

2014

## Ordinarily Reasonable: Using the Supreme Court's Barnett Analysis to Clarify Preferential Treatment under the Americans with Disabilities Act

Charles Conway

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Law Commons](#)

---

### Recommended Citation

Conway, Charles. "Ordinarily Reasonable: Using the Supreme Court's Barnett Analysis to Clarify Preferential Treatment under the Americans with Disabilities Act." *American University Journal of Gender Social Policy and Law* 22, no. 3 (2014): 721-748.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

ORDINARILY REASONABLE:  
USING THE SUPREME COURT'S  
*BARNETT* ANALYSIS TO CLARIFY  
PREFERENTIAL TREATMENT  
UNDER THE AMERICANS WITH  
DISABILITIES ACT

CHARLES CONWAY\*

I. Introduction .....	722
II. Background .....	726
A. The Americans with Disabilities Act .....	726
B. There Is Currently a Circuit Split Regarding Whether Reassignment of a Qualified Employee is a Reasonable Accommodation Within the Meaning of the ADA.....	727
1. Three Circuit Courts Agree That the ADA Mandates Reassignment of Eligible Employees to Vacant Positions.....	727
2. Other Circuits Have Held That the ADA Only Requires Employers to Give Eligible Employees the Opportunity to Compete for Vacant Positions. ....	729
3. The Supreme Court's Limited Guidance Regarding the Reassignment Obligation that the ADA Places on Employers Failed to Resolve the Circuit Split and Has Been Interpreted Differently by Lower Courts.....	730
III. Analysis .....	733

---

\* Publications Editor, Vol. 23, American University Journal of Gender, Social Policy & the Law; J.D. Candidate, May 2016, American University, Washington College of Law; B.A. English 2009, Georgetown University. Many thanks to the entire Journal staff, especially Jonathan Wilson, my editor, and Rafay Azim, my technical advisor, for patiently guiding me through the writing process while challenging my legal writing and thinking. Many thanks to Professor Robert Dinerstein for your invaluable insight and help navigating the field of disability law. Special thanks to Jeanne Tchuonbou for all your love and support and to Brooke Conway for motivating me.

722 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 22:3

- A. The Supreme Court Should Find That the ADA’s Reassignment Requirement Outweighs the Presence of Best-Qualified Hiring Policies.....733
- B. Unlike a Seniority System, Reassignment in a Best-Qualified System Does Not Subordinate Applicants’ Legitimate Interests. ....735
- C. Unlike *Barnett*, Applicants Are Not Entitled to the Vacant Position as a Result of Investment in the Best-Qualified System. ....738
- D. The Subjectivity of Employers’ Best-Qualified System Undermines an Applicant’s Legitimate Expectation of Being Hired Over an Otherwise Qualified Applicant with a Disability Requesting Reassignment. ....739
- E. Mandating Non-Competitive Reassignment Under the ADA Would Not Unjustly Discriminate Against Applicants Without a Disability. ....740
- F. Jurisprudence Supports a Finding that, Reassignment Trumps a Company’s Best-Qualified Hiring Policy, Is Ordinarily Reasonable. ....742
- G. Courts Are Likely to Misapply *Barnett*’s Two-Step Analysis Unless the Supreme Court Clarifies the Reassignment Requirement in Light of Best-Qualified Hiring Policies. ....743
- IV. Policy .....745
- V. Conclusion .....747

I. INTRODUCTION

Consider the following hypothetical situation: two employees work for the same company, one located in Chicago, Illinois, and the other located in St. Louis, Missouri; both employees perform the same job for the same company except in two different locations.<sup>1</sup> The two employees are identical in every way: performance, education, and experience.<sup>2</sup> Both of the employees are injured while on the job and are now considered to have

---

1. See Kimberly Atkins, *Lawyers Find ADA Circuit Split Hard to Accommodate*, DETROIT LEGAL NEWS (Mar. 8, 2013), <http://www.legalnews.com/detroit/1373584> (expressing the difficulty that companies have complying with the Americans with Disabilities Act (ADA) given the circuit courts’ varied holdings regarding reassignment).

2. See *id.* (highlighting the difficulties associated with applying incongruent protections in different locations even though employees have equal standing under the ADA).

a disability under the Americans with Disabilities Act (“ADA”).<sup>3</sup> Although their employer tries diligently to accommodate the employees so that they retain their current positions with the company, no accommodations are sufficient to allow the employees to stay in their current positions.<sup>4</sup> Because the employees with disabilities can no longer perform the essential functions of their current positions, each of the employees expresses an interest in being reassigned to vacant positions in the company.<sup>5</sup> The employee in Chicago is automatically placed in an administrative position with comparable pay and similar benefits based on the Equal Employment Opportunity Commission’s (“EEOC”) ADA Enforcement Guidelines.<sup>6</sup> However, the employee in St. Louis is forced to compete with other applicants who apply for the vacant position.<sup>7</sup> Although the employee in St. Louis is qualified for the job, because another applicant is deemed more qualified, the employee is not selected for the vacant position; the applicant chosen to fill the vacant position does not have a disability, and instead of risking the possibility of unemployment, the St. Louis employee takes a job with the company that pays only half of her former wages.<sup>8</sup>

Due to a circuit split regarding the duty of employers to reassign individuals with disabilities as a “reasonable accommodation,” this unequal application of the statutory protections, that are afforded to individuals with disabilities by the ADA, persists today.<sup>9</sup> The Supreme Court’s failure to

---

3. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1)(A) (2009) (defining a person with a “disability” as an individual having a physical or mental “impairment” that substantially limits one or more “major life activities”).

4. See 42 U.S.C. § 12111(9) (2009) (requiring employers to provide reasonable accommodations to individuals with disabilities, such as job restructuring and modification of equipment or devices).

5. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (explaining that Congress and the EEOC view reassignment as a last resort when other accommodations have failed).

6. See U.S. EQUAL EMP’T OPPORTUNITY COMM., ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), available at [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html) [hereinafter U.S. EEOC] (requiring reassignment to vacant positions with equivalent pay, benefits, and status).

7. See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2007) (illustrating the circuit courts’ disparate interpretations of the ADA’s reassignment requirement).

8. See *id.* (simulating a possible outcome associated with requiring reassigned employees to compete with other applicants for vacant positions).

9. See Howard S. Lavin & Elizabeth E. DiMichele, *Split Circuits: To Reassign or Not to Reassign*, 36 EMPLOY. REL. L.J. 4, 4 (2011) (explaining that the conflict between employers’ rights to institute non-discriminatory policies and employees’ reassignment rights under the ADA remains unresolved).

settle the circuit split within the U.S. Circuit Courts of Appeals means that an employer's reassignment duty, and subsequently accommodation options for its employees with a disability vary based on the controlling circuit's interpretation of the ADA.<sup>10</sup> The only difference between the two employees from the hypothetical was the jurisdiction that governed their respective rights under the ADA: Seventh Circuit precedent mandated the Chicago employee's non-competitive transfer, while the Eighth Circuit permitted the employer to fulfill its ADA obligations by merely allowing the St. Louis employee to compete with other applicants for the vacant position.<sup>11</sup> Although both of the employees with disabilities worked for the same company and had equal rights under the ADA, the outcome was different in each situation because the circuits differed in their interpretation of the statute's reassignment requirement.<sup>12</sup> In *US Airways, Inc. v. Barnett*, the Supreme Court offered a limited explanation of an employer's reassignment duty under the ADA when the duty conflicts with a seniority hiring system; however, the statute's effect on best-qualified hiring policies remains unclear.<sup>13</sup> The Supreme Court, in *EEOC v. United Airlines, Inc.*, had the chance to settle the circuits' differing views regarding the ADA's effect on best-qualified hiring policies, but declined to do so.<sup>14</sup> It is unclear why the Supreme Court denied United Airlines' application for a writ of certiorari, and the Court did not offer an explanation.<sup>15</sup> The Court's denial is particularly puzzling given its previous grant of certiorari in *Huber v. Wal-Mart*, which also presented the question of whether preferential treatment is required under the ADA when there is a non-discriminatory hiring policy in place.<sup>16</sup>

---

10. See *id.* (stating that the circuit split creates difficulty for employers that have operations that span conflicting jurisdictions).

