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Note

Bowling for Certainty: Picking Up the Seven-Ten Split by Pinning Down the Reasonableness of Reassignment After Barnett

Jared Hager*

Over the past four decades, Congress has attempted to redress past societal discrimination and promote equal employment opportunities by targeting the workplace with various statutes that protect certain classes of individuals from discrimination.1 To ensure equal treatment, these laws generally prevent an employer from taking adverse employment actions against an individual because of his membership in a protected class.2 The Americans with Disabilities Act (ADA) is unique because its nondiscrimination mandate requires that an employer treat disabled individuals differently, arguably preferentially,3 by attaching liability to an

* J.D. Candidate 2004, University of Minnesota Law School; B.A. 2000, Lewis and Clark College, Portland, OR. The author would like to thank Professors Stephen F. Befort and Miranda McGowan for their helpful guidance and advice. Rebecca Bernhard, Jennifer L.M. Jacobs, and the Editors of the Minnesota Law Review provided invaluable comments and suggestions integral to this Note's development. Finally, thanks to my family and friends; without your love and support, none of this would be.

1. E.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (2000); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000); see also id. § 12101(a)(7)-(8) (finding that “individuals with disabilities... have been... subjected to a history of purposeful unequal treatment,” and that the “proper goals regarding individuals with disabilities are to assure equality of opportunity”).

2. See, e.g., 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual...”); id. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual... because of such individual's race, color, religion, sex, or national origin...”).

employer's failure to make "reasonable accommodations to the known physical or mental limitations" of its qualified employees or applicants, unless the employer can prove "that the accommodation would impose an undue hardship on the operation of the business."\footnote{4} Even more extraordinary is the accommodation of "last resort": reassignment to a vacant position.\footnote{5} Instead of excusing or altering a disabled worker's job performance, this controversial accommodation mandates that an employer transfer the worker to an entirely different position.\footnote{6} Reassignment raises special issues when it conflicts with neutral policies to fill vacancies in a certain manner.

The Seventh and Tenth Circuit Courts of Appeal are divided on the question of whether an employer must reassign a qualified disabled employee\footnote{7} to a vacant position when such employee with a disability differently, \textit{i.e.}, preferentially."); see also S. Elizabeth Wilborn Malloy, \textit{Something Borrowed, Something Blue}: Why Disability Law Claims Are Different, 33 CONN. L. REV. 603, 618-26 (2001) (distinguishing Title VII's equal treatment approach to nondiscrimination from the ADA's different treatment approach, as characterized by the requirement of reasonable accommodation). \textit{Compare} 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist . . . "), \textit{with} id. § 12112(b)(5)(B) (construing the term "discriminate" to include the failure to make reasonable accommodations to the disabilities of qualified individuals). \textit{But see} Thomas F. O'Neil III & Kenneth M. Reiss, \textit{Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?}, 17 LAB. LAW. 347, 349 (2001) (concluding from the ADA's legislative history that the ADA should not mandate judicial preferences for the disabled over the non-disabled).

\footnote{4} 42 U.S.C. § 12112(b)(5)(A).
\footnote{5} \textit{See} id. § 12111(9)(B).
\footnote{7} \textit{See} 42 U.S.C. § 12111(8) (defining qualified individual as a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"); \textit{see also} Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1017 (8th Cir. 2000) (applying the definition of qualified individual to the context of reassignment). A plaintiff must prove that he is qualified as part of his prima facie case. \textit{See} 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation only for qualified disabled employees or applicants). For a more thorough overview of a disabled worker's prima facie case, see Stephen F. Befort & Holly Lindquist Thomas, \textit{The ADA in Turmoil: Judicial
reassignment would violate its neutral policy of filling vacancies with the best-qualified applicant. The stakes are high. If the disabled employee prevails in his reassignment request over the better-qualified applicant, then the ADA would mandate what Seventh Circuit's former Chief Judge Richard Posner called "affirmative action with a vengeance." The ADA would require an employer to fill a vacancy with a less-qualified disabled worker even though the employer would prefer, and indeed has a standing policy, to hire the best-qualified candidate for the position. The question is one of reasonableness, which is unanswered by the statute, and of policy, which divides legal scholars as well as the circuits.

In US Airways v. Barnett, decided in April 2002, the Supreme Court interpreted the meaning of "reasonable accommodation" for the first time in the statute's twelve-year history. The Court held that reassignment constitutes an

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8. Compare Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165, 1169 (10th Cir. 1999) (en banc) (finding that reassignment to a vacant position requires more than just allowing a disabled employee to compete equally with other applicants, and that requiring the disabled worker to "be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history"), with EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (holding that "the ADA does not require an employer to reassign a disabled employee" to a vacant position when there is a more qualified applicant and "provided that it's the employer's consistent . . . policy to hire the best applicant for the particular job").


10. See id.

11. O'Neil & Reiss, supra note 3, at 349 (observing that the statute provides no guidance whatsoever in determining whether a certain accommodation is reasonable).

12. Compare 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, 1086-90 (2000) (finding that the relative losses of denying transfer support the disabled worker's right to reassignment over a better-qualified employee or outside applicant), with O'Neil & Reiss, supra note 3, at 348 (concluding that the ADA "should not mandate judicial preferences for the disabled over the non-disabled" because it would undermine legitimate business interests, such as competing effectively).


unreasonable accommodation, regardless of proof of undue hardship, when it conflicts with a bona fide nondiscriminatory seniority system.\textsuperscript{15} Even though the Court did not resolve the circuit split over best-qualified applicant rules,\textsuperscript{16} four different interpretations of the reasonableness of reassignment with respect to neutral employer policies emerged from \textit{Barnett},\textsuperscript{17} which informs the proper resolution of the seven-ten split.\textsuperscript{18} Although legal scholars have commented on the competing policy concerns surrounding reassignment in violation of best-qualified applicant policies,\textsuperscript{19} no one has yet to address or incorporate \textit{Barnett}'s impact on this specific issue. In addition, discussions of \textit{Barnett} have focused on the general inquiry of reassignment versus neutral workplace rules as a normative matter; these critique the opinion rather than apply its reasoning to a specific neutral policy.\textsuperscript{20}

This Note seeks to resolve the seven-ten split by identifying and applying the different concepts of reasonable accommodation that emerged from \textit{Barnett} to a transfer request that violates an employer's neutral policy to fill vacancies with the best-qualified applicant. Part I briefly outlines the relevant mandates of the ADA, including Equal

\textsuperscript{15} See \textit{Barnett}, 122 S. Ct. at 1519-24.  
\textsuperscript{16} See id. at 1519 (limiting the holding to the specific facts of the case and deciding solely the reasonableness of reassignment when it conflicts with the rules of a seniority system).  
\textsuperscript{17} See Anderson, supra note 6, at 2 (noting the “fractured” nature of the Court’s resolution of \textit{Barnett}).  
\textsuperscript{18} See infra Part III.  
\textsuperscript{19} See supra notes 6, 12; see also John E. Murray & Christopher J. Murray, \textit{Enabling the Disabled: Reassignment and the ADA}, 83 MARQ. L. REV. 721, 731-42 (2000) (arguing that considerations of fairness, administrative efficiency, and statutory interpretation support a disabled individual's right to reassignment despite a policy to transfer the most qualified employee); Matthew B. Robinson, Comment, \textit{Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act}, 47 ST. LOUIS U. L.J. 179, 213-15 (2003) (concluding that \textit{Barnett} is wrong and that employers should have to prove that subjecting seniority rules to reassignment would cause an undue hardship).  
\textsuperscript{20} See Amar & Brownstein, supra note 14, at 362-69 (assessing the relative strengths of the majority's approach vis-à-vis Justice Scalia's alternative interpretation with respect to the normative impulse behind the ADA); Anderson, supra note 6, at 2-4 (examining \textit{Barnett}'s impact on neutral employer policies generally and concluding that the case was incorrectly decided because the right to reassignment should always trump a neutral policy unless the employer can prove an undue hardship); \textit{Leading Cases}, supra note 14, at 351-52 (criticizing \textit{Barnett}'s reliance on analogical reasoning to interpret provisions unique to the ADA).
Employment Opportunity Commission (EEOC) regulations promulgated to implement the statute. Part II describes the current circuit split by summarizing the seminal cases in the Seventh and Tenth Circuits. Part III reviews the divergent Supreme Court interpretations of the reasonableness of reassignment as an accommodation when it violates neutral seniority rules. Part IV identifies the common ground in Barnett's differing visions of reasonable accommodation and applies it to the context of a reassignment that conflicts with a neutral policy of filling vacancies with the best-qualified applicant.

This Note argues that, pursuant to the interpretations emerging from Barnett, reassignment is reasonable even when it conflicts with a neutral best-qualified applicant policy.21 The Note concludes by predicting a seven-two Supreme Court decision in favor of an employee's statutory right to reassignment as a reasonable accommodation, unless the employer can prove the existence of an undue hardship. Congress intended for disabled individuals to be treated differently than their able-bodied counterparts, and Barnett has laid the groundwork for sanctioning, indeed mandating, preferences for disabled workers in the context of reassignment.

I. FRAMING THE ISSUE: THE RELEVANT STATUTORY PROVISIONS

Congress passed the ADA with overwhelming bipartisan support in 1990.22 The statute mandates that employers make reasonable accommodations to enable qualified disabled workers to participate fully and fairly in the workplace.23 The

21. An employer would still be able to prove that not hiring the best-qualified applicant, pursuant to its policy, would impose an undue hardship on the operation of the business. See infra notes 123-25 and accompanying text (discussing the distinct burdens of proving reasonable accommodation and undue hardship).


23. See 42 U.S.C. § 12112(b)(5) (2000) (mandating that employers make reasonable accommodations); see also id. § 12101(a)(8) (noting that “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”); S. REP. NO. 101-116, at 18-19 (1989); Signing Statement of President Bush, PUB. PAPERS 1070 (July 26, 1990),
statute includes "reassignment to a vacant position" within its definition of reasonable accommodation. Recognizing that past discrimination was largely driven by employers' economic motives, the ADA allows a cost-based defense in cases of reasonable accommodation: undue hardship.

A. THE ADA'S GENERAL RULE

The ADA's employment discrimination provision mandates that "no covered entity shall discriminate against a qualified individual with a disability because of the [individual's] disability ... [with] regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Only employer acts that "discriminate" are subject to liability. Congress constructed the term to include multiple employment decisions. For example, "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects [her] opportunities or status" because of her disability is an act that discriminates.

reprinted in 1990 U.S.C.C.A.N. 601, 602 (suggesting that the ADA would bring people with disabilities into the "mainstream of American life").


25. The disadvantages faced by disabled workers are not generally the result of invidious discrimination, but rather legitimate economic concerns of employers—although these may be driven in part by negative stereotypes concerning the productivity of disabled workers. See Amar & Brownstein, supra note 14, at 368 (arguing that Congress must have intended to increase the number of disabled individuals in the workplace at the expense of employers because most discrimination against the disabled was the product of economic rationality); see also Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372-73 (2001) (suggesting that employers may have completely rational reasons to deny accommodations to disabled individuals).

