REASONABLE ACCOMMODATION AND REASSIGNMENT UNDER THE AMERICANS WITH DISABILITIES ACT: ANSWERS, QUESTIONS AND SUGGESTED SOLUTIONS AFTER *U.S. AIRWAYS, INC. V. BARNETT*

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I. INTRODUCTION

The enactment of the Americans with Disabilities Act ("ADA") has triggered a series of explosions over the past decade.[1] Although enacted with widespread support,[2] the statute almost immediately spawned a deluge of litigation.[3] This litigation explosion, coupled with the rather imprecise language of the statute, resulted in a startling diversity of judicial interpretation on a host of key ADA issues.[4] These two phenomena, in turn, have led to a more recent explosion

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213. The ADA went into effect with respect to employers with twenty-five or more employees on July 26, 1992, and with respect to employers with between fifteen and twenty-four employees on July 26, 1994. *See* 42 U.S.C. § 12111(5)(A); EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 10.3 (1992) [hereinafter TECHNICAL ASSISTANCE MANUAL].

2. The ADA passed both houses of Congress by wide margins. The House of Representatives passed the ADA with a vote of 403–20. 136 CONG. REC. H 2599-624 (1990). The Senate voted to approve the ADA with a margin of 76-8. 135 CONG. REC. S 10,765–803 (1989).

3. *See* Equal Employment Opportunity Comm'n, Americans with Disabilities Act of 1990 (ADA) Charges FY 1992–FY 2002 (Feb. 6, 2003), *available at* http://www.eeoc.gov/stats/ADA-charges.html (reporting that 174,244 charges have been filed under the ADA from the Act's effective date in 1992 through September 30, 2002).

4. *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27 (1999) (describing ten contentious ADA issues on

explosion in ADA cases heard by the Supreme Court. In a brief span from 1998 to 2002, the Supreme Court issued no less than thirteen decisions interpreting the ADA.[5] Indeed, employment-based ADA cases accounted for slightly more than 22% of all labor and employment cases decided during the Court's 2001–2002 term.[6]

A considerable portion of the cases reviewed by the Supreme Court reflect the fact that the ADA's anti-discrimination formula differs from that of other federal anti-discrimination statutes. Under Title VII, for example, an employer is prohibited from discriminating "because of" an individual's race, color, religion, sex, or national origin.[7] The ADA's anti-discrimination formula is more complicated in two significant respects. First, only individuals who have a qualifying "disability" have standing to assert a claim under the ADA.[8] Second, in ascertaining whether an employer is discriminating in violation of the ADA, the statute asks whether the employee is qualified for the job "with or without reasonable accommodation."[9]

Discrimination Law, 78 OR. L. REV. 27 (1999) (describing ten contentious ADA issues on which the circuit courts and/or the Equal Employment Opportunity Commission took conflicting positions and also discussing the reasons for this widespread judicial dissonance).

5. Barnes v. Gorman, 536 U.S. 181 (2002); Chevron USA, Inc. v. Echazabal, 536 U.S. 72 (2002); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001); Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998).

6. *See* Cynthia Estlund, *The Supreme Court's Labor and Employment Cases of the 2001–2002 Term*, 18 LAB. LAW. 291 (2002).

7. 42 U.S.C. § 2000e-2(a) (2003). The ADEA uses similar language in banning discrimination because of age. *See* 29 U.S.C. § 623(a)(1) (2003) ("It shall be unlawful for an employer . . . [to] discriminate against any individual . . . because of such individual's age.").

8. *See* 42 U.S.C. § 12112(a) (2003). In contrast, Title VII does not impose any class membership standing requirement. Anyone can assert a claim of discrimination under the statute. *See* Befort & Thomas, *supra* note 4, at 69.

9. *See* 42 U.S.C. § 12112(a). Neither Title VII nor the ADEA generally impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of the job. Instead, these statutes merely invoke a negative prohibition against discrimination. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40–44 (2000) (contrasting how the ADA employs a different treatment model of discrimination while most anti-discrimination statutes employ an equal treatment model of discrimination). While Title VII does impose a duty on employers to accommodate the religious observances and practices of its employees (see 42 U.S.C. § 2000e(j) (2003)), the Supreme Court has construed this duty as far more limited than that imposed by the ADA. *See infra* note 18.

Much of the litigation that has arisen under the ADA concerns these two unique ADA provisions. During the ADA's first decade, disputes concerning the breadth of the "disability" definition garnered the bulk of judicial attention. Six of the Supreme Court's thirteen ADA decisions, for example, have dealt with this issue.[10] As the Supreme Court has clarified, and narrowed,[11] who is disabled for purposes of the ADA, the focus of attention now is shifting to the reasonable accommodation provision.

The Supreme Court issued its first decision in a Title I reasonable accommodation case in 2002 in *U.S. Airways, Inc. v. Barnett*.[12] In that case, the Court was confronted with the issue of whether an employer, in order to comply with the ADA's reasonable accommodation duty, must reassign a disabled employee to a vacant position in spite of the fact that the employer's longstanding seniority system would award the position to a more senior, non-disabled employee.[13] In many respects, it is fitting that the Supreme Court's initial take on the reasonable accommodation issue involved a question of reassignment, since the reassignment accommodation has proven to be one of the most difficult and controversial of all accommodation issues.[14] Indeed, a number of lower courts have declined to require employers to reassign disabled workers on the grounds that doing so would amount to preferential treatment akin to affirmative action.[15]

Since the *Barnett* case represents the Supreme Court's initial construction of the ADA's reasonable accommodation and reassignment concepts, the Court's decision had the potential to offer considerable guidance as to the

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10. *See generally Toyota Motor Mfg.*, 534 U.S. 184; *Albertsons, Inc.*, 527 U.S. 555; *Murphy*, 527 U.S. 516; *Sutton*, 527 U.S. 471; *Policy Mgmt. Sys. Corp.*, 526 U.S. 795; *Bragdon*, 524 U.S. 624.

11. A number of commentators have argued that the judicial construction of the "disability" standing requirement has unduly restricted access to the protections of the ADA. *See, e.g.*, Diller *supra* note 9; Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (finding, based on empirical analysis of decided court decisions, that defendants prevail in 92.7% of all ADA cases).

12. 535 U.S. 391 (2002). Title I of the ADA, 42 U.S.C. §§ 12111–17, governs disability discrimination in employment. Other ADA titles apply to state and local government entities (Title II, 42 U.S.C. §§ 12181–89) and to public accommodations provided by private entities (Title III, 42 U.S.C. §§ 12131–50). The Supreme Court previously had decided one case involving an issue of reasonable accommodation under Title III. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (holding that certain professional golf tournaments must permit a disabled golf professional to ride a cart so as to enable him to participate in the tournaments, and that such a reasonable modification would not fundamentally alter the nature of those events).

13. *See Barnett*, 535 U.S. at 393.

14. *See infra* notes 20–24 and accompanying text; *see also* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 447–49 (2002) (discussing how reassignment and leave of absence pose the most difficulties of any type of reasonable accommodation).

15. *See infra* notes 108–12, 123–28 and accompanying text.

proper scope of these concepts, in particular, as well as to the future development of ADA jurisprudence, in general. The *Barnett* decision fulfills some of these expectations. The *Barnett* majority ruled that reassignment by way of an exception to a seniority system is not reasonable in the run of cases, at least in the absence of a showing of special circumstances.[16] The decision also provides many clues concerning the ADA's possible future direction. The five opinions issued in *Barnett*, however, raise or avoid as many questions as they provide answers. These opinions, moreover, reveal a Court with widely divergent views of the ADA's mechanics and objectives.