11. Compare *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (holding that the ADA mandates reassignment of employees with disabilities to vacant positions), with *Huber*, 486 F.3d at 483 (holding that the ADA does not trump a legitimate non-discriminatory hiring policy).

12. See *Supreme Court Declines to Decide ADA Reassignment Question*, THOMPSON'S ADA COMPLIANCE GUIDE, (Thompson Info. Servs., Washington D.C.), July 2013, at 1 [hereinafter THOMPSON'S] (noting that the Seventh, Tenth, and D.C. Circuits require preference while the other circuits do not require preference).

13. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 392 (2002) (holding that the ADA does not trump the rights and benefits provided by legitimate seniority systems).

14. See generally *United Airlines*, 693 F.3d at 760.

15. See Cathleen Flahardy, *Supreme Court Won't Hear United-ADA Accommodations Case*, INSIDE COUNSEL (May 29, 2013), <http://www.insidecounsel.com/2013/05/29/supreme-court-wont-hear-united-ada-accommodations> (speculating that the Court favors the Seventh Circuit's decision).

16. See Ellen Girard Giorgiadis, *Labor: Disabled Employees Have a Leg Up for*

This Comment argues that the Supreme Court should have granted certiorari in *EEOC v. United Airlines, Inc.* and ruled that employers are required to reassign minimally qualified employees with disabilities to vacant positions as a “reasonable accommodation” despite the existence of an employer’s policy dictating that the best-qualified candidate be hired.<sup>17</sup> Part II of this Comment discusses the current circuit split regarding whether the ADA’s definition of “reasonable accommodation” requires an employer to reassign eligible employees to vacant positions or only requires an employer to grant eligible employees the opportunity to compete for such positions.<sup>18</sup> Part III argues that the ADA generally requires mandatory reassignment of eligible employees regardless of the existence of a non-discriminatory best-qualified hiring policy because reassignment will ordinarily be reasonable, based on the two-step analysis the Supreme Court established in *Barnett*.<sup>19</sup> Part III further argues that requiring non-competitive reassignment is proper because allowing the ADA to trump a best-qualified hiring policy does not infringe on the rights of competing applicants or employers the same way subordinating a seniority system would have in *Barnett*.<sup>20</sup> Part IV argues that subordination of an employer’s best-qualified hiring policy in favor of reassignment advances the aims of the ADA.<sup>21</sup> Part V concludes that the Supreme Court should have granted certiorari in *EEOC v. United Airlines, Inc.*, and ruled that the ADA reassignment requirement mandates non-competitive placement of an

---

*Reassignment to Vacant Positions in Certain States*, INSIDE COUNSEL (Mar. 25, 2013), <http://www.insidecounsel.com/2013/03/25/labor-disabled-employees-have-a-leg-up-for-reassign> (explaining the employment bar’s hope that the Supreme Court will remedy the split).

17. Brief for the Respondent in Opposition, *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (arguing that the ADA requires an employer to reassign individuals with disabilities to vacant positions when doing so would not cause the employer undue hardship).

18. *See infra* Part II (explaining the divergent interpretations of the ADA’s language by the circuit courts and the resulting duties imposed on employers in the respective jurisdictions).

19. *See infra* Part III (arguing that under the Supreme Court’s analysis of seniority systems in *Barnett*, requests for reassignment that conflict with a best-qualified hiring policy are ordinarily reasonable and thus generally mandate non-competitive placement).

20. *See* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (explaining that all accommodations require preferential treatment); *see also* *McWright v. Alexander*, 982 F.2d 222, 227 (7th Cir. 1992) (stating that requiring an employer to change its policies to accommodate individuals with a disability is at the heart of the ADA).

21. *See infra* Part IV (highlighting the additional social and legal benefits of Supreme Court guidance beyond establishing consistent mandates for employers and employees).

employee with a disability into a vacant position, even if the placement circumvents the employer's best-qualified hiring policy.<sup>22</sup>

## II. BACKGROUND

### *A. The Americans with Disabilities Act*

In 1990, Congress passed the Americans with Disabilities Act, acknowledging the widespread discrimination affecting individuals with disabilities, and establishing a national mandate for the elimination of such discrimination.<sup>23</sup> Among other things, the purpose of the Act was to provide definitive and enforceable standards that would address discrimination against Americans with disabilities.<sup>24</sup> The ADA specifically defines what actions an employer must take to prevent discrimination against individuals with disabilities and what inactions by an employer constitute discrimination against individuals with disabilities.<sup>25</sup> In particular, the ADA prohibits employers from discriminating against individuals based on their disability with regard to various employment procedures.<sup>26</sup> The ADA states that an employer discriminates against an employee with a disability if the employer fails to provide the employee with "reasonable accommodation" for the employee's physical or mental limitations, unless providing the accommodation would cause an undue hardship on the employer.<sup>27</sup> If an employer is unable to accommodate an employee's disability, such that the employee can remain in her current position, the ADA states that a reasonable accommodation may include reassignment of the employee to a vacant position.<sup>28</sup> The ADA only

---

22. See *infra* Part V (concluding that Supreme Court review of *EEOC v. United Airlines, Inc.* was necessary for the equal administration of justice under the ADA).

23. See generally Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2009) (noting Congress' finding that disability discrimination persists in numerous critical areas of life, including employment).

24. See § 12101(b)(2) (stating that the ADA's purpose was the creation and enforcement of clear, strong, and consistent standards to address disability discrimination).

25. See § 12112 (defining which actions are prohibited and/or mandated by the ADA to eliminate disability discrimination).

26. See § 12112(a) (prohibiting employers from discriminating against job applicants with a disability and current employees with regard to application procedures, hiring, promotion, and firing).

27. See, e.g., § 12112(b)(5)(A) (mandating that employers take affirmative steps to eliminate discrimination against employees with a disability unless that action would create undue burden on the employer).

28. See § 12111(9)(B) (defining the term "reasonable accommodation" to include reassignment to a vacant position when necessary).

requires employees to reassign “qualified” employees with disabilities to a vacant position.<sup>29</sup> Since its enactment, the ADA’s “reasonable accommodations” requirement has perplexed employees and employers.<sup>30</sup> The ADA’s vague language has led to many unresolved issues as employers, employees, and courts have interpreted the ambiguous terms of the statute in different ways.<sup>31</sup>

*B. There Is Currently a Circuit Split Regarding Whether Reassignment of a Qualified Employee is a Reasonable Accommodation Within the Meaning of the ADA.*

Circuit courts have added to the confusion regarding the ADA’s language by interpreting its reassignment requirement in two different ways. Currently, some circuits require non-competitive reassignment to vacant positions, while other circuits permit employers to require applicants with disabilities to compete with other applicants for vacant positions.<sup>32</sup>

*1. Three Circuit Courts Agree That the ADA Mandates Reassignment of Eligible Employees to Vacant Positions.*

Three circuit courts, along with the EEOC, have held that under the ADA, an employer’s obligation to reassign qualified employees with a disability to vacant positions as a reasonable accommodation entails more than simply allowing the employees to compete with other applicants for the vacant position.<sup>33</sup> The most current opinion on the issue comes from the Seventh Circuit, which held that the ADA requires that an employer reassign individuals with a disability to vacant positions, for which they are qualified, if such accommodations would be reasonable and would not impose an undue hardship on the employer.<sup>34</sup> Reversing one of its previous

---

29. See § 12111(8) (defining a “qualified” employee as one who can perform the essential functions of the vacant position with or without reasonable accommodations).

30. See, e.g., L. Lynnette Fuller, *The ADA’s Reasonable Accommodation Requirement Ten Years Later*, POPULAR GOVERNMENT, at 18 (2000) (noting that the ADA, although successful in granting civil rights protections, was misunderstood by many individuals).

31. See *id.* (attributing some of the confusion surrounding the ADA to the statute’s use of terms of art such as “major life activity,” “essential job functions,” and “reasonable accommodation”).

32. See THOMPSON’S, *supra* note 12 (explaining the respective positions of the Circuit Courts of Appeals regarding whether the ADA mandates preferential treatment when reassigning qualified employees).