26. 42 U.S.C. § 12112(b)(5)(A) ("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 ... ").

27. Id. § 12112(a).

28. See 29 C.F.R. § 1630.4 (2002) ("It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability ... ").

29. See 42 U.S.C. § 12112(b) (labeling the subsection "Construction," Congress said "[a]s used in subsection (a) of this section, the term 'discriminate' includes ... ").

30. Id. § 12112(b)(1). The statute also extends protection to those who associate with disabled individuals by constructing the term "discriminate" to
More significantly, failing to reasonably accommodate a disabled employee constitutes discrimination because of disability.\textsuperscript{31}

B. THE OBLIGATION TO MAKE REASONABLE ACCOMMODATIONS

The ADA prevents an employer from “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.”\textsuperscript{32} The plaintiff bears the burden of proving the availability of a reasonable accommodation as part of her prima facie case of discrimination.\textsuperscript{33}

The ADA defines reasonable accommodation to include changes in the job application process,\textsuperscript{34} alterations to the work environment or the customary methods of job performance,\textsuperscript{35} and modifications that allow an individual with a disability to enjoy the same benefits and privileges of employment that similarly situated, non-disabled employees enjoy.\textsuperscript{36} Ultimately,
the scope of an employer's duty to accommodate depends on the extent of the limit imposed by the requirement that the accommodation be reasonable, and whether the employer can, or must, prove undue hardship—a specific defense for failing to accommodate.

C. REASSIGNMENT AS A REASONABLE ACCOMMODATION

The ADA lists reassignment to a vacant position as a possible form of accommodation. Reassignment to a vacant position requires much more than the mere modification of workplace structures or job duties; it forces an employer to transfer his disabled employee to a different position. The EEOC has issued a number of guidelines for construing the ADA's provisions. These guidelines do not have "the force of

37. This Note answers this question relying on the four interpretive frameworks provided in Barnett's fractured decision. See infra notes 61-63 and accompanying text (providing an overview); infra Part III (discussing the four interpretations); infra Part IV (applying the interpretations to a reassignment that contravenes a best-qualified hiring rule).

38. See infra Part I.D; infra notes 200-10 and accompanying text.

39. 42 U.S.C. § 12111(9) (2000). Specifically, Congress said that "[t]he term 'reasonable accommodation' may include . . . reassignment to a vacant position . . . ." Id. (emphasis added). Thus, if reassignment successfully allows a qualified disabled employee to remain employed, then an employer might have to so accommodate. See H.R. REP. NO. 101-485, PT. 2, AT 63 (1990), REPRINTED IN 1990 U.S.C.C.A.N. 303, 345. A plaintiff, however, must show more than just the existence of an effective accommodation; the accommodation also must be reasonable. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1522-23 (2002) (distinguishing the plaintiff's burden of proving an accommodation that is both effective and reasonable).

40. See Befort & Donesky, supra note 12, at 1054.

law” and are not entitled to “special deference.” In practice, however, because the statute authorized the EEOC to issue regulations to implement the ADA, courts often defer to the Interpretive Guidance since it construes the agency’s own regulations.

With respect to reassignment, these guidelines set forth several general limits on the employer’s duty to transfer a disabled employee. First, an employer should consider reassignment as a last resort, only when there is no other effective accommodation or when all accommodations within the individual’s current position would pose an undue hardship. Second, reassignment is only available to existing employees. Third, an employer should attempt to reassign the disabled individual to an equivalent position. Fourth, the

42. Pack v. Kmart Corp., 166 F.3d 1300, 1305 n.5 (10th Cir. 1999).

43. See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 n.5 (10th Cir. 1999) (en banc) (stating that courts must give substantial deference to an agency’s interpretation of its own regulations; indeed “the agency’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulations” (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)); see also 42 U.S.C. § 12116 (authorizing the EEOC to promulgate regulations to implement the ADA).

44. See ENFORCEMENT GUIDANCE, supra note 41 (“Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.” (citing Interpretive Guidance, 29 C.F.R. app. § 1630.2(o); S. REP. NO. 101-116, at 34 (1989); H.R. REP. 101-485, pt. 2, at 63 (1990)). Thus, reassignment is the last chance for a disabled individual to remain employed; if reassignment is not appropriate (i.e., causes an undue hardship, or is unreasonable), then the disabled employee is not qualified and is unprotected from an adverse employment decision by the statute. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(m).

45. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(o) (“Reassignment is not available to applicants.”).

46. See TECHNICAL ASSISTANCE MANUAL, supra note 41 (“Reassignment should be made to a position equivalent to the one presently held in terms of pay and other job status . . . .”). Reassignment does not require the promotion of a disabled employee. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(o) (“It should also be noted that an employer is not required to promote an individual with a disability as an accommodation.” (citing S. REP. NO. 101-116, at 31-32 (1989); H.R. REP. No. 485, pt. 2, at 63 (1990)); see also ENFORCEMENT GUIDANCE, supra note 41 (“Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.”). An employer may reassign an individual to a lower graded position, however, if there are no vacant equivalent positions for which the individual is qualified. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(o).
guidelines echo the language of the statute by declaring that the duty to reassign an employee only exists if there is a vacant position for which the disabled employee is qualified. Finally, an employer is not obligated to reassign a disabled employee if the reassignment would impose an undue hardship on the business.

D. THE UNDUE HARDSHIP DEFENSE

The ADA balances employers' bottom-line interests with the broad societal goal of ensuring employment for persons with disabilities. Accordingly, the employer is not liable for failing to make reasonable accommodations if it shows that such accommodation will impose an undue hardship. The ADA defines undue hardship as "an action requiring significant difficulty or expense." The statute lists multiple factors to

47. See 42 U.S.C. § 12111(9)(B) (indicating that reassignment may be a reasonable accommodation if it is to a vacant position). An employer is not required to create a new job or to bump another employee from a job to reassign. See TECHNICAL ASSISTANCE MANUAL, supra note 41; see also Buskirk v. Apollo Metals, 307 F.3d 160, 169 (3d Cir. 2002) (holding that the ADA does not require the creation of a new position to accommodate a disabled employee).

48. See 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation only for qualified individuals); supra note 7 (noting the ADA's definition of qualified individual). An employee is qualified if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the position and can perform the essential functions of the new position with or without reasonable accommodation. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(m) (laying out two-step process to determine if a disabled individual is qualified).

49. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(p) (noting that proof of undue hardship relieves the employer's obligation to provide an accommodation); see also infra Part I.D (laying out the undue hardship defense).

50. The ADA mandates non-discrimination through various burdens and limitations on employer action, 42 U.S.C. § 12112(b); see supra Part I.A, yet allows a cost-based defense in cases of reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A). For a more thorough overview and critical perspective of the ADA's effectiveness in balancing these interests, see generally Sue A. Krenek, Note, Beyond Reasonable Accommodation, 72 TEx. L. REV. 1969 (1994).

51. 42 U.S.C. § 12112(b)(5)(A); see Olsowsky v. Henderson, 237 F.3d 837, 837 (7th Cir. 2001). Other defenses shield an employer from ADA liability, such as the direct threat defense. See 42 U.S.C. § 12113(a)-(b). These, however, are largely irrelevant in answering the question of whether an employer can fill a vacant position with a best-qualified applicant instead of a qualified disabled employee seeking reassignment as a reasonable accommodation.

52. 42 U.S.C. § 12111(10)(A) (defining undue hardship as "an action
guide a court in determining whether a proposed reasonable accommodation imposes an undue hardship—all of which are economic or financial in nature and concern the operation of the business as a whole. The inquiry into whether an undue hardship exists is fact intensive. Thus, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time; the result depends on the facts of the specific case.

As an affirmative defense, the burden of proving undue hardship is on the defendant. This burden requires more than showing a de minimis cost to the employer, Title VII's standard of undue hardship, because Congress was aware that most accommodations impose some economic burden. To ensure the "full participation, independent living, and economic self-sufficiency" of disabled individuals, the ADA places the

requiring significant difficulty or expense" when considered in light of various economic factors).

53. Id. The relevant factors are the following:
   [t]he nature and cost of the accommodation needed under this chapter; 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; 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 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)(B).

54. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(p).

55. Id.


58. See supra note 25 and accompanying text.

costs of accommodation on the employer, unless those costs are shown to be significantly difficult in light of the economic fortitude of the particular business.60

II. THE SEVEN-TEN SPLIT: COMPETING JUDICIAL INTERPRETATIONS OF THE REASONABleness OF REASSIGNMENT

Congress defined reasonable accommodation in a list of permissive, rather than mandatory, accommodations.61 Nothing in the text, therefore, supports an absolute obligation to reassign a qualified disabled employee.62 The threshold question is whether the proposed accommodation is reasonable.63 Recently, courts have interpreted the reasonableness of reassignment, albeit in an uncertain manner.64 Specifically, courts have addressed whether an employer must reassign a qualified disabled employee to a vacant position when such reassignment would violate a neutral policy, such as an established seniority system65 or

60. See Amar & Brownstein, supra note 14, at 368; see also supra notes 52-54 and accompanying text (noting the individualized factors that determine whether an accommodation imposes an undue hardship); cf. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) (conceding that “it is true that antidiscrimination statutes impose costs on employers”).

61. See supra note 39 (“The term ‘reasonable accommodation’ may include . . . reassignment to a vacant position . . . .”).

62. The contingent right to reassignment contrasts with the absolute right to reasonable accommodations absent undue hardship. See supra notes 32, 39 and accompanying text.

63. After a plaintiff has proven the existence of a reasonable accommodation, a defendant must either implement the proposed accommodation or prove the existence of an affirmative defense, such as an undue hardship. Supra note 32 and accompanying text; see also supra notes 33, 56 and accompanying text (distinguishing burdens of the plaintiff and defendant in an ADA case).

64. See, e.g., US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1519-20 (2002) (interpreting the reasonableness of reassignment when it conflicts with an employer's disability-neutral seniority system); Humiston-Keeling, 227 F.3d at 1028-29 (exempting an employer from the ADA’s reassignment provision if the disabled employee is “inferior” to other applicants and it is “the employer’s consistent and honest policy to hire the best applicant” rather than the first); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165-66 (10th Cir. 1999) (en banc) (holding that, if appropriate, the disabled employee has a right in fact to a transfer since reassignment means more than allowing an employee to apply for a job on the same basis as anybody else).

65. See Barnett, 122 S. Ct. at 1520 (stating the question facing the Court in the petition for certiorari).
filling vacancies with the best-qualified applicant. While the Court answered the former issue, the latter remains open and divides the Seventh and Tenth Circuits.