This Article attempts a critical analysis of the various answers and questions emanating from the *Barnett* decision. The Article also offers some solutions for *Barnett*'s unanswered questions. Many of these questions go to the heart of just what the ADA is intended to accomplish: questions such as the appropriateness of preferential treatment for the disabled, the burden of proof allocation for establishing the existence of a reasonable accommodation, and whether the reassignment accommodation will also defer to other types of facially neutral employer transfer and assignment policies that negatively impact employment opportunities for the disabled.

Part II of this Article provides an overview of the ADA's reasonable accommodation requirement, including a discussion of two procedural issues concerning the scope of the accommodation duty that have divided the circuit courts. Part III looks more narrowly at the reassignment accommodation and three contentious reassignment issues on which the circuit courts and/or the Equal Employment Opportunity Commission ("EEOC") similarly are divided. Following that background, Part IV discusses the *Barnett* decision, including each of the five separate opinions. Part V then analyzes both the answers provided by the Court in *Barnett* and the various questions that remain unanswered in its wake. Finally, this Part goes on to suggest some policy-based solutions for these remaining questions as well as for the future direction of American disability discrimination law.

II. THE REASONABLE ACCOMMODATION REQUIREMENT

A. The Role of Reasonable Accommodation Under the ADA

The ADA prohibits discrimination against a qualified individual with a disability.[17] The ADA's discrimination prohibition differs from that of other employment discrimination statutes, however, in that it requires an employer to gauge an employee's qualifications only after providing a reasonable

16. *See Barnett*, 535 U.S. at 404–05.

17. 42 U.S.C. § 12112(a). An individual has a "disability" for purposes of the ADA if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

accommodation designed to assist employee performance.[18] The ADA defines a "qualified individual with a disability" as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[19] This definition requires employers to engage in a two-step inquiry: (1) identify the essential functions of the job in question; and (2) determine whether the individual can perform those essential functions with or without reasonable accommodation.[20]

The EEOC, the administrative agency charged with promulgating regulations to implement the statutory language of the ADA,[21] defines essential functions as the "fundamental job duties" of the employment position, but not those functions that are merely "marginal" in nature.[22] The regulations state that a job function may be considered essential because the position exists to perform that function, only a limited number of employees are available to perform the job function, and/or the function involves a high degree of specialization.[23]

Once the essential functions of the position are identified, the employer next must ask whether the disabled individual can perform these essential functions without reasonable accommodation. If the answer is in the affirmative, then the individual is "qualified" under the statute. If the answer is in the negative, then the employer has an affirmative obligation to provide the individual with a reasonable accommodation unless doing so would cause the employer to suffer an undue hardship.[24]

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18. The reasonable accommodation requirement is unique to disability law. In addition to the ADA, the Rehabilitation Act of 1973, which bans disability discrimination by federal employers, contractors and grant recipients, included a similar reasonable accommodation requirement. 29 U.S.C. §§ 791–96 (2003). With the exception of persons claiming discrimination on the basis of religion, neither Title VII, 42 U.S.C. § 2000e(j) (2003), nor the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–34 (2003), entitles persons protected by either statute to demand accommodations in their favor. The Supreme Court has construed the reasonable accommodation requirement for religion very narrowly, holding that an employer need not incur more than a *de minimis* hardship in providing an accommodation for religious purposes. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

19. 42 U.S.C. § 12111(8) (2003).

20. *See* Befort & Thomas, *supra* note 4, at 35.

21. *See* 42 U.S.C. § 12116 (2003) (stating that "the Commission shall issue regulations in an accessible format to carry out this subchapter").

22. 29 C.F.R. § 1630.2(n)(1) (2003).

23. *See id.* § 1630.2(n)(2). The ADA states that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8).

24. *See* Borkowski v.Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (stating that "the plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions").

The ADA excuses an employer from accommodating an individual with a disability if the accommodation would impose an undue hardship on that employer.[25] The statute defines undue hardship as "an action requiring significant difficulty or expense,"[26] and provides a list of factors to consider in determining whether the proposed accommodation would cause a particular employer to suffer an undue hardship.[27] Unless an employer proves undue hardship, its failure to provide an accommodation that is both available and reasonable results in a violation of the statute.[28]

B. Types of Reasonable Accommodation

Reasonable accommodation is defined generally as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy employment opportunities."[29] The ADA states that a reasonable accommodation may include:

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25. *See* 42 U.S.C. § 12112(b)(5)(A) (2003) (stating that an employer does not violate the ADA for failing to provide a reasonable accommodation if the employer can "demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

26. 42 U.S.C. § 12111(10)(A).

27. Section 12111(10)(B) provides that in determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

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

See also Befort & Thomas, *supra* note 4, at 37 (describing the undue hardship defense as a "floating concept that varies with the nature and cost of the proposed accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general").

28. *See* 42 U.S.C. § 12112(b)(5)(A) (defining discrimination under the ADA to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee"). The federal courts of appeal are split as to the requisite burdens of proof in establishing a reasonable accommodation.

29. 29 C.F.R. PART 1630 APPENDIX § 1630.2(o) (2003) [hereinafter Interpretive Guidance].

The EEOC's Interpretive Guidance states that "[t]his listing is not intended to be exhaustive of accommodation possibilities."[31]

The range of contemplated ADA reasonable accommodations may be grouped into five functional categories. They are:

(1) *Making changes to existing facilities.* An employer's duty to modify its facilities includes making both work and non-work areas used by employees accessible to a disabled employee.[32] Modifications to restrooms, break rooms, and lunchrooms thus may be required as reasonable accommodations.[33]

(2) *Providing assistive devices or personnel.* The statute lists the "acquisition or modification of equipment or devices" and "the provision of qualified readers or interpreters" as reasonable accommodations.[34] The Interpretive Guidance further suggests that an employer may be required to permit a disabled employee to utilize his or her own equipment or aids, such as a guide dog for an individual who is blind, even though the employer itself may not be required to provide such an accommodation.[35]

(3) *Job restructuring.* This type of accommodation entails making changes to an employee's current job.[36] While an employer is not required to reallocate essential job functions,[37] an employer may need to reallocate or redistribute nonessential, marginal job functions that a qualified individual with a disability is unable to perform.[38] An employer also may be required to change

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31. Interpretive Guidance, *supra* note 29, § 1630.2(o).

32. *See id.*

33. *See id.*

34. 42 U.S.C. § 12111(9)(B).

35. *See* Interpretive Guidance, *supra* note 29, § 1630.2(o).

36. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1314–15 (D.C. Cir. 1998) (en banc) (Silberman, J., dissenting) (explaining how job restructuring involves making accommodations to a disabled employee in his current position).

37. *See* Interpretive Guidance, *supra* note 29, § 1630.2(o) ("An employer or other covered entity is not required to reallocate essential functions.").

38. *See id.* The EEOC's Interpretive Guidance demonstrates this type of accommodation by way of the following illustration:

> An employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position.

Id.

when and how a job function is performed, such as by authorizing modified or part-time work schedules.[39]

(4) *Reassignment to a vacant position.* The reassignment accommodation involves placing the disabled employee in a new position. This type of accommodation goes a step beyond those listed above in that, instead of making adjustments to enable an employee to perform his or her current job, it transfers the disabled employee to an entirely different job.

(5) *Leave of absence.* Although not listed in the statute, both the EEOC[40] and the courts[41] recognize that a leave of absence may serve as an additional type of reasonable accommodation. A leave of absence may enable a disabled employee, through rest and/or rehabilitation, to return to productive work.[42]

C. The Interactive Process

The EEOC regulations state that once an individual with a disability requests an accommodation, the employer should consult with that employee in ascertaining an appropriate reasonable accommodation. The regulations envision that the employer will initiate an "informal, interactive process" with a qualified applicant or employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[43]

The EEOC's Interpretive Guidance provides more detail as to the suggested structure of this process. The Guidance states that it should be a "flexible" process that involves "the individual assessment of both the particular

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> individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position.

Id.