33. See *id.* (describing one interpretation of the ADA’s reassignment obligation).

34. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (holding that the ADA requires employers to provide



decisions, the Seventh Circuit adopted the Supreme Court's rationale in *Barnett*, recognizing the necessity of preferences for individuals with a disability as a means of achieving the ADA's objectives.<sup>35</sup> Similarly, the Tenth Circuit interpreted the language of the ADA to require more than just consideration of the qualified individual with a disability for a vacant position along with other applicants.<sup>36</sup> The court reasoned that if the ADA only required employers to allow employees a disability to apply for vacant positions, the employee is not actually being "reassigned," and thus parts of the ADA's language would be superfluous.<sup>37</sup> The U.S. Court of Appeals for the D.C. Circuit also interpreted the ADA's language to confer an obligation on employers to do more than allow employees with a disability to apply for vacant positions; the court indicated that any other interpretation would weaken the effectiveness of the statute.<sup>38</sup> Moreover, the court reasoned that merely requiring an employer to permit employees with a disability to apply to vacant positions would render some of the statute's language superfluous.<sup>39</sup> The EEOC, charged with the enforcement of Title I of the ADA, also interpreted the statute as requiring employers to place qualified employees with a disability into the vacant position without forcing them to compete with other applicants.<sup>40</sup> The EEOC set forth its Enforcement Guidance resource in 2002, after *Barnett*, to advise employers and employees about their legal rights and obligations under the ADA.<sup>41</sup>

---

employees with a disability with preferential treatment when reassigning employees with a disability as long as it does not place an undue hardship on the employer).

35. Compare *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000) (finding that mandatory preferential treatment is inconsistent with the ADA's aims and creates an undue burden), with *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (stating that any accommodation requires preferential treatment and indicating that such preferences are vital to achieving the ADA's goals).

36. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999) (rejecting the interpretation that the ADA only calls for competitive consideration of individuals with a disability).

37. See *id.* at 1165 (interpreting the ADA to allow preferences).

38. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (stating that mere consideration of qualified employees for vacancies is not consistent with the ADA).

39. See *id.* (rejecting an interpretation of the statute that nullifies specific provisions (citing *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (stating that judges should hesitate to treat statutory provisions as mere excess language)).

40. See U.S. EEOC, *supra* note 6 (explaining that a qualified employee is not required to compete and instead, should be appointed to the new position).

41. See *id.* (using its capacity as an administrative agency to assist employers seeking to ensure compliance with the ADA).

*2. Other Circuits Have Held That the ADA Only Requires Employers to Give Eligible Employees the Opportunity to Compete for Vacant Positions.*

Courts of Appeals in six of the circuits have held that the ADA does not guarantee eligible employees reassignment to a vacant position and that the ADA was not intended to provide an affirmative preference for such employees.<sup>42</sup> The most notable and recent decision came from the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, where the court limited an employers' duty to reassign individuals with a disability.<sup>43</sup> Reinforcing an opinion it expressed prior to *Barnett*, the Eighth Circuit held that the ADA does not mandate that an employer reassign an employee with a disability to a vacant position if doing so would circumvent an employer's best-qualified hiring policy.<sup>44</sup> Although some of the circuits' decisions preceded *Barnett* and do not address the statute's conflict with non-discriminatory employment policies, other circuits have interpreted the ADA to provide equal employment opportunities for qualified individuals with a disability and nothing more.<sup>45</sup> Additionally, the Fifth, Sixth, and Eleventh Circuits construed the ADA's provisions as only requiring employers to place employees with a disability on an even playing field with other applicants, and not provide preferential treatment.<sup>46</sup> The courts that have held that preferential treatment of employees with a disability is inconsistent with the ADA have justified their position using congressional intent behind passage of the ADA and a strict interpretation of the ADA's reassignment language.<sup>47</sup> Specifically, the Eighth Circuit found that the

---

42. See THOMPSON'S, *supra* note 12 (noting that six circuit courts reject the idea that the ADA demands noncompetitive reassignment).

43. See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2007) (finding the employer's neutral policy sufficient to overcome ADA reassignment in a case involving a grocer who suffered a permanent arm injury and requested reassignment to a router position).

44. See *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000) (*per curiam*) (finding that employers are not required to pass over more qualified applicants to accommodate an employee with a disability); see also *Huber*, 486 F.3d at 483 (holding that the ADA is not a mandatory preference act).

45. See *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384-85 (2d Cir. 1996) (finding that the ADA only requires equal treatment); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (stating that requiring preferential treatment is inconsistent with the ADA).

46. See *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457 (6th Cir. 2004) (explaining that the ADA does not require employers to grant preferences); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (interpreting Congress' intent to exclude preferences); *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996) (*per curiam*) (stating that the ADA does not require favoring individuals with a disability).

47. See *Wernick*, 91 F.3d at 384 (stating that, through passage of the ADA,

ADA was not intended to trump the rights of employers and other employees, whether or not those rights were bargained for in a collective agreement.<sup>48</sup> Additionally, the Fifth Circuit found that the ADA merely requires the prevention of disability discrimination.<sup>49</sup>

*3. The Supreme Court's Limited Guidance Regarding the Reassignment Obligation that the ADA Places on Employers Failed to Resolve the Circuit Split and Has Been Interpreted Differently by Lower Courts.*

The Supreme Court's interpretation of the ADA's reassignment obligation in relation to an existing seniority-based hiring system provided some guidance regarding reassignment of employees with a disability in a best-qualified system.<sup>50</sup> In *Barnett*, an employee with a disability alleged a violation of the ADA because the position that he requested to be transferred to was awarded to a more senior employee as required by the employer's seniority based hiring system.<sup>51</sup> The Court found that the mere existence of a seniority system was generally sufficient to trump an employee's ADA request because of the loss of benefits and other difficulties that may result from circumvention of the seniority system. However, the Court indicated that an employee may prove that an exception to the seniority system is proper under certain circumstances.<sup>52</sup> In *Shapiro v. Township of Lakewood*, the Third Circuit explained the two-pronged analysis of reassignment requests set forth by the *Barnett* Court.<sup>53</sup> In *Shapiro*, an employee with a disability requested reassignment to a vacant position as a reasonable accommodation, but the request was denied when the town refused to reassign the employee without following the standard interdepartmental transfer procedures.<sup>54</sup> The Court of Appeals

---

Congress only intended to create equal employment opportunities).

48. See *Kellogg*, 233 F.3d at 1089 (finding that the ADA does not require an employer to subvert the rights of others).

49. See *Turco*, 101 F.3d at 1094 (interpreting the statute to merely prohibit discrimination against individuals with disabilities).

50. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400-01 (2002) (noting that the ADA will sometimes require affirmative action, but only in situations where the action would not cause disruption to the employer's business operations).

51. See *id.* at 394-95 (alleging that his employer discriminated against him by refusing to make his transfer permanent).

52. See *id.* at 392 (stating that Congress did not intend to undermine the operation of seniority-based systems).

53. See 292 F.3d 356, 360-61 (3d. Cir. 2002) (explaining that *Barnett* first requires the employee to show a feasible reassignment, and then employers must prove undue hardship).

54. See *id.* at 357 (requiring individuals seeking transfer to visit the municipal building and review posted announcements).

found that because the employee identified positions that he was qualified for, summary judgment was improper even though reassignment would have circumvented the interdepartmental transfer procedure, a non-discriminatory policy.<sup>55</sup>

Lower courts have interpreted the Supreme Court's *Barnett* analysis in multiple ways, both supporting and rejecting the subordination of best-qualified hiring policies.<sup>56</sup> As the Eighth Circuit does now, the Seventh Circuit originally interpreted *Barnett* to support its previous interpretation of the ADA as set forth in *EEOC v. Humiston-Keeling, Inc.*<sup>57</sup> In *Humiston-Keeling*, the Seventh Circuit held that employers are not required to contravene non-discriminatory policies in order to provide reasonable accommodations to individuals with a disability. Requiring employers to do so would convert the ADA into a mandatory preference statute.<sup>58</sup> However, years later, in *United Airlines*, upon *en banc* review, the court overturned *Humiston-Keeling* based on recognition of the significant differences between seniority-based and best-qualified hiring systems.<sup>59</sup> In *Mays*, a nurse appealed a grant of summary judgment, under the Rehabilitation Act, against her claims that her employer failed to reassign her to an administrative position for which she was qualified.<sup>60</sup> Instead of assigning her to the administrative position, the hospital had assigned her to a clerical position that provided her with the same net salary but fewer career advantages and fringe benefits.<sup>61</sup> The court found that the presence

---

55. *See id.* (holding that the employee with a disability's request for accommodation through reassignment to vacant positions for which he qualified was sufficient to defeat the employer's motion for summary judgment).

