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

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

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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. The two employees are identical in every way: performance, education, and experience. 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"). 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. 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. 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. However, the employee in St. Louis is forced to compete with other applicants who apply for the vacant position. 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.

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. 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).


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. 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. 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. 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. 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. It is unclear why the Supreme Court denied United Airlines’ application for a writ of certiorari, and the Court did not offer an explanation. 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.

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).


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. 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. 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.* 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.* Part IV argues that subordination of an employer’s best-qualified hiring policy in favor of reassignment advances the aims of the ADA. 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

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*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-reassig (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).


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.  

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. Among other things, the purpose of the Act was to provide definitive and enforceable standards that would address discrimination against Americans with disabilities. 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. In particular, the ADA prohibits employers from discriminating against individuals based on their disability with regard to various employment procedures. 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. 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. 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).


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.\textsuperscript{29} Since its enactment, the ADA’s “reasonable accommodations” requirement has perplexed employees and employers.\textsuperscript{30} 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.\textsuperscript{31}

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.\textsuperscript{32}

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.\textsuperscript{33} 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.\textsuperscript{34} Reversing one of its previous

\textsuperscript{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).

\textsuperscript{30}. See, e.g., L. Lynnette Fuller, \textit{The ADA’s Reasonable Accommodation Requirement Ten Years Later}, \textit{Popular Government}, at 18 (2000) (noting that the ADA, although successful in granting civil rights protections, was misunderstood by many individuals).

\textsuperscript{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”).

\textsuperscript{32}. See \textit{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).

\textsuperscript{33}. See id. (describing one interpretation of the ADA’s reassignment obligation).

\textsuperscript{34}. See EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), \textit{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.35 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.36 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.37 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.38 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.39 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.40 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.41

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).
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.42 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.43 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.44 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.45 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.46 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.47 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. Additionally, the Fifth Circuit found that the ADA merely requires the prevention of disability discrimination.

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. 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. 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.

In *Shapiro v. Township of Lakewood*, the Third Circuit explained the two-pronged analysis of reassignment requests set forth by the *Barnett* Court. 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.

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).


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.55

Lower courts have interpreted the Supreme Court’s Barnett analysis in multiple ways, both supporting and rejecting the subordination of best-qualified hiring policies.56 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.57 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.58 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.59 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.60 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.61 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.  

Courts have even misinterpreted the Supreme Court’s analysis of whether circumvention of a non-discriminatory policy is reasonable. 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. After applying for various other positions but receiving no offers, the customer service representative was placed on leave and eventually terminated. 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. 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. 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.

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.69 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.70 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.71 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.72

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.73 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.74 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.\textsuperscript{75}

Similarly, the \textit{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.\textsuperscript{76} Although the Court ultimately determined that the requested reassignment in \textit{Barnett} was unreasonable, the Court found that the employee satisfied the first-prong of the reasonable accommodation inquiry.\textsuperscript{77} 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.\textsuperscript{78} 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.\textsuperscript{79} 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.\textsuperscript{80} The existence of a best-qualified hiring policy is most influential to the reasonableness of a requested reassignment under the second-prong of the \textit{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).

\textsuperscript{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).

\textsuperscript{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).

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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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.81


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.82 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.83 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.84 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.85 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.86

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).
Unlike seniority systems, allowing reassignment to trump best-qualified hiring policies does not violate expectations regarding job security. 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. 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. 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. 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. 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. 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. Best-qualified systems also have an


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).


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.\textsuperscript{95} After applicants meet that threshold level, company personnel decide who is better, based on many factors.\textsuperscript{96} 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.\textsuperscript{97} 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.\textsuperscript{98} 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.\textsuperscript{99} The Fourth Circuit agrees with the Seventh Circuit’s interpretation of Barnett’s application to best-qualified systems.\textsuperscript{100} The Kosakoski Court rejected the company’s reliance on Huber, which followed the now

\textsuperscript{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).