39. *See id.* ("For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour.").

40. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *available at* http://www.eeoc.gov/docs/accommodation.html (last modified Oct. 2002) [hereinafter ENFORCEMENT GUIDANCE].

41. *See, e.g.*, Cehrs v. Northeast Ohio Alzheimer's Research Cent., 155 F.3d 775 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998).

42. *See generally* Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995).

43. 29 C.F.R. § 1630.2(o)(3) (1999).

job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation."[44] The Guidance goes on to recommend that the parties jointly engage in a four-step "problem solving approach":

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
>
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
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> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[45]

D. Two Contentious Reasonable Accommodation Issues

At the time the Supreme Court decided *Barnett*, the circuit courts of appeal were divided on two issues relating to the general scope of the reasonable accommodation prong of the ADA's anti-discrimination formula. Both issues relate to the procedural burdens borne the parties when attempting to ascertain the existence of a viable reasonable accommodation.

1. What is the appropriate burden of proof allocation in determining the existence of a reasonable accommodation?

The federal courts of appeal are split as to the requisite burdens of proof in establishing the appropriateness of a reasonable accommodation. Some early Rehabilitation Act cases placed the burden entirely on the employer to demonstrate that a reasonable accommodation was not possible.[46] Courts interpreting the ADA have not followed this approach, but instead generally have adopted one of two competing formulations. Several circuits have read the statutory language as dividing the reasonable accommodation and undue hardship proof burdens equally among the parties so that the disabled employee bears the burden of proof to show a reasonable accommodation while the employer bears a

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44. Interpretive Guidance, *supra* note 29, § 1630.9.

45. *Id.*

46. *See, e.g.*, Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

similar burden to establish the existence of an undue hardship.[47] Under this approach, the employee bears the burden of persuasion to show both the existence and reasonableness of a proposed accommodation that would enable the employee to perform the essential functions of the job in question.[48] If an employee can make this showing, then the burden shifts to the employer to demonstrate that the proposed accommodation would pose an undue hardship.[49]

Other circuit decisions place only a burden of production on the disabled employee.[50] Under this approach, an employee's burden is satisfied if the employee "suggest[s] the existence of a plausible accommodation, the costs of which, facially, do not exceed its benefits."[51] The employer, however, bears the ultimate burden of persuasion on the issue of reasonableness, which "merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."[52]

The EEOC, in litigation, has urged yet another variation. The EEOC has argued that the only burden that an employee should bear is to show that the suggested accommodation would effectively enable the employee to perform the essential functions of the job.[53] According to the EEOC, other issues potentially bearing on reasonableness, such as cost or difficulty, should be a matter of proof for the employer.[54] No circuit court, however, has adopted the EEOC's position.[55]

2. What is the employer's obligation to participate in the inter-active process?

While the ADA is silent as to the process by which the parties should identify the existence of a reasonable accommodation, the regulations interpreting the ADA state that "it may necessary for the employer to initiate an informal, interactive process with the [disabled] individual."[56] Based upon this language, a number of circuit courts have ruled that an employer has an affirmative obligation to engage in an interactive process once it has been put on notice that an

47. *See, e.g.*, Barnett v. U.S. Air, Inc., 196 F.3d 979, 988–89 (9th Cir. 1999); Willis v. Conopco, Inc., 108 F.3d 282, 285–86 (11th Cir. 1997); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183, 1186 (6th Cir. 1996); Barth v. Gelb, 2 F.3d 1180, 1186 (D.C. Cir. 1993) (interpreting the Rehabilitation Act).

48. *See* Barnett v. U.S. Air, Inc., 157 F.3d 744, 749 (9th Cir. 1998); *Willis*, 108 F.3d at 285–86.

49. *See Barnett*, 157 F.3d at 749; *Willis*, 108 F.3d at 285–86.

50. *See, e.g.*, Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258–59 (1st Cir. 2001); Walton v. Mental Health Ass'n., 168 F.3d 661, 670 (3d Cir. 1999); Stone v. City of Mount Vernon, 118 F.3d 92, 98 (2d Cir. 1997).

51. *Reed*, 244 F.3d at 258.

52. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).

53. *See Reed*, 244 F.3d at 259.

54. *Id.*

55. *Id.* at n.4.

56. 29 C.F.R. § 1630.2(o)(3) (1999).

accommodation may be necessary.[57] Other circuit courts, however, have found that participation in the interactive process is not mandatory.[58] These courts point out that the statute only mandates the provision of a reasonable accommodation if such exists, but not participation in a procedural step that may or may not bear fruit.[59]

The courts also are divided with respect to the appropriate consequences for failing to engage in the interactive process. While at least one circuit court decision has suggested that independent liability may exist under the ADA for a party who fails to participate in the interactive process,[60] most courts hold that liability will arise only where an employer has failed as a matter of substance to implement a reasonable accommodation that would enable a disabled employee to perform adequately in the workplace.[61] Taking a somewhat different tack, an apparently growing number of circuit courts have ruled that an employer's failure to engage in the interactive process ordinarily should warrant a trial court's refusal to grant an employer's motion for summary judgment.[62] Some courts reach this conclusion on the grounds that a failure to participate in the interactive process constitutes evidence of bad faith,[63] while others conclude that an employer's failure to consult shifts the "burden of production concerning the availability of a reasonable accommodation from the employee to the employer."[64]

III. THE REASSIGNMENT ACCOMMODATION

A. EEOC Guidelines on Reassignment

The EEOC has issued several interpretive aids that provide guidance concerning the scope of the reassignment accommodation. These include formal regulations,[65] the Interpretive Guidance of Title I,[66] Technical Assistance

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57. *See, e.g.*, Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944 (8th Cir. 1999); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

58. *See, e.g.*, Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997); White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

59. *Willis*, 108 F.3d at 285; *White*, 45 F.3d at 363.

60. *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135–36 (7th Cir. 1996).

61. *See, e.g.*, Kvorjak v. Maine, 259 F.3d 48, 54 n.11 (1st Cir. 2001); Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1113–14 (9th Cir. 2000) (en banc); Rehling v. City of Chicago, 207 F.3d 1009, 1016 (7th Cir. 2000).

62. *See, e.g.*, Morton v. United Parcel Serv., 272 F.3d 1249 (9th Cir. 2001); *Fjellestad*, 188 F.3d at 952; Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 318 (3d Cir. 1999).

63. *See Fjellestad*, 188 F.3d at 952; *Taylor*, 184 F.3d at 318.

64. Mays v. Principi, 301 F.3d 866 (7th Cir. 2002).

65. *See* 29 C.F.R. §§ 1630.1–1630.16 (1999).

66. Interpretive Guidance, *supra* note 29, §§ 1630.1–16.

Manual,[67] and Enforcement Guidance on Reasonable Accommodation and Undue Hardship.[68] Taken together, these guidelines establish a number of basic principles that courts generally have accepted as establishing the parameters of the reassignment accommodation.[69]

First, reassignment is required only for current employees, not applicants.[70] Although the language of the statute makes no distinction between employees and applicants in this regard, the EEOC follows the legislative history[71] in concluding that "[r]eassignment is not available to applicants."[72]

Second, "[r]eassignment is the reasonable accommodation of last resort."[73] The Enforcement Guidance, for example, provides that reassignment "is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodation would impose an undue hardship."[74]

Third, an employer is under no obligation to reassign a disabled employee except to a position that is truly vacant.[75] The Enforcement Guidance defines a vacancy as a position that is either available when the employee requests a reasonable accommodation or one that the employer is aware will become available within a reasonable time.[76] The regulations further explain that a position is considered vacant "even if an employer has posted a notice or announcement seeking applications for that position."[77] An employer is not required to "bump" another employee in order to create a vacancy,[78] nor is an employer required either

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67. TECHNICAL ASSISTANCE MANUAL, *supra* note 1.