56. *See Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002) (holding that employers do not violate the ADA by hiring better-qualified applicants over individuals with a disability requesting reassignment). *But see EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (stating that the court was wrong to equate best-qualified policies and seniority-based policies because of the differing provisions of such policies).

57. *See 227 F.3d 1024, 1027-28* (7th Cir. 2000) (holding that requiring an employer to turn away a superior applicant was inconsistent with the ADA and placed an unreasonable burden on employers).

58. *See id.* at 1028 (stating that a best-qualified hiring policy is an example of a legitimate non-discriminatory policy).

59. *See United Airlines*, 693 F.3d at 764 (admitting that the *Mays* court disregarded the fact-specific analysis in *Barnett's* holding, treating all non-discriminatory policies the same).

60. *See Mays*, 301 F.3d at 868 (claiming that her employer failed to make a proper accommodation by assigning her to a clerical position that paid a lower salary).

61. *See id.* at 872 (finding that the hospital was not required to provide an ideal accommodation, only a reasonable one).

of seniority systems and best-qualified systems alone are equally sufficient to outweigh reassignment duties as placing an unreasonable hardship on the employer under the rationale in *Barnett*.<sup>62</sup>

Courts have even misinterpreted the Supreme Court's analysis of whether circumvention of a non-discriminatory policy is reasonable.<sup>63</sup> In *Haynes v. AT&T Mobility, LLC*, a customer service representative with a disability requested that he be transferred from his current call center position to a retail job, as a reasonable accommodation for his disability.<sup>64</sup> After applying for various other positions but receiving no offers, the customer service representative was placed on leave and eventually terminated.<sup>65</sup> Following AT&T's termination of the employee, he brought suit, claiming that the company discriminated against him by refusing his request for a reassignment.<sup>66</sup> The court overruled the magistrate judge's ruling, placing the burden on the employee to show that the reassignment was reasonable and that there was no undue hardship placed on the employer by the reassignment request, despite the presence of a non-discriminatory hiring policy.<sup>67</sup> The *Haynes* Court's ruling collapses the shifting burdens in a reassignment analysis into one burden and places it on the employee. The Supreme Court, in *Borkowski v. Valley Cent. Sch. Dist.*, clarified that the ultimate finding of reasonableness depends on shifting burdens of production.<sup>68</sup>

---

62. *See id.* (stating that employers are not required to overlook superior candidates).

63. *See Haynes v. AT&T Mobility, LLC*, No. 1:09-CV-450, 2011 WL 532218, at \*4 (M.D. Pa. Feb. 8, 2011) (considering the company's best-qualified system when evaluating the plaintiff's showing of a feasible reassignment, instead of requiring the employer to prove that circumvention of the system constitutes undue hardship).

64. *See id.* at \*1 (noting the customer service representative's physician's recommendation that he be reassigned to a less stressful position).

65. *See id.* (illustrating the parties' failure to reach a reasonable accommodation through the ADA's interactive process).

66. *See id.* at \*2 (alleging disability discrimination after previous attempts to accommodate his disability failed).

67. *See id.* at \*3 (stating that the correct test was whether the employee could show that reassignment was reasonable, over a more qualified applicant, under the best-qualified employment system).

68. *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (finding that an employee who identifies a plausible accommodation shows a prima facie reasonable accommodation and discussing the employer's burden to show that it creates an undue hardship emerges).

## III. ANALYSIS

*A. The Supreme Court Should Find That the ADA's Reassignment Requirement Outweighs the Presence of Best-Qualified Hiring Policies.*

The Supreme Court should have granted United Airlines, Inc.'s petition for a writ of certiorari and found that circumvention of an employer's best-qualified hiring policy alone is not sufficient to trump the reassignment obligation that the ADA places on employers.<sup>69</sup> An employer is required to grant an individual with a disability's requested accommodation even though it conflicts with a disability-neutral policy if it is reasonable, considering analogous case law, and does not impose an undue hardship on the employer.<sup>70</sup> An employee with a disability's request for reassignment to a vacant position is not unreasonable simply because the request conflicts with a non-discriminatory employment policy; rather, the presence of a non-discriminatory employment policy is only one factor in the overall reasonableness analysis.<sup>71</sup> Furthermore, reassignment is reasonable when the employee with a disability identifies a vacant position for which he or she is qualified; after that, the employer has the burden of proving that the requested reassignment imposes an undue hardship upon the employer.<sup>72</sup>

Employees seeking reassignment will usually be able to satisfy the first prong of the *Barnett* analysis notwithstanding the existence of a best-qualified hiring policy.<sup>73</sup> Employers' regular practice of hiring the most qualified applicant for a position does not affect whether a position is vacant or whether an employee is qualified for that position.<sup>74</sup> Employees

---

69. See *United Airlines, Inc. v. EEOC*, 133 S. Ct. 2734 (2013) (mem.) (denying petitioner's writ of certiorari); see also THOMPSON'S, *supra* note 12, at 1 (noting the Court's refusal to hear the issue even after they granted certiorari in a similar 2008 case).

70. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002) (finding that the employee need only show that reassignment is feasible, and then the employer may show that the reassignment inflicts an undue burden on the employer); *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002) (explaining the two-step test the Court created in *Barnett* to evaluate a reasonable accommodation that trumps a non-discriminatory rule).

71. See *Barnett*, 535 U.S. at 397 (holding that the existence of an employer's non-discriminatory policy alone does not trump the ADA).

72. See *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011, 1022 (8th Cir. 2000) (finding reassignment reasonable where the employee finds a vacant position for which they are qualified).

73. See *id.* at 1020 (finding that the employee, who identified three positions to which she could have been reassigned, established an issue of fact).

74. See *Shapiro*, 292 F.3d at 360 (finding that in ADA failure-to-transfer actions,

need only be able to perform the essential functions of the requested position, as defined by the employer within reasonable limits.<sup>75</sup>

Similarly, the *Barnett* Court indicated that the employee with a disability who is seeking reassignment need only show that the accommodation seems reasonable on its face to satisfy her initial burden.<sup>76</sup> Although the Court ultimately determined that the requested reassignment in *Barnett* was unreasonable, the Court found that the employee satisfied the first-prong of the reasonable accommodation inquiry.<sup>77</sup> Justice Sandra Day O'Connor argued that only a legally enforceable seniority-based hiring policy would impact an employee's ability to meet her initial burden of showing that a feasible reassignment existed.<sup>78</sup> Given that a best-qualified policy does not create the same type of entitlement to the vacant position by other employees as a seniority-based policy, best-qualified hiring policies do not affect the vacancy in the same way.<sup>79</sup> The Court reiterated its determination that the existence of a non-discriminatory policy is not dispositive by allowing the employee to show that reassignment does not impose an undue hardship on the employer because the non-discriminatory policy is not routinely enforced or contains so many exceptions that it does not create an enforceable expectation by other employees.<sup>80</sup> The existence of a best-qualified hiring policy is most influential to the reasonableness of a requested reassignment under the second-prong of the *Barnett* analysis, where the employer is required to counter the employee's claim by proving

---

the employee's initial burden is to prove that they identified a vacant position for which they were qualified).

75. See *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (stating that courts defer to the employer's judgment when deciding the essential functions of a job unless the functions are inconsistently enforced or unrelated to business necessities).

76. See *Barnett*, 535 U.S. at 401 (explaining the employee's burden of proof when seeking reassignment under the ADA); see also *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (holding that simply suggesting a facially cost-effective reassignment satisfies an employee's initial burden to identify a reasonable accommodation).

77. See *Barnett*, 533 U.S. at 423 (Souter, J., dissenting) (stating that Barnett met his burden for reassignment by identifying a plausible accommodation).

78. See *id.* at 409 (O'Connor, J., concurring) (stating that a position cannot be considered vacant if another employee is entitled to it under a non-discriminatory policy that is currently in place).

79. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (finding that a best-qualified system does not involve the same property rights as a seniority-based system).