A. THE TEN PIN: SMITH V. MIDLAND BRAKE

Robert Smith assembled and tested air brake valves for nearly seven years before developing muscular injuries and chronic dermatitis from on-the-job contact with various chemicals, rendering him unfit to work in his position. His employer eventually fired him because no accommodation would allow him to perform his job. The Tenth Circuit granted a rehearing en banc to decide the scope of the employer's reassignment obligation. Specifically, the court addressed whether an employer must reassign a disabled worker when other, more qualified applicants seek a vacant position.

The court rejected the argument that the duty to reassign merely means that an employer must consider a disabled employee's request to transfer to a vacant position along with all other applications the employer receives from coworkers and outside job applicants. The court found that the ADA's literal language indicated that Congress intended reassignment to provide "something more" than the mere opportunity to apply for a job with the rest of the world. Like all the other listed

66. See supra note 64 (noting the decisions of the Seventh and Tenth Circuits); discussion infra Part II.A-B.
67. See discussion infra Part III.
68. See supra note 8 and accompanying text.
69. 180 F.3d 1154 (10th Cir. 1999) (en banc).
70. Id. at 1160.
71. Id.
72. Id. at 1159.
73. See id. at 1175-76.
74. See id. at 1164. The court noted that the reassignment provison would be redundant if it meant only consideration on an equal basis with all other applicants because the ADA already prohibits discrimination in application proceedings. See id. at 1164-65; supra note 30 and accompanying text (observing that the ADA prohibits discrimination against the disabled in the job application process).
75. See Midland Brake, 180 F.3d at 1164. The court observed that the ADA does not define reasonable accommodation as including "consideration of a reassignment to a vacant position," but rather "reassignment to a vacant position," making the active verb "reassign," not "consider." Id. In addition, the court found the core word "assign" implies some active effort on the part of the employer. See id. (citing Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc)).
accommodations, an employer must consider reassignment to a vacant position, and if appropriate, the employer must also offer the reassignment.\textsuperscript{76}

The court noted that its vision of reassignment did not unduly burden or disrupt employers' prerogative because Congress significantly cabined the obligation to grant a reassignment request through other means.\textsuperscript{77} The ADA only requires employers to reassign their disabled workers when there is an equivalent position that is vacant.\textsuperscript{78} In addition, the employee must be qualified for the vacant position.\textsuperscript{79} Finally, reassignment is never required if it is unreasonable or imposes undue hardship.\textsuperscript{80}

The court observed that the right to reassignment is not absolute; even if effective, the word "reasonable" provided an intrinsic limit to reassignment as an accommodation.\textsuperscript{81} The court determined that the ADA does not require reassignment in favor of a disabled employee when it constitutes a fundamental and unreasonable alteration in the nature of an employer's business.\textsuperscript{82} While the Tenth Circuit did not list all employer policies that may be so fundamental to its business as to render reassignment unreasonable,\textsuperscript{83} it did establish a

\begin{footnotes}
\item[76] See id. at 1167.
\item[77] See id. at 1170. The court cited to the various limits imposed by EEOC regulations, such as relegating reassignment to the status of a "last resort" accommodation. See supra notes 41-49 and accompanying text (outlining the limits on reassignment imposed by EEOC regulations).
\item[78] See Midland Brake, 180 F.3d at 1170. The position is not considered vacant, however, if another employee has a legitimate contractual or seniority right to it. See id. Here the Tenth Circuit seems to mirror the Supreme Court's analysis in Barnett as well as Justice O'Connor's concurrence. See discussion infra Part III (discussing the position of the Barnett majority with respect to seniority and Justice O'Connor's concurrence with respect to enforceable contractual rights). The ADA's reassignment provision does not require the creation of a new position or promotion. See supra notes 46-47.
\item[79] See Midland Brake, 180 F.3d at 1170; supra note 48 and accompanying text (relaying the EEOC's similar interpretation). The court recognized that reassignment need not involve a promotion of the disabled employee. See Midland Brake, 180 F.3d at 1170. This means that vacant positions are limited to those of equivalent or lower status as the job held by the disabled worker. See supra note 46.
\item[80] See Midland Brake, 180 F.3d at 1170.
\item[81] See id. at 1175.
\item[82] Id. at 1176. The court recited the example of a well-entrenched seniority system. See id. (noting that seniority establishes legitimate employee expectations).
\item[83] See id. ("We neither attempt here to itemize all such policies that may exist nor comment upon such policies which may be so fundamental to the way
\end{footnotes}
BOWLING FOR CERTAINTY

framework. Legitimate and nondiscriminatory policies would be subordinate to an employer's reassignment obligation under the ADA when to do otherwise would "essentially vitiate" the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation. The court recited the obvious example of an employer's policy against ever reassigning its employees.

B. THE SEVEN PIN: EEOC V. HUMISTON-KEELING

Nancy Houser, a picker in a warehouse, suffered an on-the-job injury that left her unable to perform the essential function of her job: frequently lifting items weighing as much as five pounds off a conveyor belt. Houser's employer unsuccessfully attempted several forms of reasonable accommodation to allow her to continue working in her position. The company had several vacant clerical and telemarketing positions, and Houser met the qualification standards. She applied for a variety of different positions that would allow her to continue working despite her disability, but each time, pursuant to its bona fide policy to give vacant jobs to the best applicant, the company rejected her in favor of another, more qualified candidate. Since no accommodation could allow her to perform her job and there was no vacant position for which she was most qualified, Houser was fired.

The Seventh Circuit rejected the EEOC's interpretation of the ADA's reassignment provision as requiring the transfer of a qualified disabled person over a more qualified non-disabled

an employer does business that it would be unreasonable to set aside [the policy in favor of reassignment]."

84. See id.

85. Id.; see also Befort, supra note 6, at 470 (advocating the Tenth Circuit's standard that employers do not have to make an exception for facially neutral policies unless the policy would "essentially vitiate" the obligation under the ADA to reassign qualified disabled workers).

86. Midland Brake, 180 F.3d at 1176 ("Such a policy, if allowed to trump the ADA, would read out of the act the provision that reassignment is one of the appropriate reasonable accommodations.").

87. 227 F.3d 1024 (7th Cir. 2000).

88. Id. at 1026.

89. Id.

90. Id.

91. See id. at 1026-27.


93. See Humiston-Keeling, 227 F.3d at 1026-27.
applicant. The court reasoned that Houser’s disability had nothing to do with the clerical positions she sought, and therefore, granting her the reassignment in favor of a better-qualified applicant would amount to “bonus points to people with disabilities.” The court held that an employer’s consistent and honest policy to hire the best applicant for the particular job, rather than the first qualified applicant, dispenses the statutory obligation to reassign.

The court recognized that Midland Brake was factually indistinguishable, but found the Tenth Circuit’s decision was incompatible with Seventh Circuit precedent holding that the ADA is not a mandatory preference act. Thus, in the Seventh Circuit, an employer’s nondiscriminatory policy to fill vacancies with the best-qualified applicant trumps a disabled employee’s right to reasonable accommodation regardless of a showing of undue hardship.

III. THE SUPREME COURT’S FIRST ROLL AT REASONABLE ACCOMMODATION: US AIRWAYS V. BARNETT

Congress outlawed an employer’s failure to reassign a disabled employee by prohibiting discrimination because of disability, constructing the term “discriminate” to include the failure to make reasonable accommodations to the known disabilities of qualified employees and defining reassignment.

94. See id. at 1027. The EEOC maintained that the scope of an employer’s reassignment obligation is specifically limited by the factors set forth in its guidelines. See supra notes 44-49 and accompanying text. The Enforcement Guidance is unambiguous. A disabled employee “does not need to be the best qualified individual for the position in order to obtain it as a reassignment.” ENFORCEMENT GUIDANCE, supra note 41.

95. See Humiston-Keeling, 227 F.3d at 1027.
96. See id. at 1029.
97. Id. at 1028.
98. The court was concerned that a “contrary . . . result . . . would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.” Id. (citing Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998)).
100. See supra note 27 and accompanying text (setting out the ADA’s general prohibition).
101. See supra notes 29-32 and accompanying text (highlighting Congress’s construction of the ADA’s general prohibition on discrimination); see also supra note 7 (discussing the prima facie element of being qualified as meaning able to perform the essential job functions of the position held or desired).
as a type of reasonable accommodation. 102 While the statute is
clear in requiring accommodations that are reasonable 103 and
do not cause an undue hardship, 104 it remains silent as to what
is or is not reasonable. 105 In Barnett, the Supreme Court
squarely addressed the meaning of this limitation for the first
time. 106 The case, however, resulted in a five-four decision,
with five separate opinions, and was limited to the issue of
seniority. 107 More importantly, four interpretations of
reassignment as a reasonable accommodation emerged from
the case. 108 Therefore, examining each opinion and
understanding the differing views of reasonableness,
reassignment, and the importance attached to neutral
workplace rules, is essential in assessing whether best-
qualified hiring rules trump the ADA's right to
reassignment. 109

Robert Barnett injured his back on the job and invoked his

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102. See supra note 39 (listing "reassignment to a vacant position" as one
method of reasonable accommodation).
103. See supra notes 39, 61-63 and accompanying text (noting that the
permissive use of "may" within the statutorily defined types of accommodation
suggests that the accommodation must be reasonable, not just effective).
104. See discussion supra Part I.D.
105. See O'Neil & Reiss, supra note 3, at 349 ("The statute identifies
factors that are relevant to an undue hardship analysis, yet it provides no
guidance whatsoever in determining whether a certain accommodation is
reasonable.").
106. See supra text accompanying note 14; infra note 123 and
accompanying text (examining the Court's interpretation of the word
"reasonable").
108. See id. at 1519, 1526, 1528, 1532. Justice Stevens authored a
concurrence agreeing with the majority's interpretation of reasonable
accommodation and the effect of a seniority system on the reassignment
provision, see id. at 1525-26 (Stevens, J., concurring), while highlighting a
plaintiff's method of proving that an ordinarily unreasonable accommodation
is reasonable in a particular situation. See id. Justice Stevens believed that
the impact on fellow employees, the existence of a legal entitlement to the
position, and prior deviations from the seniority system would be significant in
overcoming a presumption of unreasonableness. Id. at 1526. Since Justice
Stevens's concurrence does not offer an independent interpretation of
reasonable accommodation, this Note omits analysis of his opinion.
109. While it is clear that Justices may change their mind on a given issue,
see Flood v. Kuhn, 407 U.S. 258, 286 n.1 (1972) (Douglas, J., dissenting)
("While I joined the Court's opinion in Toolson v. New York Yankees, Inc., I
have lived to regret it; and I would now correct what I believe to be its
fundamental error." (citations omitted)), lower courts will decide similar ADA
issues in accordance with Barnett. See infra note 155 (discussing the legal
effect a Supreme Court interpretation of a statute has on lower courts).
seniority rights to transfer to a less physically demanding mailroom position. The company’s policy, however, periodically opened the position to seniority-based bidding, and when two senior employees bid for the spot, Barnett lost his job. Barnett sued, claiming US Airways violated the ADA by refusing to assign him permanently to the mailroom position as a reasonable accommodation. The Court considered whether Barnett’s reassignment was reasonable even though it would contravene the employer’s standing seniority system.