68. ENFORCEMENT GUIDANCE, *supra* note 40.

69. *See* John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 731–32 (2000) (noting a consensus among federal courts concerning certain steps that employers are not obligated to take in order to comply with the reassignment requirement).

70. *See* Interpretive Guidance, *supra* note 29, § 1630.2(o).

71. *See* H.R. REP. NO. 101-485, pt. 2, at 56 (1990) (referring to reassignment for employees, but not applicants).

72. Interpretive Guidance, *supra* note 29, § 1630.2(o).

73. ENFORCEMENT GUIDANCE, *supra* note 40; *see also* Interpretive Guidance, *supra* note 29, § 1630.2(o).

74. ENFORCEMENT GUIDANCE, *supra* note 40; *see also* Interpretive Guidance, *supra* note 29, § 1630.2(o) (stating that "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship").

75. ENFORCEMENT GUIDANCE, *supra* note 40 (defining "vacant").

76. *Id.*; *see also* Interpretive Guidance, *supra* note 29, § 1630.2(o) (stating that what constitutes "[a] 'reasonable amount of time' should be determined in light of the totality of the circumstances").

77. *See* ENFORCEMENT GUIDANCE, *supra* note 40.

78. *Id.*

to create a new position for a disabled employee or to promote a disabled employee to a higher graded position.[79]

Fourth, even if the "vacancy" of a position is established, an employer need not reassign a disabled individual unless he or she is "qualified" for the new position.[80] Otherwise stated, the disabled employee must demonstrate that he or she satisfies the requisite job requirements and is capable of performing the position's essential functions with or without reasonable accommodation.[81]

Fifth, as with all the accommodations listed in the ADA, an employer is excused from the obligation of reassigning a disabled employee if doing so would result in an undue hardship.[82]

Finally, according to the EEOC's Enforcement Guidance, a disabled "employee gets the vacant position if s/he is qualified for it."[83] The EEOC position is that an employer does not satisfy the reassignment duty merely by permitting a disabled employee to compete with others for a vacant position.[84] The Enforcement Guidance, structured in a question and answer format, provides the following exchange:

> Q: Does reassignment mean that the employee is permitted to compete for a vacant position?
>
> A: No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[85]

The Enforcement Guidance also addresses the issue of employer policies:

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79. *Id.* An employer, however, may have a duty to reassign a disabled employee to a lower graded position as a reasonable accommodation. *See* Interpretive Guidance, *supra* note 29, § 1630.2(o) ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without a reasonable accommodation.").

80. *See* ENFORCEMENT GUIDANCE, *supra* note 40.

81. *See id.*; *see also* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998) (stating that in determining those positions for which a disabled employee may be qualified, "[t]he employer must first identify the full range of alternate positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites, and then determine whether the employee's own knowledge, skills, and abilities would enable her to perform the essential functions of those alternate positions, with or without reasonable accommodations").

82. *See supra* notes 25–28 and accompanying text (discussing the undue hardship defense).

83. ENFORCEMENT GUIDANCE, *supra* note 40.

84. *Id.*

85. *Id.*

> Q: Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?
>
> A: Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[86]

B. The Most Controversial Accommodation

Of all the accommodations listed in the ADA, the reassignment accommodation has proven to be the most difficult to apply. In particular, the reassignment accommodation has generated the most litigation, including that involving three contentious issues on which the federal courts are split.[87]

Several reasons may account for the additional scrutiny demanded of the reassignment accommodation. First, the reassignment obligation is a duty that was not recognized prior to the adoption of the ADA. Although the ADA closely tracks the statutory language of the Rehabilitation Act of 1973[88] and its interpretive case law,[89] the ADA departs from its older statutory sibling by expressly including "reassignment to a vacant position" in its list of reasonable accommodations.[90] The Rehabilitation Act required reassignment only if it was available under an employer's existing policies.[91] Reassignment, therefore, was a permissible, but not

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86. *Id.*

87. These three issues are discussed *infra* notes 99–128 and accompanying text.

88. 29 U.S.C. §§ 791–96 (2003).

89. *See* GARY PHELAN & JANET BOND ATHERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE § 1.06 (1997) (indicating that the ADA was closely modeled on the Rehabilitation Act of 1973).

90. *See* 42 U.S.C. § 12111(9)(B) (2003) (listing "reassignment to a vacant position" as a reasonable accommodation).

91. *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987) (summarizing reassignment duty under the Rehabilitation Act). In *Arline*, the Supreme Court stated:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

Id.; *see also* Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987); 29 C.F.R. § 1614.704 (1991).

a required, accommodation.[92] The lack of clearly delineated standards for reassigning qualified individuals with disabilities under the Rehabilitation Act may explain some of the current struggle that the federal courts are experiencing in defining the scope of this new ADA accommodation.[93]

Second, accommodation by way of reassignment requires a greater degree of workplace reorganization and imposes extra burdens on both employers and fellow workers as compared to other types of accommodations. The other types of accommodations recognized under the ADA[94] involve relatively minor adjustments that enable a disabled employee to remain in his or her current position. Changes made to existing facilities and the provision of assistive devices, for example, may impact the manner in which work is performed, but generally do not alter the quantity and quality of such work. These accommodations impose some obligations on the employer but have no immediate impact on non-disabled co-employees.[95] Similarly, job restructuring involves making adjustments for disabled employees in their current position that, again, would have little impact upon the rights of other employees.[96] Although an employer's reallocation of marginal functions may alter some of the tasks performed by other employees in the workplace, such an accommodation does not necessarily result in a net increase of work duties for the non-disabled employee.[97] Thus, with respect to each of these accommodations, the disabled employee continues to perform the essential duties of his or her assigned job. The employer reaps the benefit of the work that is performed, and fellow employees are not burdened with the reallocation of any essential duties.

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92. *See* Jeffrey S. Berenholz, Note, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act*, 15 HOFSTRA LAB. & EMP. L.J. 635, 639 (1998).

93. Nevertheless, Congress clearly intended to go beyond the Rehabilitation Act by expressly providing in the text of the ADA that reasonable accommodation may include "reassignment to a vacant position." *See* 42 U.S.C. § 12111(9). Congress' commitment to reassignment as an accommodation for the disabled was further evidenced when Congress amended the Rehabilitation Act in 1992 to expressly include reassignment as an accommodation. *See* 29 U.S.C. §§ 791(g), 794(d) (1994), *amended by* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (1992).

94. *See supra* notes 29–42 and accompanying text (discussing the types of reasonable accommodations under the ADA).

95. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1314 (D.C. Cir. 1998) (en banc) (Silberman, J., dissenting).

96. *See id.* at 1315 (observing that job restructuring and part time and modified work schedules involve accommodations of an employee's current position and "have no direct effect on non-disabled employees or applicants").

97. The reallocation is a trade-off of marginal job functions between the disabled and non-disabled employee: the non-disabled employee picks up those marginal functions that the disabled employee cannot perform and the disabled employee picks up those functions that he or she can perform from the non-disabled employee. *See supra* note 38 and accompanying text.

In contrast, a reassignment removes the disabled employee from his or her current position and places the employee in a new position that invariably entails different duties than that which the employee performed in the previous position. For an employer, such a transfer means that it will not receive the work effort of employees who are trained and experienced in their current positions. The employer will need to identify and train a new worker to perform these tasks. Reassignment additionally limits an employer's discretion in filling vacant positions. A mandatory reassignment duty, in short, impinges on management's overall flexibility and productivity.

The reassignment accommodation also imposes burdens on fellow employees. A reassignment mandated by the ADA may translate into a tangible loss for other employees because the placement of a disabled employee into a vacant position necessarily deprives other employees of the possibility of filling that position.[98] Reassignment also may necessitate the transfer of a co-worker who must learn how to perform the functions of the transferred employee.