80. See *Barnett*, 535 U.S. at 405-06 (granting employees the possibility of achieving a reasonable accommodation for their disability despite the existence of a non-discriminatory employment policy preventing such accommodation).

that reassignment imposes an undue hardship on the employer.<sup>81</sup>

*B. Unlike a Seniority System, Reassignment in a Best-Qualified System Does Not Subordinate Applicants' Legitimate Interests.*

Reassignment is a reasonable accommodation under the ADA, even where the company uses a best-qualified system, because it does not subordinate the vested interest of other employees as it does in a seniority-based system.<sup>82</sup> The Supreme Court in *Barnett* analyzed the various purposes of a seniority system to decide whether reassignment sufficiently outweighs the benefits and expectations that a seniority system provides to employers and employees.<sup>83</sup> Many of the advantages and possible difficulties the Court considered, such as job security and predictable advancement, do not support the imposition of a best-qualified system over ADA reassignment obligations.<sup>84</sup> Additionally, the Seventh Circuit's recent decision in *United Airlines*, abrogating *Mays v. Principi*, asserts that ADA accommodations should withstand a claim of undue hardship based solely on the existence of a best-qualified policy.<sup>85</sup> The Seventh Circuit found that the nurse had been adequately accommodated, but even if the employer awarded the position to a more qualified applicant, the hospital would have been in compliance with the ADA because a seniority system or best-qualified system are equally sufficient to outweigh reassignment duties as imposing an unreasonable hardship on the employer under *Barnett's* rationale.<sup>86</sup>

The application of the Court's analysis of seniority systems in *Barnett* to best-qualified hiring policies fails to justify subordinating ADA

---

81. See *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002) (explaining the shifting burdens the Court must analyze when considering a requested accommodation's reasonableness).

82. See *Barnett*, 535 U.S. at 392 (finding that employees' interests in a seniority system usually prevail over ADA interests).

83. See *id.* at 404-05 (considering the advantages and difficulties that would result from subverting a company's seniority policy).

84. See *id.* (finding that the seniority system provides predictability in layoffs, advancement, and limits unfairness).

85. See *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002) (holding that employers do not violate the ADA by hiring better-qualified applicants over individuals with a disability requesting reassignment). *But see* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (stating that the court was wrong to equate best-qualified policies with seniority policies because of the differing rights and administrative concerns associated with each type of policy).

86. See *Mays*, 301 F.3d at 872 (reasoning that if employers are not required to grant seniority to justify reassignment in a seniority system, then they are not required to overlook inferior qualifications in a best-qualified system).



obligations.<sup>87</sup> Unlike seniority systems, allowing reassignment to trump best-qualified hiring policies does not violate expectations regarding job security.<sup>88</sup> The Supreme Court stated that this is the most significant benefit conferred by the seniority system; however it has no bearing on applicants' or employees' expectations in a best-qualified system.<sup>89</sup> Even if an employee does rely on the existence of a company best-qualified hiring policy, her reliance is not as clearly defined as it would be in a seniority system and therefore is not entitled to the same deference.<sup>90</sup> The *Barnett* Court also stated that a seniority system, notwithstanding special circumstances pleaded by the employer, should be sufficient to show undue hardship given that any deviation from it would undermine other employee expectations.<sup>91</sup> This supposed benefit of a non-discriminatory policy is not transferable to the best-qualified hiring policy that many employers evoke to withstand ADA requirements.<sup>92</sup> Unlike a seniority system, where an employee's entitlement to the position over another similarly qualified applicant is objectively measured, the employer discretion inherent to best-qualified systems tempers employee expectations.<sup>93</sup> Seniority systems contain an objective threshold level of qualifications that applicants must meet whereupon their finite seniority levels then become the deciding factor of who gets the position.<sup>94</sup> Best-qualified systems also have an

---

87. See Jared Hager, *Bowling for Certainty: Picking Up the Seven-Ten Split by Pinning Down the Reasonableness of Reassignment After Barnett*, 87 MINN. L. REV. 2063, 2086 (2003) (finding the court's analysis in *Barnett* useful in applying ADA obligations to other non-discriminatory employment policies).

88. See *id.* at 2092 (explaining that an external applicant for a vacant position, having never occupied a position with the company, has no expectation of job security resulting from the company's implementation of the best-qualified policy).

89. See *Barnett*, 535 U.S. at 404-05 (affirming the use of seniority systems to determine layoffs).

90. See *United Airlines*, 693 F.3d at 764 (finding that reassignment trumps the existence of a best-qualified system because its imposition would not violate property rights or other company concerns).

91. See *Barnett*, 535 U.S. at 404-05 (finding that because employees rely on their status in the seniority system to predict equal treatment, the system should not be overcome by the ADA's reassignment provisions).

92. See Hager, *supra* note 87, at 2092 (finding that reassigning an individual with a disability over an external applicant does not violate any legitimate expectations).

93. See *Johnson v. Transp. Agency*, 480 U.S. 616, 641 n.17 (1987) (commenting that the final hiring decision of choosing the best-qualified applicant will always involve some subjectivity (citing Brief for the Am. Soc'y for Pers. Admin. as Amici Curiae Supporting Respondents, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (No. 85-1129) 1986 WL 728160, at \*9)).

94. See *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 605-06 (1980) (defining a seniority system as a scheme that determines transfers and promotions by a mix of

objective minimal qualifications level.<sup>95</sup> After applicants meet that threshold level, company personnel decide who is better, based on many factors.<sup>96</sup> Because there are many possibilities that would justify a company's hiring of one person over another, when both meet the minimum threshold, there is less of a workplace disruption where reassignment trumps a best-qualified hiring system than in a seniority system.<sup>97</sup> The discretion in a best-qualified system permits the selection of an individual who seems less qualified, when judging only on the objective job criteria, where a seniority system would not allow a less senior applicant to obtain the position after both meet the minimum criteria.<sup>98</sup> Therefore, such a selection would not undermine the function of a best-qualified system such that it would constitute undue hardship; however, circumvention of a seniority policy produces a much more substantive change in the way the company functions and may be enough to trump the ADA.<sup>99</sup> The Fourth Circuit agrees with the Seventh Circuit's interpretation of *Barnett's* application to best-qualified systems.<sup>100</sup> The *Kosakoski* Court rejected the company's reliance on *Huber*, which followed the now

---

seniority and other factors such as aptitude tests).

95. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(8) (2009) (requiring an employee to be capable of performing the essential functions of the vacant position before they are qualified for reassignment).

96. See *Johnson*, 480 U.S. at 641 n.17 (finding it rare that one applicant is the most qualified of the field of applicants, giving that applicant a legitimate expectation to be hired over others (citing Brief for the Am. Soc'y for Pers. Admin. as Amici Curiae Supporting Respondents, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (No. 85-1129) 1986 WL 728160, at \*9)).

97. Compare *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1046 (7th Cir. 1996) (finding reassignment improper because it would disrupt the collective bargaining agreement between employees and the employer), with *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (stating that allowing reassignment to trump a best-qualified policy would not result in similar burdens or administrative concerns).

98. See *Hager*, *supra* note 87, at 2092 (explaining that unlike an objective seniority system, identifying the best-qualified applicant may require subjective evaluation of the applicant).

99. Compare *Matheson v. Firemen's & Policemen's Civ. Serv. Comm'n*, 587 S.W.2d 795, 797 (Tex. Civ. App. 1979) (upholding the promotion of a less qualified applicant, based on civil service examination scores, in the interest of the police department), with *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1176 (10th Cir. 1999) (concluding that subordinating a seniority system may constitute an alteration in the nature of the employer's business).

100. See *Kosakoski v. PNC Fin. Servs. Grp., Inc.*, No. 12-cv-00038, 2013 WL 5377863, at \*17 (E.D. Pa. Sept. 26, 2013) (agreeing that a company's best-qualified hiring policy does not create a *per se* undue hardship sufficient to trump ADA mandates).

reversed *Humiston-Keeling* without further analysis.<sup>101</sup>

*C. Unlike Barnett, Applicants Are Not Entitled to the Vacant Position as a Result of Investment in the Best-Qualified System.*

Reassignment that circumvents an employer's best-qualified hiring policy does not deprive applicants of vested interests.<sup>102</sup> Although the *Barnett* Court found that the seniority system encourages employees to invest in their employer's company, this investment is non-existent when considering a reassigned employee and an outside applicant for a position in a best-qualified scenario.<sup>103</sup> The Seventh Circuit differentiates the two employment systems and their respective effects on reassignment under the ADA.<sup>104</sup> The Seventh Circuit has expressly found that best-qualified employment policies are not identical to seniority systems because the systems entail different employee rights and expectations.<sup>105</sup>

Further, the Eighth Circuit's interpretation that reassignment is unreasonable if it conflicts with the operation of any non-discriminatory policy is over-expansive and inconsistent with the Supreme Court's fact-specific analysis requirement.<sup>106</sup> Because reassignment requests that conflict with neutral employment policies do not render reassignment per se unreasonable, companies with established best-qualified systems are not entitled to summary judgment or judgment as a matter of law in failure-to-transfer suits under the ADA.<sup>107</sup>

---

101. See *id.* at \*16 (noting that similar case law no longer supports the subordination of reassignment based solely on the existence of a best-qualified system).