A. THE MAJORITY’S INTERPRETATION

Justice Breyer, writing for the majority, rejected the defendant’s view that the ADA prohibits all forms of preferential treatment of disabled workers. The Court noted that any form of special accommodation requires that an employer provide differential, and hence preferential, treatment of disabled individuals. The Court found that Congress did not intend to grant neutral workplace rules an automatic exemption from the ADA’s mandate of reasonable accommodation. The fact that an accommodation permits a disabled worker to violate neutral rules that others must obey, the majority concluded, does not make it unreasonable.

The Court, however, also rejected the plaintiff’s argument that reasonable accommodation means effective accommodation. Utilizing the ordinary English meaning, the statute’s primary purposes, and legislative guidance, the...
majority reconciled the separate burdens of proving reasonable accommodation and undue hardship in a practical manner.\textsuperscript{122} A plaintiff must show that an accommodation seems reasonable on its face.\textsuperscript{123} The defendant may respond by showing special, case-specific circumstances that demonstrate undue hardship on the operation of the business.\textsuperscript{124} A demand for an effective accommodation could prove unreasonable because of its impact not on business operations, but on fellow employees.\textsuperscript{125}

Applying this framework to the facts of the case, the majority held that when reassignment would violate the rules of a seniority system, the accommodation is ordinarily unreasonable.\textsuperscript{126} The Court supported its conclusion with several factors. First, the majority observed that analogous case law under Title VII recognized the importance of seniority.\textsuperscript{127} Second, the Court noted the typical seniority system provides important employee benefits by creating and fulfilling expectations of fair, uniform treatment.\textsuperscript{128} Seniority provisions limit unfairness in personnel decisions, which ensures job security and encourages employees to invest in the company.\textsuperscript{129} Forcing employers to prove an undue hardship

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\textsuperscript{122} See id. To accomplish this goal, the majority interpreted the ADA as demanding "reasonable responsive reaction on the part of employers and fellow workers alike . . . [The ADA] will sometimes require affirmative conduct to promote entry of disabled people into the workforce." \textit{Id.} at 1523.

\textsuperscript{123} Id. at 1523.

\textsuperscript{124} See id. Specifically, the Court found that Congress distinguished the terms "reasonable" and "effective," and cited EEOC regulations as support. See \textit{id.}

\textsuperscript{125} See id.

\textsuperscript{126} See id. The \textit{Barnett} majority cited circuit court definitions of what is reasonable. "[P]laintiff meets burden on reasonableness by showing that . . . the accommodation will be \textit{feasible} for the employer." \textit{Id.} (emphasis added) (citing Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001)). "[P]laintiff satisfies 'burden of production' by showing 'plausible accommodation.'" \textit{Id.} (emphasis added) (citing Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995)).

\textsuperscript{127} See \textit{id.} at 1522. The Court gave examples of such unreasonable impacts as "dismissals, relocations, or modification of employee benefits to which an employer . . . may be relatively indifferent." \textit{Id.} This interpretation distinguishes the employer's burden of proving undue hardship from the employee's burden of proving the existence of a reasonable accommodation.

\textsuperscript{128} \textit{Id.} at 1523-24.

\textsuperscript{129} See \textit{id.} (finding that seniority rules offer "an opportunity for steady
resulting from violating a seniority system on a case-by-case basis would undermine employees' expectations of consistent, uniform treatment upon which the system's benefits depend.\textsuperscript{130} Therefore, if reassignment violates standing seniority rules, it is presumed unreasonable.\textsuperscript{131}

Even if a requested accommodation is unreasonable, the plaintiff may show that special circumstances based on the particular facts of the case overcome the presumption of unreasonableness.\textsuperscript{132} The main inquiry is whether special circumstances alter the important expectations described above; if so, then the accommodation will be reasonable, despite the existence of a neutral seniority system.\textsuperscript{133}

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor disagreed with the Court's interpretation of the ADA's reasonable accommodation provision,\textsuperscript{134} but sided with the majority because she thought it was more important that stalemate not prevail in cases merely interpreting a statute.\textsuperscript{135} Furthermore, she observed that the Court's rule would often lead to the same outcome as the test she would have adopted.\textsuperscript{136}

Justice O'Connor stated that the effect of a seniority system on the reasonableness of a reassignment request depends on the legal enforceability of the system.\textsuperscript{137} In her opinion, the relevant issue was whether the seniority rules and predictable advancement based on objective standards," benefiting both employee and employer).

\textsuperscript{130} See id.
\textsuperscript{131} Id. at 1523-24 ("[I]t would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.").
\textsuperscript{132} Id. at 1525.
\textsuperscript{133} See id.
\textsuperscript{134} Justice O'Connor was troubled with the Court's blurring of the terms "reasonable accommodation," a general inquiry, and "undue hardship," a specific inquiry. Id. at 1528 (O'Connor, J., concurring). The Court blurred these burdens by allowing a plaintiff to overcome a presumption of unreasonableness. See id.
\textsuperscript{135} See id.
\textsuperscript{136} Id. (arguing that unenforceable seniority systems will likely allow employers to "retain[ ] the right to change the system," "permit[ ] exceptions," and "reduce[ ] employee expectations that the system will be followed" (quoting id. at 1525)).
\textsuperscript{137} Id. at 1526.
prevent the position from being vacant.\textsuperscript{138} A position is not vacant if a seniority system entitles an employee to fill it as soon as it opens, nullifying any right a disabled employee would have to reassignment as a reasonable accommodation.\textsuperscript{139} To state the converse proposition, a position is vacant if no other employee either occupies or is legally entitled to it.\textsuperscript{140} Where genuine vacancies exist, reassignment is reasonable and the employer must prove an undue hardship in order to excuse the failure to transfer its disabled worker.\textsuperscript{141}

C. JUSTICE SCALIA'S DISSENT

Justice Scalia, joined by Justice Thomas, focused on the "because of" language of the ADA and argued that reasonable accommodation requires only the suspension of rules and practices that the employee's disability prevents him from observing.\textsuperscript{142} Justice Scalia noted that the ADA mandates accommodation to the limitations of qualified disabled employees.\textsuperscript{143} Read together, these two provisions require the plaintiff to prove that the employer did not remove barriers that would not be barriers but for the employee's disability.\textsuperscript{144}

Justice Scalia's interpretation suggested that the right to reassignment exists only if there are no obstacles to that appointment, for example, a seniority system or a candidate who is better qualified, if there is a policy to fill vacancies with the best-qualified applicant.\textsuperscript{145} This does not render the reassignment provision moot, however, because a similarly situated non-disabled, non-performing employee will typically be fired whereas the ADA mandates that an employer first

\textsuperscript{138} See id. at 1527.
\textsuperscript{139} See id. An employer's obligation to reassign only occurs if the desired position is vacant. See 42 U.S.C. § 12111(9)(B) (2000); supra note 47 and accompanying text (discussing the vacancy requirement).
\textsuperscript{140} See Barnett, 122 S. Ct. at 1527 (O'Connor, J., concurring) ("The word 'vacant' means 'not filled or occupied by an incumbent [or] possessor.' In the context of a workplace, a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement." (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2527 (1976))).
\textsuperscript{141} See id. at 1527-28.
\textsuperscript{142} See id. at 1528-29 (Scalia, J., dissenting).
\textsuperscript{143} See id. at 1529; see also supra Part I.B (discussing the duty to make reasonable accommodations "to the known physical or mental limitations" of a qualified disabled individual).
\textsuperscript{144} See Barnett, 122 S. Ct. at 1529 (Scalia, J., dissenting).
\textsuperscript{145} See id. at 1530.
consider reassigning a non-performing disabled employee to a vacant position.\textsuperscript{146} Justice Scalia interpreted reassignment as only eliminating the obstacle of the current position when an alternate position is freely available.\textsuperscript{147} Justice Scalia's vision of reassignment, however, did not require the elimination of obstacles to an employee's transfer that have nothing to do with his disability, such as another employee's claim to that position under a seniority system, or another employee's superior qualifications.\textsuperscript{148}

D. JUSTICE SOUTER'S DISSERT

Justice Souter's dissent, joined by Justice Ginsburg, examined the legislative history of the ADA specifically and comparable anti-discrimination legislation more generally.\textsuperscript{149} He would have affirmed the Ninth Circuit's decision that a unilaterally imposed seniority system enjoys no special protection under the ADA.\textsuperscript{150} Furthermore, Justice Souter found that Barnett's reassignment was reasonable because US Airways's specific seniority system was not binding and its violation would not have a great impact on other employees.\textsuperscript{151} At this point, Justice Souter would shift the burden to the

\begin{itemize}
\item \textsuperscript{146} See id. Justice Scalia suggests that "such reassignment is an accommodation to the disability because it removes an obstacle (the inability to perform the functions of the assigned job) arising solely from the disability." Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} See id. at 1532-34 (Souter, J., dissenting). Justice Souter pointed out that because Congress meant for collective bargaining agreements to amount to no more than "a factor" in deciding whether an accommodation that violates a seniority system is reasonable, Congress surely meant for "no greater weight" to be afforded "a seniority scheme...unilaterally imposed by the employer, and...not singled out for protection by any positive federal statute," than is afforded collective bargaining agreements. Id. at 1533. The legislative history also explicitly rejected the application of Title VII religious accommodation principles of undue hardship analysis. See id. at 1533, 1534 n.2; supra notes 57-60 and accompanying text (discussing the difficulty of proving an undue hardship).
\item \textsuperscript{150} Barnett, 122 S. Ct. at 1534 (Souter, J., dissenting).
\item \textsuperscript{151} See id. Significant to Justice Souter was the fact that, unlike most employees seeking accommodation, Barnett sought a continuation of the status quo rather than a change of position. Id. This suggests that the impact on other employees was not so great as the defendant suggested since the reassignment would neither bump any other employee nor result in an employee losing a job. Id. In addition, US Airways did not intend for its seniority rules to be binding, so there could not have been any great disruption of employee expectations by granting the reassignment request. Id.
\end{itemize}
defendant-employer to prove that violating the seniority system would cause an undue hardship on its operations.\textsuperscript{152}

IV. PICKING UP THE SEVEN-TEN SPLIT: BARNETT SPARES THE ADA'S RIGHT TO REASSIGNMENT

Whether a qualified disabled employee is entitled to reassignment when it would violate a standing employer policy to fill vacancies with the best-qualified applicant depends on the meaning of "reasonable accommodation." A statute's text is the most authoritative interpretive tool,\textsuperscript{153} but the ADA is silent as to what "reasonable" means.\textsuperscript{154} The four strains of thought emerging from Barnett, however, provide a framework to determine when reassignment will be unreasonable because the Court's interpretation of a statute is binding on lower courts.\textsuperscript{155} To better frame the discussion, this Part will initially discuss the common ground among the Justices' varying interpretations of reasonable accommodation, most notably their shared focus on the impact on fellow employees that results from breaching the employer's neutral policy.