C. Three Contentious Reassignment Issues

Courts have experienced considerable difficulty in determining the reach of the reassignment accommodation. This difficulty is illustrated by the fact that the circuit courts of appeal have reached different conclusions with respect to three reassignment issues. Each of these three issues is summarized below.

1. Is reassignment of a disabled employee required by the ADA when such result would violate the seniority rights of another employee under the terms of a collective bargaining agreement?

The EEOC, in both its Interpretive Guidance and the Technical Assistance Manual, suggests that the terms of a collective bargaining agreement ("CBA") may be relevant in determining whether an accommodation would impose an "undue hardship."[99] This position finds support in the ADA's legislative history which indicates that collective bargaining provisions are relevant but not determinative on the reassignment issue.[100]

At least two court decisions have looked favorably on the EEOC's position. In *Emrick v. Libbey-Owens-Ford Co.*,[101] the federal district court for the eastern district of Texas ruled that a collective bargaining agreement should be a factor to consider when determining the reasonableness of an accommodation, but that a per se rule should not apply to ADA cases. Similarly, in *Aka v. Washington*

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98. *See Aka*, 156 F.3d at 1315 (Silberman, J., dissenting) (noting that in contrast to other types of accommodations listed in the ADA, reassignment infringes on the rights of non-disabled employees).

99. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 1, §§ 3.9, 7.11.

100. *See* H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

101. 875 F.Supp. 393, 396–97 (E.D. Tex. 1995).

Hospital Center,[102] a panel of the D.C. Circuit adopted a balancing standard that would weigh the need for an accommodation with the degree of hardship imposed by the infringement on seniority rights. The court noted that this balance should be based on the particular circumstances of each case, with a potential "continuum" of results.[103] The *Aka* decision subsequently was vacated and decided *en banc* on different grounds.[104]

In *Eckles v. Consolidated Rail Corp.*, however, the Seventh Circuit adopted a per se rule that an employer is not required to violate a seniority system agreed upon in a CBA in order to reassign a disabled employee as a reasonable accommodation.[105] The majority of circuit courts have now adopted this position.[106] These cases find that a per se rule provides a predictable, bright-line standard and recognizes the special status of collectively bargained seniority rights.[107]

2. Does the ADA require an employer to transfer a disabled employee to a vacant position despite the superior qualifications of another applicant or employee who also desires that position?

In *EEOC v. Humiston-Keeling, Inc.*,[108] the Seventh Circuit Court of Appeals expressly rejected the EEOC's interpretation that a disabled employee should be afforded a priority in filling vacant positions.[109] The Seventh Circuit, in a decision authored by Judge Posner, criticized the EEOC's position as giving "bonus points" to individuals with disabilities even where an employee's disability puts her at no disadvantage in bidding for an open position.[110] Such a result, according to Judge Posner, would constitute "affirmative action with a vengeance."[111] The court, instead, concluded that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better

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102. 116 F.3d 876, 896 (D.C. Cir. 1997).

103. *Id.*

104. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc). The *en banc* decision is discussed *infra* at notes 94–96 and accompanying text.

105. 94 F.3d 1041, 1051 (7th Cir. 1996).

106. *See* Willis v. Pac. Mar. Assoc., 244 F.3d 675, 681–82 (9th Cir. 2001); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995).

107. *See Eckles*, 94 F.3d at 1052.

108. 227 F.3d 1024 (7th Cir. 2000).

109. The EEOC's interpretation is discussed *supra* at notes 83–86 and accompanying text.

110. *Humiston-Keeling*, 227 F.3d at 1027.

111. *Id.* at 1029.

applicant, provided it's the employer's consistent and honest policy to hire the best applicant . . . in question."[112]

The District of Columbia and Tenth Circuit courts of appeal disagree. In *Aka v. Washington Hospital Center*,[113] the D.C. Circuit expressed the view that reassignment under the ADA requires something more of an employer than simply allowing a disabled employee to compete equally with other applicants for a vacant position. The court looked at the ADA's statutory text and concluded that the natural meaning of the word "reassign" necessarily implies the need for some "active effort" on the part of the employer."[114] The court, however, did not specify what type of active effort was necessary for an employer to comply with the ADA's reassignment duty.

The Tenth Circuit, in *Smith v. Midland Brake, Inc.*,[115] went beyond *Aka* to define more precisely what "something more" entails by stating that "[t]he disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[116] To eliminate any doubt as to the majority's interpretation of the statute, the opinion summarized an employer's reassignment obligation as follows:

> The unvarnished obligation derived from the statute is this: an employer *discriminates* against a qualified individual with a disability if the employer fails to offer a reasonable accommodation. If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.[117]

3. Does the ADA's reassignment accommodation compel employers to make exceptions to non-discriminatory transfer and assignment policies?

Similar issues arise when the reassignment of a disabled employee would conflict with a facially non-discriminatory employer policy. The type of policy at issue here generally concerns an employer's protocol for filling vacant positions.

Some decisions have adhered to the EEOC's interpretation and ruled that such policies must give way to the obligation to reassign qualified disabled

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112. *Id.*
113. 156 F.3d 1284 (D.C. Cir. 1998) (en banc).
114. *Id.* at 1304.
115. 180 F.3d 1154 (10th Cir. 1999) (en banc).
116. *Id.* at 1166.
117. *Id.* at 1169.

employees. In *Davoll v. Webb*,[118] several police officers employed by the City of Denver were forced into retirement after disabling conditions rendered them unable to perform their current jobs, and a city-wide policy against employee transfers precluded their placement into other vacant positions. The Tenth Circuit Court of Appeals, relying heavily on its holding in *Smith*, ruled that a "disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[119] Similarly, the district court in *Ransom v. Arizona Board of Regents*,[120] struck down a policy requiring that "all employees, including those with disabilities, must compete for job reassignments through the competitive hiring process."[121] The court ruled that the defendant's competitive transfer policy effectively "prevents" the reassignment of disabled employees and, therefore, "discriminates against 'qualified individuals with disabilities.'"[122]

Several other decisions, however, maintain that such an interpretation amounts to an impermissible "preference" for disabled workers. In *Daugherty v. City of El Paso*,[123] for example, a part-time city bus driver was denied reassignment to a different full-time position because of a policy that gave full-time employees priority over part-time workers. The court concluded that the city was not required to make an exception, stating that "we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."[124] In *Dalton v. Subaru-Isuzu Automotive, Inc.*,[125] the Seventh Circuit Court of Appeals rejected the plaintiffs' request that they receive permanent positions within the employer's established temporary job placement program for employees with temporary disabilities. The court, after reviewing the statute and existing case law, concluded that the ADA does not compel an employer "to abandon its legitimate nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers."[126] Similarly, the Eleventh Circuit Court of Appeals in *Duckett v. Dunlop Tire Corp.*[127] has held that the ADA does not require an employer to violate its "no roll back" policy that prohibited employees from transferring from salaried positions to production positions within the bargaining unit.[128]

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118. 194 F.3d 1116 (10th Cir. 1999).
119. *Id.* at 1132.
120. 983 F. Supp. 895 (D. Ariz. 1997).
121. *Id.* at 898.
122. *Id.* at 903.
123. 56 F.3d 695 (5th Cir. 1995).
124. *Id.* at 700.
125. 141 F. 3d 667 (7th Cir. 1998).
126. *Id.* at 678.
127. 120 F.3d 1222 (11th Cir. 1997).
128. *Id.* at 1225. *See also* EEOC v. Sara Lee Corp., 237 F.3d 349, 355–56 (4th Cir. 2001) (ruling that an employer need not disregard its seniority policy in order to reassign a disabled employee); Burns v. Coca-Cola Enter., 222 F.3d 247, 258 (2000)