102. See *United Airlines, Inc.*, 693 F.3d at 764 (explaining that allowing reassignment to trump a best-qualified policy does not involve the property rights, administrative concerns, or company disruption that results from subordinating a seniority system).

103. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002) (stating that employees sacrifice their value in order to earn greater benefits in the future).

104. See *id.* (specifying that in a seniority system, employees are already entitled to a particular position based on their tenure at the company); see also *id.* at 408 (O'Connor, J., concurring) (stating that only enforceable systems trump the ADA).

105. See *United Airlines*, 693 F.3d at 764 (finding that the *Mays* Court erroneously equated seniority and best-qualified systems).

106. Compare *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011, 1020 (8th Cir. 2000) (finding that reassignment does not usually trump established non-discriminatory policies), with *Barnett*, 535 U.S. at 397 (holding that an employer's disability-neutral rule cannot by itself supplant its reassignment duty).

107. See *United Airlines*, 693 F.3d at 761 (differentiating the statute's conflict with best-qualified and seniority employment policies).

*D. The Subjectivity of Employers' Best-Qualified System Undermines an Applicant's Legitimate Expectation of Being Hired Over an Otherwise Qualified Applicant with a Disability Requesting Reassignment.*

The managerial discretion inherent in best-qualified hiring policies precludes an applicant's legitimate expectations of being hired over an otherwise qualified individual; thus, ADA reassignment interests trump the operational interest justifying the rule, and reassignment is ordinarily reasonable.<sup>108</sup> The Supreme Court ultimately decided that a company's seniority system would ordinarily trump ADA reassignment obligations because Congress did not intend to overcome employees' legitimate expectations under the system's provisions.<sup>109</sup> Unlike seniority systems, employer's best-qualified hiring systems do not offer the same objectively measured expectations that the Court protected in *Barnett*.<sup>110</sup> An employer's diversity interests, as well as other immeasurable subjective qualities, may undermine an applicant's expectation to be hired in a best-qualified system.<sup>111</sup> These immeasurable qualities become more relevant given that, in the private sector, service-producing industries have the largest number of employers that recruit individuals with disabilities.<sup>112</sup> An employer's preference for an individual possessing less experience or education for a particular position, in light of the applicant's status as a person with a disability and relevant immeasurable characteristics, would not be uncommon or unfair in a best-qualified system.<sup>113</sup>

---

108. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 978-79 (1988) (stating that hiring policies that have both objective and subjective criteria should be considered subjective); *Johnson v. Transp. Agency*, 480 U.S. 616, 641 n.17 (1987) (stating that hiring decisions in best-qualified systems are subjective).

109. See *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1048 n.11 (7th Cir. 1996) (expressing that seniority systems are used to "compute" benefits earned by an employee while working at a particular company).

110. See *Barnett*, 535 U.S. at 394 (permitting summary judgment where requested accommodations conflict with seniority systems).

111. See *Watson*, 487 U.S. at 991 (explaining that qualities like common sense, originality, and ambition may contribute to success at many jobs but are not objectively measurable).

112. See U.S. DEPT. OF LABOR, OFF. OF DISABILITY EMP'T POL'Y, SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES, TECH. REP., 2 (2008) [hereinafter SURVEY OF EMPLOYER PERSPECTIVES] (reporting that private industries such as retail, transportation, and hospitality have the largest number of employers that recruit individuals with disabilities).

113. See *Johnson*, 480 U.S. at 641 n.17 (agreeing that there is rarely a single best-qualified applicant, and that for jobs that do not require unique experience, the decision as to what applicant is "best-qualified" is subjective).

*E. Mandating Non-Competitive Reassignment Under the ADA Would Not Unjustly Discriminate Against Applicants Without a Disability.*

Employers are free to grant preferences based on attributes other than merit, such as race and sex, through affirmative action plans created to accomplish legitimate diversity goals.<sup>114</sup> Thus, mandating reassignment under the ADA would not create undue hardship through reverse disability discrimination litigation by competing applicants without a disability.<sup>115</sup> Mandating non-competitive reassignment of qualified individuals with a disability to vacant positions, in furtherance of ADA objectives, would not unduly discriminate against applicants without a disability.<sup>116</sup> The Supreme Court has upheld measures taken by private entities that are consistent with congressional statutory goals and intended to correct historical discrimination.<sup>117</sup> In *Johnson v. Transportation Agency*, the Court found that the agency properly considered the female applicant's minority status as a factor in improving the representation of minorities in the workforce as consistent with Title VII.<sup>118</sup>

Similarly, an employer's consideration of an employee's status as a person with a disability under the ADA would be proper in order to comply with the ADA and combat the widespread disability discrimination that continues to plague American workers.<sup>119</sup> Given that the individual with a disability seeking reassignment must satisfy other ADA criteria, considering her disability to achieve diversity in the workplace along with other objective job criteria would not unjustly discriminate against

---

114. *See id.* at 616-17 (finding the agency's consideration of applicants' sex justified by the existence of an underrepresentation of women in segregated job categories).

115. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(g) (2008) (stating specifically that the ADA does not provide a cause of action for discrimination based on an individual's lack of a disability); *see also* *Carrier v. Paige*, 159 F.3d 1357 (5th Cir. 1998) (depublished) (stating that the ADA's language does not support a claim for reverse disability discrimination).

116. *See Johnson*, 480 U.S. at 630 (finding no improper discrimination partly because voluntary employer action can play a role in furthering the aims of Title VII).

117. *See id.* at 617 (finding the company's attempt to improve the representation of minorities consistent with Title VII).

118. *See id.* at 641-42 (finding that because the agency's affirmative action plan was moderate, flexible, and considered applicants on a case-by-case basis, the plan was consistent with Title VII and helped eliminate historical sex discrimination in the workplace).

119. *See* SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 112, at 3, 9 (reporting that of all the companies surveyed, only 471,562 of them (19.1%) currently employ individuals with disabilities and only 8.7% hired a person with a disability within the past 12 months).

applicants without a disability.<sup>120</sup> The ADA does not explicitly require affirmative action, but it does require an employer to accommodate an employee where it would not impose undue hardship.<sup>121</sup> Requiring more than the mere showing that a seniority system exists to defeat a requested reassignment undermines the value of investing in the system, thereby defeating the functionality of the system for predicting one's status as an applicant.<sup>122</sup> In contrast, a best-qualified system does not grant an applicant the ability to determine her standing in reference to other applicants, and would not be disrupted such that its function is nullified.<sup>123</sup> Courts have rejected the generalized argument that the circumvention of any neutral policy will erode an employer's ability to set standards and other workplace policies because the ADA already requires that the employer relinquish that power in some instances.<sup>124</sup>

The Title VII framework permits claims for reverse race discrimination.<sup>125</sup> The protection of whites from racial discrimination was derived from the legislative history and historical context from which the Act was conceived.<sup>126</sup> A similar claim alleging reverse disability discrimination under the ADA would not be sustainable given the language of the statute, which strictly precludes a claim of action by a person without a disability.<sup>127</sup> Therefore, an employer may not allege that reassignment, which provides preferential treatment to an employee with a disability,

---

120. See *Johnson*, 480 U.S. at 617-18 (highlighting the fact that the agency's diversity plan did not establish a quota based solely on applicants' sex).

121. See *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 359, 361 (3d Cir. 2002) (explaining the burden of the individual seeking reassignment).

122. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 392 (2002) (stating that employee benefits earned through investment into the system would be undermined if courts require more than the mere showing that a seniority system exists).