When an employer is forced to violate its neutral policy to fill vacancies with the best-qualified applicant by reassigning a less-qualified disabled worker, the employer bypasses either an

\textsuperscript{152} Id.

\textsuperscript{153} See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 354 (1990) ("The text is most often the starting point for interpretation, and textual arguments carry the greatest argumentative weight."). Eskridge and Frickey also provide a useful overview of the competing theories of statutory interpretation. See id. at 325-45 (discussing intentionalism, purposivism, and textualism).

\textsuperscript{154} See supra Part I.B (recognizing an employer's obligation to make reasonable accommodations, listing several types of accommodations, but failing to define what makes the accommodations reasonable).

\textsuperscript{155} The Supreme Court, in Rivers v. Roadway Express, Inc., stated, It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

511 U.S. 298, 312-13 (1994); see also Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (stating that "unless we wish anarchy to prevail" within the federal judicial system, "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be"). But see Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused, 7 J.L. & RELIGION 33, 77-78 (1989) (arguing that lower court judges may not be bound to enforce higher court precedent).
external applicant or internal, transfer-seeking coworker. Three of the four Barnett opinions this Note examines, accounting for seven Justices, substantially relied on the impact that such an accommodation might have on other employees, and it is this differential impact that determines whether reassignment is reasonable. Therefore, after identifying Barnett's common ground, this Part concludes with a separate discussion of the two possible scenarios.

A. PINNING DOWN THE REASONABLENESS OF REASSIGNMENT: BARNETT'S COMMON GROUND

Barnett interpreted "reasonable accommodation" and its reassignment provision solely with respect to seniority systems. The reasoning within the Justices' opinions, however, provides a basis for understanding the scope of the ADA's accommodation mandate with respect to other neutral workplace rules. The Court's general conception of reasonable accommodation seems to reject the Seventh Circuit's stance against a disabled worker's right to a reassignment that conflicts with her employer's policy to fill vacancies with the best-qualified applicant. Even post-Barnett, however, the Seventh Circuit has remained steadfast in its protection of best-qualified applicant rules: Reassignment is reasonable only if it is feasible and does not require the employer to turn away a superior applicant. Thus, in the

156. See, e.g., Befort & Donesky, supra note 12, at 1086-90 (discussing arguments in favor of choosing the disabled worker).
157. See infra notes 167-69 and accompanying text (noting the majority's position that an accommodation's detrimental effects on other employees can make it unreasonable and the general agreement on this point in Justice O'Connor's concurrence and Justice Souter's dissent). But see O'Neil & Reiss, supra note 3, at 359 (suggesting that the ADA's legislative history "espouses the view that an employer is entitled to hire the most qualified applicant for a position . . . regardless of whether the individual is being selected from outside the company or from within").
158. See supra note 16 and accompanying text.
159. Supra note 155 and accompanying text; see also Anderson, supra note 6, at 2-3 (addressing the implications of Barnett beyond the specific context of seniority systems).
161. Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002). The court summed up its interpretation of Barnett rather succinctly:
Seventh Circuit, an employer does not have to prove that violating its best-qualified hiring rules would impose an undue hardship; reassignment in this instance is unreasonable per se, because the contrary decision would grant individuals a mandatory preference solely because of their membership in a protected class. Professor Cheryl Anderson likewise posits that the ultimate impact of *Barnett* will be the creation of a "neutral policy presumption" that forces plaintiffs to prove the absence of undue hardship, although she disagrees with this.

[A]ssuming that [the plaintiff] was qualified for such a job, if nevertheless there were better-qualified applicants . . . the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her. This conclusion is bolstered by *Barnett* which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break," *US Airways* becomes our case.  

Id. (citations omitted); see also *Humiston-Keeling*, 227 F.3d at 1027 (disagreeing with an EEOC interpretation of the ADA that requires an employer to give preference to disabled employees over more qualified non-disabled employees).

162. See supra note 96 and accompanying text (citing the Seventh Circuit's interpretation of the impact that best-qualified applicant policies have on the duty to reassign qualified disabled workers). The Seventh Circuit's aversion to mandatory preferences allowed the court to openly reject the Tenth Circuit's decision in *Midland Brake*. See supra text accompanying note 97.

163. Anderson, supra note 6, at 35 (arguing that despite its language to the contrary, *Barnett* did not end the "neutral policy defense" and that "[t]he defense may live on in the form of a neutral policy presumption, under which courts will simply shift the burden of proof to the employee to show it would not be a hardship for the employer to have to violate its neutral rule"). Anderson's use of the word "may" reflects the uncertainty of the result she predicts will flow from her normative criticism of *Barnett*’s outcome. Many circuits have yet to address the issue, and the Tenth Circuit most likely would not "simply shift the burden of proof" to the employee. See supra notes 75, 83 and accompanying text (noting the Tenth Circuit's interpretation of reassignment as requiring an active effort by the employer, regardless of a neutral policy). Anderson conflates the means and the ends of proving an undue hardship. See Anderson, supra note 6, at 35-36. *Barnett*, however, stands for the proposition that an accommodation is unreasonable if the mere attempt to prove undue hardship would undercut the benefits of the neutral rule, for example, by undermining the expectations upon which the rule's benefits depend. Infra note 172; see also *Amar & Brownstein*, supra note 14, at 363 ("The reason why ordinarily deviations from seniority systems are not 'reasonable' is that the burden . . . falls primarily not on the employer's pocketbook, but rather on the other employees and their 'expectations of consistent, uniform treatment . . . .'`). Whether the actual violation of the neutral rule imposes a hardship on the employer is a question of undue
result as a matter of statutory interpretation and policy. Anderson suggests that a reassignment request is reasonable, regardless of the existence of a neutral policy, so long as it is only a self-imposed policy and the employee is otherwise qualified for the position.

Barnett, however, supplants the Seventh Circuit’s reasoning because it determined that all special accommodations, by definition, require preferential treatment. In addition, the Barnett majority opinion does not support Anderson’s interpretation of its rule because it limits the presumption of unreasonableness to cases where reassignment would have a great impact on other employees.

hardship. See supra note 125 and accompanying text (noting the distinction between an accommodation’s impact on fellow employees (unreasonable) with an impact on the business (undue hardship)).

164. See Anderson, supra note 6, at 20. Anderson argues, despite language to the contrary in the majority opinion, Barnett may be used to justify the degree of deference given to employers’ ‘neutral’ policies in reassignment cases. This is unfortunate, given that the decision is another in a line of cases from the Supreme Court that unnecessarily alters the ADA’s intended statutory scheme.

Id. (footnotes omitted).

165. Id. at 42.

166. See supra notes 114-17 and accompanying text (outlining the Court’s rejection of the defendant’s position that the ADA prohibits all forms of preferential treatment).

167. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1522 (2002); see supra note 125 and accompanying text (distinguishing the burdens of proving reasonableness and undue hardship by analyzing the accommodation’s impact on employees and employers respectively). The four-Justice majority was unequivocal:

[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.

Barnett, 122 S. Ct. at 1522. But see Anderson, supra note 6, at 33 (arguing that Barnett creates a neutral policy presumption because the decision fails to “distinguish between expectations that trump ADA rights and expectations that must give way”). Here, Anderson conflates the meaning of “reasonable” and the requirement that the position be “vacant.” See id. at 37 (“Justice Breyer’s approach certainly stems from his concern for the interests of other employees, but by failing to clearly connect his reasoning to a primacy of employee contractual rights over ADA rights, . . . he provides no basis for limiting the presumptive approach to seniority system cases.”). If an employee has a contractual right to the position, then the position is not vacant. See supra text accompanying note 139 (noting Justice O’Connor’s reliance on legally enforceable seniority rules and its relation to the statute’s requirement that the position be “vacant”). Yet, even where vacant positions exist, the
Justice O'Connor's position does not square with the Seventh Circuit's rule either, because she would find reassignment reasonable if it does not breach the enforceable rights of fellow employees. Justice Souter and Ginsburg, despite dissenting in Barnett, also directed the reasonableness inquiry to the impact on fellow employees: A plaintiff meets his burden of reasonableness if he shows that reassignment would not greatly affect other employees, such as by putting them out of a job.

The outcome of the reasonableness inquiry also depends on the nature of the benefits of the neutral policy. A seniority system's benefits are rooted in the expectations it creates and fulfills. In Barnett, the majority relieved the employer from the burden of proving undue hardship for a very specific reason: Case-by-case proof would undermine other employees' expectations, upon which the benefits of a seniority system depend. This is not the situation with all neutral rules, though. The opinions of Justices O'Connor and Souter also examined the nature of the benefits that a neutral policy confers on other employees. Justice O'Connor would require the accommodation be "reasonable" circumscribes the right to reassignment. Amar & Brownstein, supra note 14, at 363; supra notes 61-63 and accompanying text.

168. Supra notes 137-39 and accompanying text.
169. Supra note 151 and accompanying text.
170. See supra notes 128-31 and accompanying text (discussing seniority provisions).
171. See infra note 203 and accompanying text.
172. The majority is quite clear on this point: Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules. Such management decisionmaking, with its inevitable discretionary elements, would involve a matter of the greatest importance to employees, namely, layoffs; it would take place outside, as well as inside, the confines of a court case; and it might well take place fairly often. Barnett, 122 S.Ct. at 1524-25. But see Anderson, supra note 6, at 34-37 (suggesting that the Court created a neutral policy presumption without examining the specific benefits derived from the neutral policy).
173. See infra notes 203-05 and accompanying text (discussing the distinction in the operation of best-qualified applicant rules and seniority rules).
expectation-based benefits to be contractually enforceable, while Justice Souter would require the neutral policy's benefits to be of the utmost importance to employees, for example, their job security.

Ultimately, when faced with a neutral workplace policy, Barnett takes a two-step approach to analyze the reasonableness of a plaintiff's accommodation. The Court first examines who bears the adverse effects of an accommodation: Where an accommodation's impact falls on other employees, as opposed to the employer, the accommodation may be unreasonable depending on the gravity of the harm. The Court next examines the nature of the benefits that run to employees from the neutral policy. Seniority's benefits, for example, were of utmost importance to other employees and relied on the creation and fulfillment of expectations. To force an undue hardship defense in this context, with its fact-specific inquiry, would by its nature undermine the expectation-based employee benefits. Therefore, an accommodation that violates seniority rules is unreasonable. Best-qualified applicant rules, however, differ significantly regardless of whether the best-qualified applicant is an external applicant or a fellow employee.