IV. *U.S. AIRWAYS, INC. V. BARNETT*

A. Introduction

U.S. Airways, Inc. ("U.S. Air") has a long-standing seniority policy in place for filling certain vacant positions. Under this policy, employees with greater seniority receive a preference in bidding to transfer into covered positions for which they are otherwise qualified.[129] Unlike many such systems that are the product of labor/management negotiations,[130] U.S. Air unilaterally adopted the terms of this particular policy.[131]

Robert Barnett worked for U.S. Air in a cargo-handling position.[132] In 1990, he injured his back and was transferred to a less physically demanding position.[133] Mr. Barnett invoked his rights under U.S. Air's seniority system and transferred to a less physically demanding mailroom position.[134] Under U.S. Air's policy, the mailroom position subsequently became open for seniority-based bidding.[135] Since two more senior employee's also intended to bid for the mailroom position, Mr. Barnett asked U.S. Air to make an exception to the seniority policy by allowing him to remain in the mailroom position as an accommodation to his disability.[136] U.S. Air eventually denied this request and the seniority bidding process resulted in Mr. Barnett losing employment.[137]

Mr. Barnett sued claiming that U.S. Air's conduct violated the ADA. More specifically, Mr. Barnett contended that he was an individual with a disability who was qualified to perform the mailroom job, and that U.S. Air violated the ADA by refusing to provide him with a reasonable accommodation by reassigning him to the mailroom position.[138]

The federal district court granted U.S. Air's motion for summary judgment and dismissed Barnett's ADA claims as a matter of law.[139] The district court reasoned that even if Barnett's requested reassignment to the mailroom

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(ruling that an employer need not deviate from a policy of reassigning employees only if they file a written transfer request form for the desired position).

129. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002).

130. *See supra* notes 99–107 and accompanying text (discussing seniority systems established by collective bargaining agreements).

131. *Barnett*, 535 U.S. at 404.

132. *Id.* at 394.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 395.

position constituted a reasonable accommodation, the resulting violation of the seniority policy would impose an undue hardship.[140] The court stated:

> [T]he uncontroverted evidence shows that the USAir seniority system has been in place for "decades" and governs over 14,000 USAir Agents. Moreover, seniority policies such as the one at issue in this case are common to the airline industry. Given this context, it seems clear that the USAir employees were justified in relying upon the policy. As such, any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees.[141]

The Ninth Circuit Court of Appeals, sitting *en banc*, reversed and held that U.S. Air's seniority policy does not operate as a per se bar to reassignment under the ADA.[142] Instead, the appeals court ruled that the impact of such a policy is merely a factor that a court should consider in determining whether the reassignment of a disabled employee would constitute an undue hardship.[143] The appeals court explained that:

> A case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees.[144]

B. The Supreme Court's Decision

The Supreme Court granted certiorari to decide whether "[t]he [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system."[145] In attempting to answer this question, the members of the Court issued five separate opinions. By a slim five-vote majority, the Court vacated the Ninth Circuit's decision.

1. The Majority Opinion

Justice Breyer authored the majority opinion. An unusual coalition consisting of Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Stevens joined in that opinion.

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140. *Id.*
141. *Id.*
142. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc).
143. *Id.* at 1120.
144. *Id.*
145. *Barnett*, 535 U.S. at 395–96.

a. The Positions of the Parties

The majority opinion begins its analysis by summarizing the dueling positions of the parties as to what Congress meant to encompass in the term "reasonable accommodation." U.S. Air contended that the ADA demands only "equal" treatment for individuals with disabilities.[146] Consistent with this position, U.S. Air argued that a requested accommodation that seeks "preferential" treatment, such as an exception from a disability-neutral seniority system, is inherently unreasonable.[147]

In contrast, Barnett asserted that the term "reasonable accommodation" is synonymous with that of an "effective" accommodation.[148] Pursuant to this view, a workplace adjustment necessarily qualifies as a reasonable accommodation if it effectively enables an individual with a disability to perform the essential functions of the job.[149]

Under Barnett's suggested interpretation, if a requested accommodation effectively qualifies an individual with a disability for a position, such as a reassignment to a position the employee is capable of performing, the employee will prevail unless the employer can establish that this particular accommodation imposes an undue hardship. According to Barnett, this position is consistent with the generally accepted notion that an employee generally bears the burden of establishing the existence of a reasonable accommodation, while an employer bears the burden to demonstrate that such an accommodation will result in an undue hardship.[150]

b. The Theoretical Resolution

The majority opinion rejected both parties' positions and adopted an intermediate view of what constitutes a reasonable accommodation. The Court first disposed of U.S. Air's anti-preference argument. The Court reasoned that the simple fact that an accommodation would permit a disabled employee to avoid the impact of a neutral rule that others must obey does not necessarily make that accommodation unreasonable.[151] While leaving open the possibility that some requests for preferential treatment might be unreasonable or work an undue hardship, the Court ruled that the mere existence of a difference in treatment does not create an "automatic exemption" from the ADA's reasonable accommodation

146. *Id.* at 397.
147. *Id.*
148. *Id.* at 399.
149. *Id.*
150. *Id.* at 400. *See supra* notes 46–55 and accompanying text (discussing how the circuit courts have viewed the burden of proof allocation concerning the reasonable accommodation/undue hardship analysis).
151. *Barnett*, 535 U.S. at 398.

mandate.[152] The Court explained its rationale for this conclusion in the following passage:

> [P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.[153]

The majority opinion also rejected Barnett's contention that an "effective" accommodation is necessarily a "reasonable accommodation." The Court explained that the ordinary meaning of the terms "effective" and "reasonable" are not synonymous.[154] Instead, the Court stated, "[I]t is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness."[155] Thus, a proposed accommodation could be effective in terms of enabling job performance, yet still fall of short of being reasonable. As an example, the Court noted, "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees."[156]

Finally, as to the appropriate burden of proof allocation, the Court noted with favor the "practical way" that several circuit courts have reconciled the reasonable accommodation/undue hardship calculus.[157] Under that approach, an employee can avoid a motion for summary judgment by showing that the requested type of accommodation is "reasonable on its face," which the Court describes as being "ordinarily" reasonable or reasonable "in the run of cases."[158] Once an employee has made such a showing, the employer then bears the burden of persuasion to establish that the requested accommodation would result in an undue hardship given the particular circumstances at issue.[159]

c. Practical Application

In applying these principles, the majority opinion concluded that reassignment would not be reasonable in the run of cases in which it would

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152. *Id.* at 399.
153. *Id.* at 397.
154. *Id.* at 400.
155. *Id.*
156. *Id.*
157. *Id.* at 401.
158. *Id.*
159. *Id.* at 402.

conflict with the rules of a seniority system.[160] The Court also ruled that employers need not submit "proof on a case-by-case basis that a seniority system should prevail."[161] The Court gave several reasons for these conclusions. First, the Court found support in the decisions of several circuit courts holding that collectively bargained seniority systems trump the ADA's reassignment provision.[162] Second, the Court noted that the benefits of a seniority system are not confined to those established through labor/management negotiations. Regardless of origin, "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment."[163] Finally, and "most important" to the Court, is the matter of predictability.[164] Seniority systems implement "uniform, impersonal" guidelines for decision-making.[165] A case-by-case balancing analysis, in contrast, would undermine employee expectations and result in considerable uncertainty for all concerned.[166]

The Court, nonetheless, recognized a limited exception to the presumption that reassignment in the face of a conflicting seniority system generally is unreasonable. The Court stated that an employee may show that "special circumstances" warrant a finding that reassignment is reasonable under the particular facts of the case.[167] The Court offered the following examples of such circumstances:

> The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.[168]

The Court went on to state that it did not mean for these examples "to exhaust the kinds of showings that a plaintiff might make."[169]

Since the Court's analysis differed from that of the Ninth Circuit, the Court vacated the appeals court's judgment.[170] The Court also remanded the case for further proceedings consistent with its opinion.[171]

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160. *Id.* at 403.
161. *Id.*
162. *Id.* at 403–04. This issue is discussed *supra* at notes 99–107 and accompanying text.
163. *Barnett*, 535 U.S. at 404.
164. *Id.* at 404–05.
165. *Id.*
166. *Id.*
167. *Id.* at 405.
168. *Id.*
169. *Id.*
170. *Id.* at 406.