123. See *Hager*, *supra* note 87, at 2092 (arguing that best-qualified systems do not provide applicants with predictability regarding employment issues such as hiring, firing, and advancement).

124. See *Ward v. Mass. Health Res. Inst., Inc.*, 209 F.3d 29, 36-37 (1st Cir. 2000) (interpreting the ADA to require employers to allow modification of "some" rules and conditions).

125. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976) (stating that Title VII prohibits race discrimination against any individual, including whites; noting that the EEOC interprets the statute to protect all races).

126. See *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 194 (1979) (noting that a practice may not be within the letter of the law or the intention of Congress but may still be allowed or prohibited within its provisions).

127. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(g) (2008) (establishing that unlike Title VII, the ADA does not support a cause of action for reverse discrimination for applicants without a disability or employees who may feel they were unjustly discriminated against).

would impose an undue hardship by making her liable for reverse discrimination lawsuits under the ADA.<sup>128</sup>

*F. Jurisprudence Supports a Finding that, Reassignment Trumps a Company's Best-Qualified Hiring Policy, Is Ordinarily Reasonable.*

The Supreme Court's recognition that it is necessary to give preference to employees with a disability in order to accomplish the ADA's objectives, along with its limitation of employers' duties under ADA reassignment, achieves a sufficient compromise between both parties' interests.<sup>129</sup> Reassignment that circumvents an existing best-qualified policy would not upset Congress' and the Court's balancing of employee rights and employer obligations.<sup>130</sup> The courts have carefully limited the ADA from infringing upon important employee and employer rights.<sup>131</sup> In the Fifth, Seventh, and Eighth Circuits, courts have protected the rights of employers to control the composition of their staff by limiting the preferential treatment afforded to individuals seeking reassignment under the ADA.<sup>132</sup> One of the most influential restrictions on employers' ADA obligations, introduced by the Seventh Circuit, found that employers are not obligated to provide an individual's specific accommodation request, only a reasonable request considering the specific circumstances of the reassignment.<sup>133</sup> Courts have relied on the statute's language and congressional intent to draw ADA reassignment parameters; requests for

---

128. See generally *id.* (precluding a claim of hardship by exposure to litigation given that the statute does not provide for a claim of reverse disability discrimination); see also 42 U.S.C. § 12111(10)(B) (2008).

129. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (stating that the ADA requires preferences); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996) (explaining that requiring employees with a disability to meet specific criteria for reassignment limits employers obligations).

130. See Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of *U.S. Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 *DRAKE L. REV.* 1, 9-10 (2002) (commenting that the scope of ADA reassignment is sufficiently restricted).

131. See, e.g., *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011, 1019 (8th Cir. 2000) (rejecting the notion that promotions are required); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 53 (5th Cir. 1997) (stating that employers are not required to create new jobs); *Gile*, 95 F.3d at 499 (holding that the ADA does not require employers to bump others).

132. See *Cravens*, 214 F.3d at 1019 (holding that requiring employers to bump employees, create new positions, and promote people requesting reassignment constitutes undue hardship); *Still*, 120 F.3d at 53; *Gile*, 95 F.3d at 499.

133. See *Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342, 344 (7th Cir. 1996) (holding that the ADA does not require an employer to acquiesce to employees' every request).

reassignment that go beyond these limitations have been rejected on the ground that they impose undue hardship.<sup>134</sup>

Furthermore, the rigidity of seniority systems contrasts directly with the malleability of a best-qualified system, thereby creating varied expectations.<sup>135</sup> By contrast, a best-qualified system leaves room for managerial discretion that may ordinarily provide bases for imposing reassignment over the hiring of the supposedly more qualified individual.<sup>136</sup> Although the employers must present objective skills and requirements for employment, the employer's preference for one quality over another, such as selecting an applicant with more experience rather than education in a particular field, would still be discretionary.<sup>137</sup>

*G. Courts Are Likely to Misapply Barnett's Two-Step Analysis Unless the Supreme Court Clarifies the Reassignment Requirement in Light of Best-Qualified Hiring Policies.*

For the ADA to provide adequate protection to individuals with a disability, preference is necessary.<sup>138</sup> The Supreme Court's finding that reassignment that subordinates seniority systems is ordinarily unreasonable overshadows its endorsement of a fact-specific analysis of the employee's accommodation request, resulting in other courts misconstruing its reasoning.<sup>139</sup> A Supreme Court finding that mandatory ADA reassignment in circumvention of a best-qualified hiring policy is ordinarily reasonable would clarify employers' duties, employees' rights, and the parties' legal burdens of proof whenever a conflict between the two arises.<sup>140</sup> Employees

---

134. See *Barnett*, 535 U.S. at 392 (stating that Congress did not intend to override legitimate expectations in seniority systems).

135. See Anderson, *supra* note 130, at 27 (commenting that the difficulty in meeting ADA goals in conflict with a seniority system lies with the absence of exceptions to the plan, the stability, and the presence of contractual expectations).

136. See *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (finding that a court may not supersede an employer's judgment when considering hiring employees).

137. See *Pettaway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 232 (5th Cir. 1974) (stating that a claim that an employer or union selected or promoted the best-qualified person is not valid until it demonstrates that it used objective criteria particular to the job).

138. See Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 456 (2002) (opining that the ADA's text, history, and purpose suggests preferential treatment is proper).

139. See *Barnett*, 535 U.S. at 397 (explaining that all accommodations require specific preferential treatment).

140. See *Atkins*, *supra* note 1 (stating that businesses are urging the Court to define



who are eligible for reassignment under the ADA would not suffer the eventual loss of their jobs or decreases in pay because their disability renders them incapable of performing the basic functions of their current position.<sup>141</sup> Lower courts will apply a consistent and predictable standard when considering the parties' duty to show that the reassignment is or is not reasonable.<sup>142</sup> While some practitioners hope that the Eighth Circuit will eventually change its opinion and resolve the split, the practical implications of the statute's ambiguity deserve a swifter decision.<sup>143</sup> The Eighth Circuit is unlikely to change its opinion of the ADA's effect on neutral employment systems, given that it claimed to have already considered *Barnett's* rationale in *Huber*, and interpreted it to bolster the Court's current position.<sup>144</sup> In addition, the goals of the ADA are accomplished because individuals with a disability remain active participants in the country's workforce.<sup>145</sup>

Although the *Barnett* Court establishes a specific burden of proof for an employee seeking reassignment under the ADA, other courts have used its characterization of a seniority policy to heighten the employee's burden when seeking reassignment that circumvents a non-discriminatory policy.<sup>146</sup> Instead of evaluating the reasonableness of the employee's request and then the employer's claim of undue hardship, the *Haynes* court places upon the employee the responsibility to prove reasonableness and disprove undue hardship before the employer establishes undue hardship

---

their obligations).

141. See *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 Fed. Appx. 314, 324 (4th Cir. 2011) (finding that a jury could determine that the employer's failure to reassign her prompted her early retirement); see also *Befort*, *supra* note 138, at 469 (commenting that because reassignment is a last resort accommodation, it is the employee's last hope to remain employed at their company).

142. See *Befort*, *supra* note 138, at 449 (emphasizing the difficulty federal courts experience as a result of the current lack of clear reassignment standards).

143. See *Justices Decline to Review ADA Case on Reassignment as Reasonable Accommodation*, EMPLOYERS GROUP (2013), <http://www.employersgroup.com/Content.aspx?id=2329> [hereinafter EMPLOYERS GROUP] (stating that Supreme Court review is unwarranted because the Eighth Circuit may reconsider its position in light of *United Airlines*).

144. See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (stating that *Barnett* supports its reading).

145. See *Stone v. Mount Vernon*, 118 F.3d 92, 98 (2d Cir. 1997) (commenting that another equally important ADA goal is to minimize the societal costs of dependency of individuals with a disability, thereby increasing productivity).