B. SCENARIO ONE: DISABLED EMPLOYEE PREVAILS OVER BEST-QUALIFIED EXTERNAL APPLICANT

When the best-qualified applicant is not a current employee, courts should interpret the ADA to require that employers reassign qualified disabled employees, who can no longer perform their current job due to their disability, without regard to the existence of a best-qualified applicant rule. Although the trial court in Humiston-Keeling noted that the employer's policy was limited to situations where current employees, and not outside applicants, were being considered for a vacant position, on appeal the Seventh Circuit found

174. Supra note 137 and accompanying text.
175. Supra note 151 and accompanying text.
176. See supra note 125 and accompanying text (noting examples of unreasonable impacts).
177. Supra notes 128-30 and accompanying text.
178. See supra note 172 and accompanying text (quoting the Barnett majority’s discussion of employee expectations and case-specific inquiry).
179. Supra note 131 and accompanying text.
the distinction immaterial: An employer's policy to fill vacancies with the best-qualified applicant will always trump the ADA's right to reassignment.\textsuperscript{181} Barnett's interpretation of the reasonableness of reassignment and its reliance on the benefits of a neutral seniority system suggest otherwise.\textsuperscript{182}

The Barnett majority recognized that, by providing consistency and predictability in management decisions, seniority rules protect the interests of all employees and facilitate good employee-management relations.\textsuperscript{183} In addition, by creating and fulfilling employee expectations of fair, uniform treatment, seniority rules provide important employee benefits, such as job security and "an opportunity for steady and predictable advancement based on objective standards."\textsuperscript{184} These considerations, which justify the presumption that seniority rules trump the right to reassignment, are either not present, or are sufficiently diminished, with respect to best-qualified applicant rules and a better-qualified external applicant.

If a disabled employee seeking reassignment is passed over for a best-qualified external applicant, then she loses her job.\textsuperscript{185} This result can only exacerbate employee-management relations because the contrary decision affects a non-employee. Moreover, a decision to transfer a disabled employee, even in the face of a more qualified outside applicant, can even improve employee-management relations by exhibiting respect for incumbent employees.\textsuperscript{186}

\footnotesize{(N.D. Ill. 1999), aff'd, 227 F.3d 1024 (7th Cir. 2000).}

\textsuperscript{181} See supra note 96 and accompanying text. The Seventh Circuit explained that "[a] policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory." Humiston-Keeling, 227 F.3d at 1028.

\textsuperscript{182} Supra Part IV.A.

\textsuperscript{183} See supra notes 127-30 and accompanying text (examining the Court's reasons for exempting seniority rules).

\textsuperscript{184} Supra notes 128-29 and accompanying text.

\textsuperscript{185} "Reassignment often is a disabled employee's sole remaining lifeline to avoid unemployment and, perhaps, permanent removal from the work force." John A. Beranbaum, ADA Reasonable Accommodation of Reassignment, 9 NO. 11 EMP. L. STRATEGIST 1 (2002), WL 9 No. 11 EMPLST1. This result occurs because reassignment is the accommodation last resort, available only to disabled workers who can no longer perform the essential functions of their current position. Supra note 44.

\textsuperscript{186} See Befort & Donesky, supra note 12, at 1088 (recognizing that retaining incumbent employees increases morale and productivity in the workplace (citing Barth v. Gelb, 2 F.3d 1180, 1189 (D.C. Cir. 1993))).
Passing over an external best-qualified applicant does not disturb any legitimate expectations. An applicant for a vacant position never had the position to begin with; therefore, job security is not an issue. Incumbent disabled employees, however, depend on reassignment to maintain their job security. In addition, assessing seniority ranking is inherently objective, whereas identifying a best-qualified applicant may sometimes require subjective determinations of an applicant's traits. An employer, let alone an outside job applicant, will not always be able to predict the best-qualified candidate simply by resume alone—interviews matter.

Best-qualified hiring rules provide little predictability to applicants. No anti-discrimination statute recognizes "best-qualified" applicants as a protected class, yet Congress expressly singled out disabled employees to receive the

187. See, e.g., Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576-78 (1972) (comparing the relative interests of an employee seeking continued employment and another seeking hire); see also Befort & Donesky, supra note 12, at 1087-88 (noting the practical advantages of reassigning the disabled employee instead of hiring the better-qualified applicant).

188. See supra note 185 (noting that without reassignment, disabled workers face unemployment and possibly permanent removal from the workforce).

189. Seniority is based on the length of service with a particular employer, an objective and easily identifiable and calculable number. Cf. Cal. Brewer's Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980) ("In the area of labor relations, 'seniority' is a term that connotes length of employment. . . . [I]t allot[s] to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." (footnote omitted)).

190. See Murray & Murray, supra note 19, at 740 ("Unlike those seniority policies, a 'most qualified' policy includes a necessary element of subjectivity . . . ."); see also Millbrook v. IBP, Inc., 280 F.3d 1169, 1173, 1176 (7th Cir. 2002), cert. denied, 123 S. Ct. 117 (2002) (noting an employer's use of subjectivity in selecting a best-qualified applicant); Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993) ("We also remain cognizant of the fact that the evaluation of applicants (and applications) . . . involves both objective and subjective elements.").

191. Cf. ANDREW J. RUZICO & LOUIS A. JACOBS, EMPLOYMENT PRACTICES MANUAL: A GUIDE TO MINIMIZING CONSTITUTIONAL, STATUTORY AND COMMON-LAW LIABILITY § 4:20, at 37 (1994) ("What 'best qualified' really means is open to question. Every rating involves a prediction about future job performance. Naturally, employers prefer applicants with the higher test results, the more enthusiastic interviewers, and the stronger track record. These combine to yield that prediction.").

protection of reassignment as a reasonable accommodation.\textsuperscript{193} Despite this, an employer's neutral workplace rule can benefit the company in ways that render an accommodation that violates them presumptively unreasonable.\textsuperscript{194} Generally, this inquiry should be individualized.\textsuperscript{195} Exempting seniority rules from case-by-case proof of undue hardship was necessary, however, to avoid undermining the expectations of fellow employees, upon which the benefits of a seniority system depend; in that context, the Court found the reassignment unreasonable.\textsuperscript{196}

The benefits an employer reaps from having a best-qualified applicant rule are substantially different than the advantages gained from a seniority system. Hiring only the best-qualified applicants ostensibly allows an employer to maintain the most productive and presumably efficient workforce possible.\textsuperscript{197} The neutral hiring criteria might also be

\textsuperscript{193} Congress's goal in enacting the ADA was to protect a disabled employee's job security over the employer's interest in maintaining legitimate nondiscriminatory policies that adversely affect the handicapped. \textit{See Smith v. Midland Brake, Inc.}, 180 F.3d 1154, 1168-69 (10th Cir. 1999) (en banc). Thus, the ADA differs from Title VII's equal treatment model by requiring an employer to treat its disabled applicants and employees differently. \textit{See supra note 114-17} and accompanying text (discussing the \textit{Barnett} majority's interpretation of the ADA as mandating preferences through reasonable accommodation); \textit{see also Befort & Donesky, supra note 12}, at 1082-86 (distinguishing reasonable accommodation from affirmative action). Other scholars have thoroughly examined the practical differences between the ADA and Title VII. \textit{E.g.}, \textit{Anderson, supra note 6}, at 15-19; Pamela S. Karlan & George Rutherglen, \textit{Disabilities, Discrimination, and Reasonable Accommodation}, 46 DUKE L.J. 1, 21 (1996).

\textsuperscript{194} \textit{See Interpretive Guidance, 29 C.F.R. app. § 1630.15(d) (2002)} ("Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business.").

\textsuperscript{195} \textit{See PGA Tour, Inc. v. Martin}, 532 U.S. 661, 688 (2001) ([A]n individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration"); \textit{Sutton v. United Air Lines, Inc.}, 527 U.S. 471, 483 (1999) ([W]hether a person has a disability under the ADA is an individualized inquiry.").

\textsuperscript{196} \textit{See supra note 172} and accompanying text (quoting the \textit{Barnett} majority's discussion of employee expectations and case-specific inquiry).

\textsuperscript{197} \textit{See O'Neil & Reiss, supra note 3}, at 360 (arguing that favoring less-qualified, disabled employees essentially requires employers to lower their standards). This may not always be the case, however. \textit{Cf. Barth v. Gelb, 2 F.3d 1180, 1189 (D.C. Cir. 1993)} (suggesting that continued retention of
easier for the employer to administer, decreasing discretionary decision making and potential liability.\textsuperscript{198} These benefits, however, do not justify a presumption that reassignment is unreasonable if it violates the neutral hiring criteria, because they focus on reassignment’s impact on the employer.\textsuperscript{199} The ADA already provides a defense that considers the economic justifications for failing to make reasonable accommodations: undue hardship.\textsuperscript{200} This determination is made on a case-by-case basis\textsuperscript{201} and accounts for the fact that the ADA requires employers to incur certain costs to ensure the employment of disabled individuals rather than just cease invidious forms of discrimination.\textsuperscript{202}

Best-qualified applicant rules operate differently than seniority rules. The latter rely on the creation and fulfillment of expectation to confer benefits to employees, while the former rely on the actual implementation of the policy to confer benefits to employers.\textsuperscript{203} Thus, an employer can prove that a


\textsuperscript{199} See supra note 125 and accompanying text (discussing the Barnett majority’s focus on the impact that reassignment would have on fellow employees in determining whether it was reasonable in the run of cases).

\textsuperscript{200} See discussion supra Part I.D.

\textsuperscript{201} See supra note 54 (noting that the undue hardship defense is analyzed on a case-by-case basis and is fact-intensive).

\textsuperscript{202} See supra note 60 and accompanying text (noting the costs that anti-discrimination statutes place on employers).

\textsuperscript{203} The benefits of a seniority system depend on the expectations of employees that an employer will follow the system. See Barnett, 122 S. Ct. at 1524 (describing employee benefits in a seniority system); cf. Ford Motor Co. v. EEOC, 458 U.S. 219, 229 (1982) (suggesting that violating seniority rules causes a deterioration in “moraie, labor unrest, and reduced productivity” by destroying the expectations of other employees). The benefits of a best-
particular reassignment is unduly costly without undermining the benefits of the neutral rule. Reassignment in this context is reasonable and, in the absence of case-specific proof of undue hardship, the employer must so accommodate the employee, regardless of a standing policy to fill vacancies with the best-qualified candidate or the existence of a better-qualified outside applicant.

In the context of a best-qualified applicant rule, showing
undue hardship is a more daunting task than it may seem. Undue hardship is a fact-specific, individualized inquiry into the financial impact on a business. The burden is on the employer to prove that the costs of reassignment are too significant and difficult to make in relation to its size. For large and prosperous companies, proving a cost-based undue hardship to a jury may not be easy. Moreover, job performance in certain occupations may be unaffected by slight differences in qualifications, so long as the employee is qualified. Forcing the employer to prove an undue hardship will also allow the plaintiff-employee to question the legitimacy of the neutral policy by showing that the difference in qualifications is not significant to job performance in the particular position, or perhaps that the policy is not consistently implemented.