2. The Concurring Opinions

Justice Stevens and Justice O'Connor authored separate concurring opinions. Justice Stevens' opinion is quite short and primarily attempts to clarify the Ninth Circuit's task upon remand.[172] In terms of the pertinent legal issues, Justice Stevens underscored that while the Ninth Circuit misread the ADA by analyzing the impact of U.S. Air's seniority system as a matter of undue hardship rather than of reasonable accommodation, the appeals court acted correctly by rejecting the notion that such a system acts as a per se bar to reassignment.[173]

Justice O'Connor's concurrence is more complicated. She begins her opinion with the unusual twist of noting her disagreement with the majority opinion in which she joined. Justice O'Connor stated that she would prefer to judge the impact of a seniority system on a request for reassignment on the basis of whether the seniority system is "legally enforceable."[174] Under that approach, if a seniority system provides a senior employee with a legal entitlement to the position in question, then no vacancy occurs and reassignment necessarily is unreasonable.[175] In spite of this preference for a test different than that articulated in the majority opinion, she noted that the Court would fail to achieve a majority ruling in this case without her fifth vote.[176] Thus, she explained, "Accordingly, in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns."[177]

Interestingly, Justice O'Connor's "similar" test would lead to a different outcome in this case. As her opinion noted, U.S. Air's written seniority policy contains an express disclaimer of enforceability.[178] Since no employee had an enforceable right under this policy to bump into the mailroom job, that position was vacant and Barnett's request for reassignment would have been reasonable under Justice O'Connor's test.[179]

3. The Dissenting Opinions

Justice Breyer's majority opinion drew criticism in separate dissenting opinions issued by both the right and left wings of the Court. Justice Scalia, joined by Justice Thomas, chastised the majority for unduly expanding the scope of an employer's reassignment duty. Justice Souter, joined by Justice Ginsburg, on the

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171. *Id.*
172. *See id.* at 406–08 (Stevens, J., concurring).
173. *Id.* at 407.
174. *Id.* at 408 (O'Connor, J., concurring).
175. *See id.* at 408–09.
176. *Id.* at 408.
177. *Id.*
178. *See id.* at 409.
179. *See id.*

other hand, criticized the majority opinion for overly limiting the scope of the reassignment accommodation.

a. Justice Scalia's Dissent

The principal thrust of Justice Scalia's dissenting opinion is the contention that the ADA only obligates employers to accommodate "disability-related obstacles."[180] A disability-related obstacle, according to Justice Scalia, includes "those employment rules and practices *that the employee's disability prevents him from observing*."[181] Thus, Justice Scalia would find that an employer is required to modify a work station that cannot accommodate a disabled employee's wheelchair.[182] He would not find, however, that an employer must pay a disabled employee more than others at the same grade level for physical therapy that would promote greater comfort, but which is not needed for successful job performance.[183]

Turning specifically to the reassignment accommodation, Justice Scalia criticized circuit court decisions such as *Smith* and *Aka* for requiring employers to provide disabled employees with a preference in filling vacant positions even in the face of disability-neutral rules and policies.[184] He maintained that the reassignment accommodation, just like any other reasonable accommodation, should compel the elimination only of disability-related obstacles.[185] In practical application, this means that:

> If he [a disabled individual seeking reassignment] is qualified for that position, and no one else is seeking it, or no one else who seeks it is better qualified, he *must* be given the position. But "reassignment to a vacant position" does *not* envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications.[186]

As a final matter, Justice Scalia also criticized the majority opinion for creating the "special circumstances" exception to the general rule that a requested reassignment that would conflict with the terms of a seniority system is not a reasonable accommodation.[187] He finds the scope of this exception to be unclear, extending not only to "unmask sham seniority systems" that create no meaningful

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180. *See id.* at 412 (Scalia, J., dissenting).
181. *Id.* (emphasis in original).
182. *Id.* at 413.
183. *Id.*
184. *Id.* at 414–17. The *Smith* and *Aka* decisions are discussed *supra* at notes 113–17 and accompanying text.
185. *See Barnett*, 535 U.S. at 415–16 (Scalia, J., dissenting).
186. *Id.* at 416.
187. *Id.* at 418.

employee expectations, but also to undercut bona fide systems in some "vague and unspecified" way.[188] This exemption, he concluded, will result in a "state of uncertainty that can be resolved only by constant litigation."[189]

b. Justice Souter's Dissent

Justice Souter would affirm the Ninth Circuit's decision. He would find that Barnett's requested accommodation was reasonable and that the employer should be required to show that the requested reassignment would result in an undue hardship.

Justice Souter initially determined that a unilaterally established seniority system should enjoy no special protection under the ADA.[190] He pointed to the fact that, unlike Title VII, nothing in the ADA expressly insulates seniority rules from the reasonable accommodation requirement.[191] In addition, he noted that the ADA's legislative history indicates that seniority provisions contained in a collective bargaining agreement should not amount to more than "a factor" in determining the appropriateness of a particular accommodation.[192] Since the seniority system here was adopted unilaterally by U.S. Air and is not protected by a positive federal statute such as the National Labor Relations Act,[193] Justice Souter concluded that it too is not entitled automatically to trump the ADA's reasonable accommodation requirement.[194]

Turning to the particular facts of the case, Justice Souter would find that Barnett sufficiently established that his request to occupy the mailroom position constituted a reasonable accommodation.[195] Justice Souter noted that Barnett already had filled the position for two years such that his request represented "not a change but a continuation in the status quo."[196] In contrast, U.S. Air "took pains to ensure that its seniority rules raised no great expectations."[197] Under these circumstances, Justice Souter concluded, the Ninth Circuit was correct in finding that Barnett's request was reasonable and in placing the burden on U.S. Air to come forward with proof that the request, in fact, would impose an undue hardship.[198]

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188. *Id.* at 419.
189. *Id.* at 420.
190. *See id.* at 420–23 (Souter, J., dissenting).
191. *Id.* at 420–21. Title VII contains a provision that explicitly authorizes an employer to provide different benefits to employees pursuant to a bona fide seniority system. 42 U.S.C. § 2000e-2(h) (2003).
192. *Barnett*, 535 U.S. at 421.
193. 29 U.S.C. §§ 151–69 (2003).
194. *Barnett*, 535 U.S. at 423 (Souter, J., dissenting).
195. *See id.*
196. *Id.*
197. *Id.*
198. *Id.* at 424.

V. ANSWERS, QUESTIONS, AND SUGGESTED SOLUTIONS

This Part attempts a critical analysis of the impact of the *Barnett* decision on the issues of reasonable accommodation and reassignment. As this decision represents the Supreme Court's initial foray into this territory, the Court's pronouncements have the potential for great significance concerning the future development of ADA jurisprudence.

The following sections address the various answers and questions resulting from *Barnett* with respect to reasonable accommodation, in general, and reassignment, in particular. Since we are used to thinking in a more linear fashion in terms of questions first and answers second, it may seem odd to reverse that order in this instance. But, the *Barnett* decision does not provide a very linear approach to the issues of reasonable accommodation and reassignment. The five opinions issued in that decision depict a Court with widely divergent views of the ADA's objectives and mechanics. These opinions also raise or avoid as many questions as they provide answers.

The following sections, accordingly, will first summarize the answers provided by *Barnett* concerning the scope of the reasonable accommodation obligation and the reassignment accommodation. The sections then will discuss the questions that remain uncertain in *Barnett*'s aftermath. Finally, the sections will provide policy-based suggestions as to how the remaining questions should be resolved in the future.