146. See *Anderson*, *supra* note 130, at 21 (stating that the Court essentially created a rebuttable presumption for individuals seeking reassignment where reassignment trumps seniority policies).

simply because there is a non-discriminatory policy in place.<sup>147</sup> This requirement conflates the two-step analysis introduced in *Barnett* into one elevated burden thrust upon the employee.<sup>148</sup> However, as the Court in *Barnett* demonstrates, the existence of a non-discriminatory policy is only a factor in a totality of the circumstances analysis of the employer's undue hardship.<sup>149</sup> There is no rebuttable presumption that reassignment that circumvents best-qualified hiring policies is unreasonable.<sup>150</sup> The Tenth Circuit directly rejects requiring the employee to simultaneously prove that the reassignment is reasonable and that the employee is the best-qualified candidate.<sup>151</sup> Because of the circuit split, the *Haynes* court rejected the employee's reliance on one side's interpretation of the ADA's reassignment duty.<sup>152</sup>

#### IV. POLICY

Non-competitive reassignment under the ADA should trump best-qualified hiring policies because doing so furthers the goals of the statute, alleviates practical difficulties of employing individuals with a disability, and is not unduly burdensome to employers.<sup>153</sup> Ten years after its

---

147. See *Haynes v. AT&T Mobility, LLC*, No. 1:09-CV-450, 2011 WL 532218, at \*4-5 (M.D. Pa. Feb. 8, 2011) (finding that *Haynes* may only avoid summary judgment against him by showing that his reassignment is reasonable over the most qualified applicant, a duty not required by the ADA).

148. See *id.* at \*4 (finding the employee's reassignment request unreasonable unless he proved that it justified violating the best-qualified hiring policy). *But see* Anderson, *supra* note 130, at 4 (arguing that requiring employees to justify why reassignment trumps a non-discriminatory policy creates a presumption of undue hardship that increases the plaintiff's initial burden to show a reasonable accommodation).

149. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (explaining that once the employee shows that reassignment is feasible, an employer must then show case-specific undue hardship).

150. Compare Anderson, *supra* note 130, at 21 (stating that the Court created a rebuttable presumption that violating seniority systems is unreasonable), with *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 763 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (explaining that the presumption in *Barnett* was a narrow exception that should not overshadow the two-step analysis).

151. See *Smith v. Midland Bank, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999) (dismissing the increased burden as unwarranted by the ADA's language or legislative history).

152. See *Haynes*, 2011 WL 532218, at \*4 n.8 (rejecting the plaintiff's reliance on the authority of one side of the split).

153. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 112, at 4-5 (noting companies' inability to find qualified workers with a disability and the need to educate the private sector to accurately assess the burdens of employing individuals with a disability).

enactment, the ADA's reasonable accommodation requirement continued to perplex employers, employees, and their counsel; today, the statute remains just as unworkable as it was then.<sup>154</sup> If reassignment, a last resort effort to retain the employee, is presumed unreasonable in light of a best-qualified hiring policy, many employees with a disability are likely to become unemployed and dependent.<sup>155</sup> An employer's imposition of a best-qualified hiring policy over the ADA's reassignment obligation may often result in a constructive firing or demotion of individuals with a disability similar to the fictional St. Louis employee from the earlier hypothetical.<sup>156</sup> Congress expressly sought to combat this problem through the ADA.<sup>157</sup> Clarification is even more urgent now given recent and future growth of the population of individuals with a disability.<sup>158</sup> Not only will the influx of aging Baby Boomers affect the size of the community of people with disabilities, recent amendments to the ADA have magnified the implications of the statute's ambiguities.<sup>159</sup>

To ensure the equal administration of the law, Supreme Court guidance is necessary when employers and employees are faced with varying interpretations of the ADA.<sup>160</sup> Given that large companies are more likely to employ people with disabilities, those that may operate simultaneously in conflicting Circuit Court jurisdictions need a bright-line rule that clearly defines the companies' obligations.<sup>161</sup> By addressing the issue and

---

154. See, e.g., Atkins, *supra* note 1 (commenting that the ADA's requirements are unclear and employers must tread lightly to ensure compliance); Fuller, *supra* note 30, at 25 (stating that, in the year 2000, that the ADA remained a complex statute to interpret, utilize, and follow).

155. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(8) (2009) (lamenting the billions of dollars in costs the United States incurs from the dependency and non-productivity of individuals with a disability as a result of widespread discrimination).

156. See *infra* Part I.

157. See H.R. Rep. No. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 (stating that reassignment prevents unemployment and the employer's loss of a qualified worker).

158. See U.S. DEPT. OF LABOR, OFF. OF DISABILITY EMP'T POL'Y, CHANGING DEMOGRAPHIC TRENDS THAT AFFECT THE WORKPLACE AND IMPLICATIONS FOR PEOPLE WITH DISABILITIES VOLUME I: LITERATURE REVIEW AND GAPS ANALYSIS, 29 (2009) [hereinafter CHANGING DEMOGRAPHIC TRENDS] (predicting that the aging Baby Boomer generation will impact the population of individuals with disabilities).

159. See *id.* at 3 (stating that the incidence of disability is directly correlated to age and will likely increase); see also 29 C.F.R. § 1630.1 (2014) (stating that the purpose of the ADA Amendments Act of 2008 is to expand ADA coverage).

160. See Lavin, *supra* note 9, at 4 (opining that Supreme Court guidance would provide a greater degree of certainty when considering reassignment).

161. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 111, at 2 (reporting that

developing a rule that furthers ADA goals, and allows predictability to all interested parties, the Supreme Court achieves other goals that Congress sought to accomplish when enacting the ADA.<sup>162</sup>

A survey conducted by the Department of Labor highlights key concerns and practical challenges of employing individuals with a disability.<sup>163</sup> Delineated interpretations of the ADA reassignment duty are most problematic where they affect large companies; such companies have more employment opportunities for individuals with a disability but also are most likely to operate in conflicting jurisdictions.<sup>164</sup> Retention of a qualified employee with a disability helps combat one of the greatest challenges large companies face when recruiting individuals with a disability.<sup>165</sup>

#### V. CONCLUSION

The Supreme Court should have found that equal administration of justice under the ADA demands review, and granted certiorari in *EEOC v. United Airlines* as it did in *Huber v. Wal-Mart Stores, Inc.*<sup>166</sup> The Court should adopt the Seventh Circuit's interpretation of the ADA, mandating non-competitive reassignment of eligible individuals with a disability as a reasonable accommodation.<sup>167</sup> Further, the Supreme Court should find that reassignment that contravenes a company's best-qualified policy does not infringe employer or employee interests such that it would ordinarily

---

33.8% of companies with 250 or more employees recruit people with disabilities and 53.1% employ them).

162. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(2) (2009) (stating that Congress intended to address disability discrimination by providing "clear" and "consistent" enforceable standards under the ADA).

163. See SURVEY OF EMPLOYER PERSPECTIVES, *supra* note 112, at 6 (stating the purpose of the survey was to understand employer perspectives about employing individuals with a disability to increase employment opportunities and influence developing policy).

164. See *id.* at 9 (finding that companies with a larger workforce are more likely to diversify their workforce by hiring individuals with disabilities).

165. See *id.* at 4 (explaining that large companies consider the difficulty of finding qualified people with disabilities as their number one challenge).

166. See *Huber v. Wal-Mart Stores, Inc.*, 128 S. Ct. 742 (2007) (granting petitioner's writ of certiorari, limited to the question regarding the extent of the respondent's ADA obligation).

167. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (agreeing with the Court of Appeals for the District of Columbia and the Tenth Circuit that the ADA requires employers to appoint employees with a disability to vacant positions).

748 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 22:3

constitute undue hardship on the employer.<sup>168</sup> Employers with a best-qualified hiring system do not provide a calculable measure of earned benefits, but often use subjective criteria.<sup>169</sup> Additionally, because a uniform interpretation of the ADA will ensure the efficiency of the statute, and clarify employer's obligations in all jurisdictions, the Court should find that non-competitive reassignment is required.<sup>170</sup> A Supreme Court decision in congruence with the Seventh Circuit will eliminate disparate treatment of individuals with a disability such as those in the hypothetical, and provide the assistance that Congress intended for a growing population of people with disabilities.<sup>171</sup>

---

168. See *id.* (holding that deviation from a best-qualified hiring system does not always create the same undue hardship as deviation from a seniority system).

169. See *Johnson v. Transp. Agency*, 480 U.S. 616, 641-42 n.17 (1987) (noting the subjectivity of determining the best-qualified applicant).

170. See *Lavin*, *supra* note 9, at 4 (affirming that because of the continued split, the issue must be addressed again to clarify employers' ADA duties).

171. See *CHANGING DEMOGRAPHIC TRENDS*, *supra* note 158, at 3 (predicting that disability rates will dramatically increase over the next forty years).