206. See supra note 56-60, 124 and accompanying text.
207. See supra note 56 and accompanying text.
208. Cf. Ransom, 983 F. Supp. at 903 (noting that the impact of reassignment will be a minimal hardship on employers). Employers retain the ability to establish the minimum qualifications of a position, to which courts will grant deference. See Interpretive Guidance, 29 C.F.R. app. § 1630.2(n) (2002) (“It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards.”). In addition, future adverse impacts would have to be tempered by possible positive impacts. See supra note 197 and accompanying text (discussing the benefit of retaining disabled employees). Finally, after reassignment, the disabled worker's former position, an equivalent or better position, see supra note 46 (observing that the vacant position should be equal or lesser in status, but never a promotion), becomes vacant and would be available to the non-assigned applicant.

209. Cf. Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 24 (1st Cir. 1998) (considering candidates who scored within a three-point band as functionally equivalent and equally qualified to successfully perform the job as any other person in that score band).

210. See O'Neil & Reiss, supra note 3, at 360 (“[U]nder a more principled reading of the ADA, disabled employees would be entitled to a reassignment unless the employer can show that it selected a more qualified applicant or otherwise took action consistent with the legitimate expectations of other workers.”). In addition, the cost to the employer will differ dramatically depending on whether the disabled employee is the second most qualified applicant, as opposed to the most minimally qualified applicant; this analysis requires an individualized inquiry. Cf. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 723-24 (9th Cir. 1992) (“[M]inor differences in test scores do not reliably predict differences in job performance. . . . The smaller the difference between observed scores, the more likely it is a result of measurement error, and not a variance in job-related skills and abilities.”).
C. SCENARIO TWO: DISABLED EMPLOYEE PREVAILS OVER BEST-QUALIFIED COWORKER

A closer case is presented if the best-qualified applicant is another employee, but the statutory directive and Barnett's interpretations of reasonable accommodation still suggest that an employer must reassign a qualified disabled employee to a vacant position, even if she is not the best-qualified. In its Enforcement Guidance, the EEOC answers the question on point: Qualified disabled employees have a right to reassignment and do not have to be the most qualified person seeking the vacant position. Seven Justices are likely to agree.

The four-Justice majority looked to analogous case law under Title VII and the creation and fulfillment of employee expectations to show that reassignment is unreasonable if it conflicts with a neutral seniority policy. Title VII recognizes the importance of seniority systems to employee-management relations, but does not apply to the ADA and a case involving a policy to fill vacancies with the best-qualified applicant. Unlike Title VII, the ADA contains no provision offering explicit protection of seniority systems and affirmatively requires reasonable accommodation of disabled employees.

211. Cf. Befort & Donesky, supra note 12, at 1088-90 (arguing, prior to Barnett, that courts should favor the reassignment claim of a disabled employee versus a better-qualified employee).
212. Supra note 94 and accompanying text.
213. See supra notes 127-30 (discussing the Court's analysis of reassignment versus seniority systems).
214. While the two statutes share similarities, ADA causes of action involve unique considerations not present in Title VII claims. See, e.g., Anderson, supra note 6, at 15-19 (observing that courts have often conflated ADA and Title VII claims, despite distinct statutory provisions); Malloy, supra note 3, at 618-60 (identifying the differences between the ADA and Title VII, notably the requirement of reasonable accommodation and allocation of burdens of proof).
215. See supra note 149 (discussing Justice Souter's critique of the Court's reliance on Title VII).
216. Title VII requires employers to reasonably accommodate their employees' religious beliefs. See 42 U.S.C. §§ 2000e, 2000e-1 (2000) (excluding application to religious organizations and defining religion as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"). With respect to equality of employment opportunities, religious accommodation is not as significant as disability accommodation, because disability will affect an employee's ability
More saliently, the ADA does not protect the rights of all people regardless of ability or disability, whereas Title VII protects all races, sexes, national origins, and religions.\textsuperscript{217} Even so, Supreme Court precedent interpreting Title VII is unambiguous: A better-qualified employee "had no absolute entitlement to the... position.... [D]enial of the promotion unsettled no legitimate, firmly rooted expectation...."\textsuperscript{218} Thus, to the extent that Title VII is relevant, it does not insulate best-qualified hiring policies.\textsuperscript{219}

Violating a best-qualified applicant rule would likely disturb employee-management relations less than violating a seniority system would.\textsuperscript{220} Vying employees for a vacant

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\textsuperscript{217} Compare Americans with Disabilities Act, 42 U.S.C. § 12112(a) (preventing discrimination against otherwise qualified disabled employees or applicants), with Title VII of the Civil Rights Act of 1964, id. § 2000e-2 (preventing employment discrimination because of any race, sex, religion, or national origin). Reverse discrimination lawsuits are not available under the ADA. See, e.g., Karlan & Rutherglen, supra note 193, at 3-4. Similarly, the Constitution demands only the lowest level of scrutiny of disability-related distinctions, as opposed to the higher level of scrutiny for distinctions based on race or religion. See Amar & Brownstein, supra note 14, at 367-69; see also Leading Cases, supra note 14, at 347-52 (critiquing Barnett's reliance on strained analogies to Title VII without an explanation of its appropriateness, "a critical component of reasoning by analogy").

\textsuperscript{218} Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987). Interestingly, the Court also noted the lack of adverse impact on the employee because "he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions." Id.; cf. Befort & Donesky, supra note 12, at 1088-90 (discussing the relative impacts of denying transfer to a vacant position on a disabled employee versus a better-qualified employee and using the impact to justify the disabled individual's right to reassignment).

\textsuperscript{219} See, e.g., Fischbach v. D.C. Dep't of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates.").

\textsuperscript{220} Seniority violations affect all current employees by undermining expectations that the system will be followed, whereas best-qualified applicant violations affect only the best-qualified candidate because no other applicant would have gotten the position under the policy. US Airways, Inc. v. Barnett, 122 S.Ct. 1516, 1524 (2002). This difference is crucial in assessing whether the accommodation is presumptively unreasonable. Id. at 1524-25 (noting the Court's reliance on the importance of employee expectations in holding that reassignment was unreasonable, instead of conducting a case-by-case inquiry into undue hardship).
position will often be unaware of the qualifications of competing applicants and of the employer’s perception of such qualifications.\(^{221}\) The same set of employees, however, will most likely be aware of each other’s relative seniority ranking since it is far easier to discover and compare length of service.\(^{222}\)

Moreover, the *Barnett* majority’s concern for job security and predictability in employment decisions\(^{223}\) does not render reassignment unreasonable in the context of best-qualified applicant rules. A typical employee will likely have less expectation and reliance on being transferred into a position before it becomes vacant pursuant to a best-qualified hiring policy because that status is not easily predictable.\(^{224}\) Therefore, since the benefits of a best-qualified hiring rule do not rely on expectations, a case-by-case determination to violate this type of neutral policy under an undue hardship analysis is proper.\(^{225}\)

A disabled employee generally has less security in his or her job than an able-bodied counterpart.\(^{226}\) This is especially
true in the reassignment context because the disabled employee is faced with transfer or firing. A fellow employee maintains job security with or without transfer. Thus, to the extent that job security is an important employee benefit influencing whether accommodation is reasonable, it cuts in favor of the disabled worker's right to reassignment.

The Barnett majority focused on the benefits a neutral seniority system confers on employees to find a reassignment in violation of the system unreasonable. With the case of a best-qualified applicant rule, however, the primary concern is the benefit to the employer. Furthermore, the benefits of a policy that fills vacancies with the best-qualified candidate do not depend on employees' expectation that the policy will be followed. This suggests that reassignment in violation of this type of rule will be reasonable in the run of cases, leaving the

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Bureau data). But see Nat'l Org. on Disability, Employment Rates for People with Disabilities, at http://www.nod.org/cont/dsp_cont_item_view.cfm?contentId=134 (July 24, 2001) (indicating that the employment rate for people with disabilities who say they are able to work has increased ten percent from 1986 to 2000). The explanation for this fact is hardly elusive. Negative stereotypes combine with the legitimate economic concerns of employers, see Amar & Brownstein, supra note 14, at 388, leaving the disabled as the demographic group with the highest unemployment rate in the country. See Robitaille, supra; see also Ctr. for an Accessible Soc'y, Labor Day, 2002: Unemployment Rate for People with Disabilities More than 40 Percent, Census Data Shows, at http://www.accessiblesociety.org/topics/economics-employment/labor2002.html (last visited March 23, 2003) (suggesting that the twenty-one percent employment differential between able-bodied and disabled Americans was due to "adverse court rulings and contradictory federal policies that actually make it difficult for people with disabilities to work").

227. See supra notes 44, 185 and accompanying text (observing that, without reassignment, a disabled worker will typically be fired).

228. See supra note 218 and accompanying text (noting the Supreme Court's practical weighing of this scenario in Johnson); see also Befort & Donesky, supra note 12, at 1089 (observing that the consequences suffered by a more qualified employee who does not obtain a desired transfer are minimized because they retain their current position and qualifications, making them strong candidates for future transfers or promotions).

229. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1522 (2002). "[A] demand for effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer... may be relatively indifferent." Id.

230. See supra notes 197-98 and accompanying text (observing that the primary benefit of hiring the most qualified worker is increased productivity and efficiency).

231. See supra note 203.

232. See supra note 172 and accompanying text; see also supra notes 119-30 and accompanying text (noting that the impact of reassignment on other
employer to prove undue hardship as a cost-based defense.  

Justice O'Connor's interpretation of the reassignment provision makes the impact of neutral employer policies on the reasonableness of reassignment depend on the legal enforceability of the policies and their effect on a position's vacancy. An applicant cannot claim a legal entitlement to a vacant position based on the employer's bona fide policy of assigning the best-qualified applicant. This is true regardless of whether the applicant is an employee seeking transfer or an outsider seeking a job. Neither applicant has a contractual agreement with the employer that confers an enforceable right to the vacant position.

Moreover, Justice O'Connor's reliance on the "vacant" requirement offers affirmative support for the right to reassignment despite an employer's consistently implemented policy to fill vacancies with the best-qualified applicant. By constructing the term "discriminate" to include the failure to reasonably accommodate qualified disabled individuals, the ADA creates a duty to accommodate, in turn giving the disabled individual a right to reasonable accommodation. If reassignment is the only possible accommodation that will enable a qualified disabled worker to remain employed, then the ADA creates a legal entitlement to the position. When a

employees was crucial to the Court finding the accommodation unreasonable.