\textsuperscript{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)).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

reversed Humiston-Keeling without further analysis. ¹⁰¹

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. ¹⁰² 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. ¹⁰³ The Seventh Circuit differentiates the two employment systems and their respective effects on reassignment under the ADA. ¹⁰⁴ 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. ¹⁰⁵ 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. ¹⁰⁶ 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. ¹⁰⁷

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).


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).
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.\textsuperscript{108} 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.\textsuperscript{109} Unlike seniority systems, employer’s best-qualified hiring systems do not offer the same objectively measured expectations that the Court protected in \textit{Barnett}.\textsuperscript{110} 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.\textsuperscript{111} 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.\textsuperscript{112} 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.\textsuperscript{113}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{110} See \textit{Barnett}, 535 U.S. at 394 (permitting summary judgment where requested accommodations conflict with seniority systems).

\textsuperscript{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).

\textsuperscript{112} See U.S. DEPT. OF LABOR, OFF. OF DISABILITY EMP’T POL’Y, \textit{SURVEY OF EMPLOYER PERSPECTIVES ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES}, TECH. REP., 2 (2008) [hereinafter \textit{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).

\textsuperscript{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.\(^{114}\) Thus, mandating reassignment under the ADA would not create undue hardship through reverse disability discrimination litigation by competing applicants without a disability.\(^{115}\) 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.\(^{116}\) The Supreme Court has upheld measures taken by private entities that are consistent with congressional statutory goals and intended to correct historical discrimination.\(^{117}\) 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.\(^{118}\)

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.\(^{119}\) 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. 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. 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. 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. 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.

The Title VII framework permits claims for reverse race discrimination. The protection of whites from racial discrimination was derived from the legislative history and historical context from which the Act was conceived. 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. 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).


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.128

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.129 Reassignment that circumvents an existing best-qualified policy would not upset Congress’ and the Court’s balancing of employee rights and employer obligations.130 The courts have carefully limited the ADA from infringing upon important employee and employer rights.131 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.132 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.133 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).
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.134

Furthermore, the rigidity of seniority systems contrasts directly with the malleability of a best-qualified system, thereby creating varied expectations.135 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.136 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 discretionar y.137

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.138 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.139 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.140 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).


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. Lower courts will apply a consistent and predictable standard when considering the parties’ duty to show that the reassignment is or is not reasonable. 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. 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. In addition, the goals of the ADA are accomplished because individuals with a disability remain active participants in the country’s workforce.

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. 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.

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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).


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. This requirement conflates the two-step analysis introduced in Barnett into one elevated burden thrust upon the employee. 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. There is no rebuttable presumption that reassignment that circumvents best-qualified hiring policies is unreasonable. 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. Because of the circuit split, the Haynes court rejected the employee’s reliance on one side’s interpretation of the ADA’s reassignment duty.

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. 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 proves 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).


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.\textsuperscript{154} 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.\textsuperscript{155} 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.\textsuperscript{156} Congress expressly sought to combat this problem through the ADA.\textsuperscript{157} Clarification is even more urgent now given recent and future growth of the population of individuals with a disability.\textsuperscript{158} 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.\textsuperscript{159}

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.\textsuperscript{160} 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.\textsuperscript{161} By addressing the issue and

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{156} See infra Part I.
  \item \textsuperscript{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).
  \item \textsuperscript{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).
  \item \textsuperscript{160} See Lavin, supra note 9, at 4 (opining that Supreme Court guidance would provide a greater degree of certainty when considering reassignment).
  \item \textsuperscript{161} See SURVEY OF EMPLOYER PERSPECTIVES, supra note 111, at 2 (reporting that
\end{itemize}
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. 162

A survey conducted by the Department of Labor highlights key concerns and practical challenges of employing individuals with a disability. 163 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. 164 Retention of a qualified employee with a disability helps combat one of the greatest challenges large companies face when recruiting individuals with a disability. 165

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. 166 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. 167 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).


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).


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).
constitute undue hardship on the employer. 168 Employers with a best-qualified hiring system do not provide a calculable measure of earned benefits, but often use subjective criteria. 169 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. 170 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. 171

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).


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).