agree on anything more expansive than what *Barnett* actually held.²⁰³ In addition, the Court is supposed to avoid rendering an advisory opinion, and minimalism has been espoused by most justices.²⁰⁴ A ruling, therefore, that applied beyond seniority policies would have been inappropriate, as it would have exceeded the scope of the precise issue presented.²⁰⁵ Therefore, the Court delivered its ambiguous holding, agreeing to as much as it could, issuing *five distinct*

¹⁹⁹ See Greenwald, *supra* note 98, at 1 (reviewing comments of various attorneys regarding how the ADA's reassignment duty should be interpreted, and noting that one attorney stated that requiring affirmative action would be dangerous because it goes against making a decision based on merit, and thus, violates an important cornerstone of good hiring practices); *supra* note 98 (quoting Hyman, explaining that when an employer makes a hiring decision on grounds other than merit, it opens itself up to lawsuits from non-selected candidates).

²⁰⁰ See *supra* Part III.C (describing the policy concerns, and demonstrating why requiring an employer to reassign a qualified, disabled employee unable to perform his assigned job to a vacant position over a more-qualified candidate does not appropriately balance these concerns).

²⁰¹ See *infra* notes 202–13 and accompanying text (discussing why the Court should apply *Barnett's* rebuttable presumption rule to an employer's legitimate, non-discriminatory policy of hiring the best-qualified candidate).

²⁰² See *supra* notes 59, 61, 66 (discussing the ambiguity of *Barnett* and the uncertainty it left in its wake); *supra* notes 67–68 and accompanying text (discussing cases in which plaintiffs tested *Barnett's* limits).

²⁰³ See *supra* note 61 (indicating, in the second full paragraph of the quoted text, that Justice O'Connor acknowledged that if she had not voted with the majority, the Court may not have delivered a majority opinion).

²⁰⁴ See *supra* note 48 (explaining that courts must refrain from delivering advisory opinions).

²⁰⁵ See *supra* note 48 (noting that the Court must avoid rendering opinions that exceed the issues presented).

opinions; the Court's opinion was vague and complex, and that is largely why it was so problematic.²⁰⁶ However, with new members on the Court and facts implicating a merit-based hiring policy as opposed to the seniority policy in *Barnett*, the Court can agree to apply the feasible rebuttable presumption rule.²⁰⁷ In light of the litigation triggered by *Barnett*, the Court may be well-convinced that a more precise holding concerning an employer's reassignment obligation is not only warranted but also necessary.²⁰⁸

The other major criticism of *Barnett* is the unmanageability of the "special circumstances" exception.²⁰⁹ However, it is well-established that disability discrimination is different than other types of discrimination, requires different protections, and most significantly, requires a different and *individualized* analysis.²¹⁰ Although this is not wholly comforting to most employers who would favor a per se rule upholding employers' merit-based hiring policies, the unique nature of disability discrimination makes a per se rule inappropriate and unworkable.²¹¹ Such a rule would potentially prevent disabled plaintiffs from challenging the legitimacy of particular hiring policies or the manner in

²⁰⁶ See *supra* note 61 (noting the issues on which the members of the Court had difficulty reaching agreement, and discussing each of the five opinions in *Barnett*); *supra* note 59 (quoting Judge Trott).

²⁰⁷ See *supra* note 98 and accompanying text (noting that, before the Court dismissed *Huber*, management employment lawyers predicted that the Court would rule in Wal-Mart's favor and that the Court would have a relatively easy time reaching consensus, in part because Justice Breyer recused himself from the case). See also, e.g., *supra* notes 78-81 and accompanying text. Based on the record in *Huber*, which directly involved an employer's merit-based hiring policy, the current Court would have been able to apply *Barnett*'s rebuttable presumption rule. *Supra* notes 78-81 and accompanying text. *Huber* conceded that the candidate selected for the vacant position that *Huber* sought was more-qualified than *Huber*. *Supra* notes 78-81 and accompanying text. Furthermore, *Huber* did not contend that Wal-Mart's hiring policy was illegitimate or discriminatory. *Supra* notes 78-81. Instead, *Huber* argued that Wal-Mart should have made an exception to its established policy because of *Huber*'s disability. *Supra* notes 78-81 and accompanying text. Thus, applying *Barnett*'s rebuttable presumption rule would have allowed the Court to uphold Wal-Mart's policy. *Supra* notes 78-81 and accompanying text.