233. See supra note 204 and accompanying text.
234. See supra notes 137-41 and accompanying text.
235. See supra note 218 and accompanying text (quoting the Supreme Court's belief that better qualifications grant no legal entitlements).
236. Cf. Fischbach v. D.C. Dep't of Corrs., 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Even if a court suspects that a job applicant 'was victimized by [l] poor selection procedures' it may not 'second-guess an employer's personnel decision absent demonstrably discriminatory motive.' . . . [T]he court must respect the employer's unfettered discretion to choose among qualified candidates." (citation omitted)).
238. See supra notes 27-31 and accompanying text.
239. Cf. Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. REV. 975, 986-87 (explaining the concept of "jural correlatives" as expressing a single legal relation from the point of view of two parties, and identifying "right" as the correlative of "duty").
240. Provided, of course, that the other requirements are met: the disabled individual is a current employee and is qualified for the position, the position is vacant and is equivalent (or lesser) to the individual's former job, and all other avenues of accommodation have failed. See discussion supra Part I.C.
qualified disabled employee requests reassignment, subject to a
determination of its appropriateness, she becomes the
possessor of that position.241 The employer’s neutral policy of
filling vacancies with the best-qualified applicant is not
implicated because the position has ceased to be vacant.

Justice Scalia’s dissent supplies the biggest impediment to
uniformity of reassignment decisions in the lower courts and
amongst employers.242 The ADA defines unlawful
discrimination as including the failure to make reasonable
accommodations “to the known physical or mental limitations”
of qualified disabled employees.243 Justice Scalia’s
interpretation gives the preposition “to” overriding significance
when assessing best-qualified applicant rules.244 Hence,
Justice Scalia would not find liability where better-qualified
applicant rules exist because the lower qualifications of a
disabled employee have nothing to do with his disability.245

This argument is flawed because it ignores the preceding
prohibitive phrase: “Not making reasonable accom-
modations.”246 The accommodation in question is not changing
the hiring rules; the requested accommodation is
reassignment.247 The barrier is the current job.248

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241. The disabled worker has a right in fact to the transfer if it is
reasonable. See Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166 (10th Cir.
1999) (en banc).

242. Only this opinion explicitly mentions the neutral workplace policy of
filling vacant positions with the best-qualified applicant, and it does so in a
way that clearly limits the disabled employee’s right to reassignment. See
supra notes 145-48 and accompanying text (noting that a disabled employee
only has a right to reassignment where there are no obstacles to the
appointment, such as seniority systems or a better qualified candidate).


244. See supra notes 142-44 and accompanying text.

245. See supra notes 143-45 and accompanying text (explaining Justice
Scalia’s argument that the ADA imposes liability only if an employer fails to
remove those barriers that would not be barriers but for the disability of the
employee).

246. 42 U.S.C. § 12112(b)(5)(A) (constructing the term discriminate to
include “not making reasonable accommodation to the known physical or
mental limitations”).

247. Justice Scalia misconstrues the accommodation in question to be
modifying the neutral hiring policy that fills vacancies with the best-qualified
applicant. Thus, because the requested accommodation must “arise from” the
(Scalia, J., dissenting), the ADA’s reassignment provision cannot violate best-
qualified applicant hiring policies. A disabled employee is requesting
Accommodation can only remove the barrier to employment (the current job) by providing an alternate job (through reassignment) for the disabled employee.\textsuperscript{249} Thus, if reassignment does not cause an undue hardship, the employer must do more than merely consider the transfer because failing to make reasonable accommodations is an act of discrimination.\textsuperscript{250}

Justice Souter's position recognizes that the ADA does not create any special exemption for consistently implemented, non-discriminatory employer policies.\textsuperscript{251} Justice Souter believes that if a plaintiff shows that reassignment is "plausible" or "feasible," then she has proven the accommodation is reasonable.\textsuperscript{252} Thus, he would reject the reassignment to a vacant position, however, because his disability prevents him from performing his current job with or without reasonable accommodation. \textit{See supra} note 44 and accompanying text. Thus, if this accommodation is both effective and reasonable, then the ADA requires an employer to either transfer the individual or prove the existence of an undue hardship. \textit{See supra} notes 119-24 and accompanying text (discussing the majority's interpretation of the ADA's "reasonable accommodation" mandate).

\textsuperscript{248.} \textit{See supra} note 147 and accompanying text (highlighting Justice Scalia's recognition that reassignment seeks to eliminate the obstacle of the current job).

\textsuperscript{249.} This interpretation also satisfies Justice Scalia's demand that the barrier arise from the disability because the failure to be able to perform the essential functions of the current job are due to the worker's disability. \textit{See supra} notes 70-71, 88-93, 110-11 and accompanying text (highlighting the facts of \textit{Midland Brake}, \textit{Humiston-Keeling}, and \textit{Barnett}, where all three plaintiffs sought reassignment because their disability prevented them from performing their original job).

\textsuperscript{250.} \textit{See supra} Part I.A-B (relating the ADA's general prohibition of discrimination and its requirement of reasonable accommodations); \textit{cf.} Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166-67 (10th Cir. 1999) (suggesting the consideration of reassignment is not the extent of an employer's duty to transfer). Likewise, it would not be sufficient for an employer to consider modifying a workstation and not actually modify it. \textit{See Barnett}, 122 S. Ct. at 1521. Justice Scalia argues that this situation is different because the obstacles arise from the disability. \textit{See id.} at 1531 (Scalia, J., dissenting). Justice Scalia does not acknowledge the barrier in the case of reassignment which arises from the disability because the disability prevents performance of the original position, creating a need to be transferred to remain employed; removing the barrier through reasonable accommodation requires reassignment to a vacant position. \textit{See Amar & Brownstein, supra} note 14, at 365; \textit{see also supra} note 249 (noting the disabled employees' motivation for seeking reassignment in \textit{Midland Brake}, \textit{Humiston-Keeling}, and \textit{Barnett}).

\textsuperscript{251.} \textit{See supra} notes 149-50 and accompanying text; \textit{see also} Anderson, \textit{supra} note 6, at 41-43 (suggesting that, as a matter of policy and statutory interpretation, this is the correct outcome).

\textsuperscript{252.} \textit{Barnett}, 122 S. Ct. at 1534 (Souter, J., dissenting) (quoting \textit{Barnett},
Seventh Circuit’s requirement that reassignment be both feasible and not require the employer to turn away a superior applicant. His standard also suggests that the Tenth Circuit was incorrect to require an employer’s nondiscriminatory policy vitiate the statutory obligation before a disabled worker’s right to reassignment prevailed. As a threshold inquiry, regardless of nondiscriminatory employer policies, disabled employees seeking reassignment must merely show that the accommodation is reasonable. Barnett’s reassignment was reasonable because he showed that it would not cause any unmanageable ripple effect nor overstep an inordinate number of seniority levels.

With respect to best-qualified applicant rules, Justice Souter’s analysis cuts more strongly in favor of the disabled employee. Ripple effects will be less pronounced than those resulting from violating a seniority system. A snubbed applicant may not even be an employee of the company. This is rarely the case with seniority systems. In addition, a best-qualified applicant policy is of less importance to fellow employees than a seniority system because the latter affects everyone, and often implicates decisions of fundamental

122 S. Ct. at 1523).

253. See supra note 161 (quoting the Seventh Circuit’s interpretation of Barnett’s rule, as applied to best-qualified hiring rules).

254. See supra notes 85-86 and accompanying text. Some have argued, rather persuasively, that best-qualified applicant rules would not vitiate the right to reassignment since the provision would obligate the transfer of a non-performing disabled employee who happens to be the best-qualified applicant for the vacant position, where the employer could simply fire a non-disabled, non-performing employee. Barnett, 122 S. Ct. at 1529-30 (Scalia, J., dissenting); see also Anderson, supra note 6, at 37-40 (arguing that the Tenth Circuit’s standard is too narrow).

255. See supra notes 39, 81, 123 and accompanying text.

256. See Barnett, 122 S. Ct. at 1534 (Souter, J., dissenting). The fact that the seniority system was modifiable at-will and non-binding showed that Barnett’s reassignment would not “have resulted in anything more than a minimal disruption to U.S. Airways’s operations.” Id.

257. See supra notes 203, 220-22 and accompanying text (distinguishing the impact of violating seniority rules from the impact of violating best-qualified hiring rules).

258. Since seniority starts to accrue after hire, violations that undermine the system’s stability affect every employee of the company. Cf. Cal. Brewer’s Ass’n v. Bryant, 444 U.S. 598, 605-06 (1980) (“In the area of labor relations, ‘seniority’ is a term that connotes length of employment. . . . [It] allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.”).

importance to employees, namely layoffs and firings, whereas a transfer denial only affects those seeking to switch jobs.

An individualized decision to bypass a policy to fill vacancies with the best-qualified applicant also oversteps fewer rights of fellow employees. At most, any given violation of this neutral policy will allow a disabled employee to overstep just one fellow employee since there can be only one best-qualified applicant. Thus, even though Justices Souter and Ginsburg dissented from the majority in Barnett, they would most likely join the majority in finding reassignment to be reasonable even if it violates an employer's nondiscriminatory policy to fill vacancies with the best-qualified applicant.

CONCLUSION

The opinions of a majority of Justices in Barnett sanction mandatory preferences for qualified disabled employees who are eligible for reassignment. Irrespective of a bona fide policy to hire the best-qualified applicant, employers cannot avoid the ADA's mandate of reasonable accommodation without proving that the accommodation, in the specific instance, would impose an undue hardship on the business. Seven Justices support the proposition that a presumption of unreasonableness does not arise merely from the existence of a neutral policy; the nature of the policy's benefits to fellow employees, and whether those benefits are inextricably linked to expectations that the policy will be consistently followed, determines whether a proposed accommodation is presumptively unreasonable. Unlike the case of seniority rules, it is possible to conduct an individualized inquiry into undue hardship without upsetting

259. See supra note 172. As explained above, these decisions and policies are also likely to be less visible and, due to their subjectivity, are less easily calculable, which would result in less of a ripple effect from their violation. See supra notes 220-25 and accompanying text.

260. Even then, the worst-case scenario is not firing, but rather remaining in the current position. See supra note 228 and accompanying text.

261. In fact, the decision oversteps no rights of fellow employees. See supra notes 218-19 (observing that best-qualified applicants have no enforceable right to be hired).

262. Of course, there may be situations where qualifications are equal, but even then an employer retains discretion to select just one of them. Cf. Simms v. Oklahoma ex rel. Dep't of Mental Health, 165 F.3d 1321, 1330 (10th Cir. 1999) ("When two candidates are equally qualified . . . and neither is clearly better qualified, 'it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria.'" (citation omitted)).
the purpose of best-qualified hiring rules. Similarly, the rare contravention of the policy will not hopelessly undermine its benefits to the employer. Either way, that issue would be for the employer to prove under the defense of undue hardship.

Regardless of whether the best-qualified candidate for a vacant position is an external applicant or internal coworker seeking transfer, a qualified disabled employee's claim for reassignment should prevail. The ADA's text supports the inviolability of the obligation to reasonably accommodate qualified disabled individuals. The ADA seeks to ensure the productivity and self-sufficiency of disabled individuals. That goal depends largely on reassignment as a reasonable accommodation because reassignment offers the last option for a disabled worker to remain employed. To properly fulfill this function of reassignment, courts must require that an employer reassign a qualified disabled worker, even if he is not deemed the best-qualified candidate for the vacancy.