²⁰⁸ See *supra* notes 67-68 and accompanying text (discussing several lawsuits filed after *Barnett*).

²⁰⁹ See *supra* note 59 (discussing the problems with *Barnett*'s "special circumstances" language); *supra* note 67 (listing cases brought after *Barnett*, which attempted to clarify when a plaintiff shows "special circumstances").

²¹⁰ See *supra* notes 45, 49 (noting that ADA cases call for individualized inquiries); *supra* notes 110-12 (discussing the unique nature of disability discrimination compared to other types of discrimination).

²¹¹ See John F. Scalia & David A. Kessler, *U.S. Supreme Court Rules That Employers Do Not Have To Disturb Seniority Systems To Accommodate Disabled Employees Absent Proof Of Special Circumstances* (May 2002), http://www.gtlaw.com/pub/Alerts/2002/scaliaj_05.asp (arguing that a bright-line rule would be beneficial for employers).

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which policies are implemented.²¹² *Barnett's* rebuttable presumption rule strikes the necessary balance by recognizing that mandatory reassignment of a qualified, disabled employee over a better-qualified candidate is unreasonable and presents an undue hardship, but not restricting entirely a disabled person's ability to challenge policies that are illegitimate or improperly executed.²¹³ In keeping with the notion of *stare decisis*, the Court should apply *Barnett's* rebuttable presumption rule when an employer refuses to reassign a disabled employee because of its legitimate and non-discriminatory policy of hiring the best candidate.²¹⁴

V. CONCLUSION

Since the ADA's passage in 1990, the Act has spawned much judicial debate. From its infancy to the present, difficulties in addressing basic questions, such as whether a particular condition is a disability or whether the ADA requires an employer to reassign a disabled worker, have troubled employers and their legal counsel greatly. Not all of the blame for this uncertainty should be directed toward Congress for writing the statute vaguely. Part of the problem with resolving these rudimentary questions stems from the uniqueness of disability issues and the need for individualized review. Consequently, employers have looked not only to the ADA and its history to guide their decision making, but also to case law. However, this practice has not been without obstacles because it has left employers trying to piece together parts of judicial opinions from cases with similar, but slightly different, facts. Speculating as to how a court may rule on a set of facts has been mere guesswork. More predictability, particularly regarding when an employer's reassignment duty conflicts with its policy of hiring the best applicant, is sorely needed.

The judicial reasoning proposed in Part IV.A provides a method for the Court to resolve the circuit split and to determine that the ADA does *not require* an employer to waive its legitimate, non-discriminatory, merit-based hiring policy in favor of reassigning a qualified, disabled employee to a vacant position. When an employer is forced to violate its hiring policy in order to reassign a qualified, disabled employee, the Court should apply *Barnett's* rebuttable presumption rule, which will nearly always result in upholding the policy. Although the rule allows a

²¹² See Long, *supra* note 152, at 893-94 (describing problems with a bright-line rule favoring hiring policies).

²¹³ *Id.* (explaining that balancing the interests of all parties involved in the reassignment of a qualified, disabled employee is important).

²¹⁴ See *supra* notes 201-13.

plaintiff to present special circumstances that warrant an exception to the policy, such circumstances do not exist where the plaintiff concedes that the policy was legitimate and non-discriminatory, and that the chosen candidate was more-qualified than the plaintiff.

In applying *Barnett's* rebuttable presumption to the hypothetical scenario presented in Part I, involving a disabled employee and a non-disabled *external applicant*, the employer would not be forced to hire the disabled, but less-qualified, employee, so long as it selected the more-qualified candidate pursuant to a legitimate, non-discriminatory, merit-based hiring policy. The ADA is aimed at providing equality of opportunity—not at providing special advantages or giving preference to disabled individuals over non-disabled individuals. Thus, *Barnett's* rebuttable presumption—favoring a legitimate, non-discriminatory qualification-based hiring policy while, allowing a disabled employee to present evidence that special circumstances warrant an exception to the policy—appropriately balances the business needs of employers and the interests of both disabled and non-disabled individuals.

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