A. Reasonable Accommodation

1. Answers

As the first Supreme Court case to address the unique reasonable accommodation prong of the ADA's anti-discrimination formula, the Court in *Barnett* had the opportunity to resolve numerous issues concerning the scope of the reasonable accommodation duty. Among these opportunities, the majority opinion in *Barnett* provided clear guidance as to the following:

The reasonable accommodation and undue hardship concepts are not identical. Justice Breyer explained that the reasonable accommodation inquiry focuses generally on whether a work-related adjustment or modification is "reasonable on its face, *i.e.*, ordinarily or in the run of cases."[199] The undue hardship inquiry, in contrast, focuses more narrowly to determine whether such an accommodation would impose a significant burden on the employer "in the particular circumstances."[200] Thus, these two concepts resemble the opposite ends of a telescope with one end focusing broadly and the other focusing narrowly.

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199. *Id.* at 402.
200. *Id.*

In general, the employee bears the burden of proving a reasonable accommodation, while the employer bears the burden of proving that such an accommodation would impose an undue hardship. The Court cited with favor a number of lower court decisions that "have reconciled the phrases 'reasonable accommodation' and 'undue hardship' in a practical way."[201] In accordance with the general approach adopted in those cases, the employee must establish that an accommodation is reasonable in the run of cases, with the burden of persuasion then shifting to the employer "to show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[202]

An "effective" accommodation is not necessarily a "reasonable" accommodation. The Court rejected Barnett's argument that an employee need show only that an accommodation will be effective in terms of enabling job performance in order to establish that accommodation's reasonableness.[203] The *Barnett* majority opinion explained that some accommodations, such as a requested exception to a seniority policy,[204] may be unreasonable even though effective in facilitating successful job performance. Thus, an employee, in order to carry its burden, must show that an accommodation is both effective and otherwise reasonable in the run of cases.

If an accommodation is not reasonable in the run of cases, the burden rests with the employee to establish reasonableness in the particular circumstances. This conclusion flows as a corollary of the previous two conclusions. If the employee bears the burden of proof on the issue of reasonable accommodation, but does not establish that a desired accommodation is reasonable in the run of cases, the employee will not prevail even if the accommodation does not impose an undue hardship.[205] In these circumstances, the employee will be able to shift the burden of proof to the employer only if he or she can show "special circumstances [sufficient to] warrant a finding that . . . the requested 'accommodation' is 'reasonable' on the particular facts."[206]

The fact that a particular accommodation may provide a "preference" to a disabled individual does not necessarily make the accommodation unreasonable. The Court also rejected U.S. Airways contention that the ADA does not require accommodations that would treat individuals with disabilities more favorably than other workers. The Court explained that, under the ADA, some preferential accommodations are deemed necessary in order to permit the disabled to obtain the same work opportunities as the non-disabled.[207] Thus, "the simple fact that an

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201. *Id.* at 401.
202. *Id.* at 402.
203. *Id.* at 400–01.
204. *See id.* at 403–05 (holding that a mandated deviation from a seniority system is not reasonable in the run of cases).
205. *See id.* at 403.
206. *Id.* at 405.
207. *Id.* at 397.

accommodation would provide a preference . . . cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[208]

2. Questions

In spite of these pronouncements, the *Barnett* decision leaves considerable uncertainty in its wake. With regard to the general scope of the reasonable accommodation requirement, two unanswered questions loom particularly large.

a. Beyond effectiveness, what other considerations are appropriate in determining the reasonableness of an accommodation, and what are the respective burden of proof allocations with respect to these considerations?

Justice Breyer's opinion, as noted above, rejected the argument that an accommodation that effectively enables job performance is automatically a "reasonable" accommodation.[209] The majority opinion found that Barnett's requested reassignment, even though effective in terms of enabling Barnett to successfully perform the essential functions of the mailroom position, was not reasonable because it would violate U.S. Air's seniority system and thereby frustrate "employee expectations of fair, uniform treatment."[210] In reaching this conclusion, the Court commented more generally in support of the notion that an accommodation's negative impact on co-employees may render an accommodation unreasonable:

> Nor does an ordinary English meaning of the term "reasonable accommodation" make of it a simple, redundant mirror image of the term "undue hardship." The statute refers to an "undue hardship on the operation of the business." Yet, a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.[211]

While the above-quoted passage makes an accommodation's impact on co-employees part of the calculus for determining reasonableness, it also may be construed as suggesting that an accommodation's impact on the *employer* is not. At least one plausible interpretation of this language is that an accommodation's impact on the employer's business operation is a matter of, and solely a matter of,

208. *Id.* at 398 (emphasis in original).
209. *See supra* notes 154–56 and accompanying text.
210. *Barnett*, 535 U.S. at 404.
211. *Id.* at 400–01 (citation omitted).

undue hardship analysis. Clearly, the statute[212] and the regulations[213] contemplate that an accommodation's impact on the employer primarily will be scrutinized at the undue hardship stage. The EEOC's stance in litigation is consistent with the interpretation that the matter of employer impacts is relevant only with respect to the undue hardship analysis.[214]

Such a conclusion, however, is far from inevitable. The *Barnett* Court may have intended this passage only to illustrate that the reasonable accommodation and undue hardship concepts are not wholly identical since an accommodation's impact falls solely within the realm of reasonable accommodation analysis. This, conceivably, could leave the matter of an accommodation's impact on the employer relevant at both stages. This latter construction finds support in several circuit court decisions that have ruled that the cost of an accommodation is relevant to the issue of reasonableness as well as to the issue of undue hardship.[215] The Seventh Circuit, for example, has ruled that an employee must show at the reasonable accommodation stage that a proposed accommodation not only is efficacious but also that its benefits are not disproportionate to its costs.[216] If the employee satisfies this burden, the employer then "has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."[217] Given the number and prominence of these decisions, it could be argued that Justice Breyer likely would have written more explicitly if he intended a departure from their holdings.

Another perspective for viewing this same issue concerns the appropriate division of burden of proof responsibilities with respect to the reasonable accommodation and undue hardship elements of the ADA's anti-discrimination formula. In discussing this issue, the majority opinion first appears to agree with Barnett's assertion that the "statute imposes the burden of demonstrating an 'undue hardship' upon the employer, while the burden of proving 'reasonable accommodation' remains with the . . . employee."[218] The Court then cited with favor the "practical" approach adopted by a number of circuit court decisions.[219] According to the Court, these decisions place the burden on the employee to show

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212. *See* 42 U.S.C. § 12111(10) (2003) (describing the undue hardship defense in relation to the financial and administrative burden that an accommodation may impose upon the employer).

213. *See* 29 C.F.R. § 1630.2(p) (2003).

214. *See, e.g.*, Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (noting that the EEOC, in an amicus brief, urged the position that whether an accommodation would be too costly or difficult is entirely for the employer to establish).

215. *See, e.g.*, *id.* at 260; Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995).

216. *Vande Zande*, 44 F.3d at 543.

217. *Id.*

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

219. *See id.* at 401.

that an accommodation is reasonable in the run of cases.[220] If such is demonstrated, the burden then shifts to the employer to show special circumstances "that demonstrate undue hardship in the particular circumstances."[221]

The problem with the Court's analysis is that the circuit court decisions that it cites with favor do not all adopt the same burden of proof rules. The District of Columbia Circuit Court in *Barth v. Gelb*,[222] for example, takes the position that the employee generally is responsible for establishing the existence and reasonableness of a proposed accommodation, while the employer bears the burden of proving the undue hardship defense.[223] This approach places on the employee the entire burden of proof with respect to the reasonable accommodation issue.[224] In contrast, the First and Second Circuit Courts have adopted formulations that split the burden of proof with respect to the reasonable accommodation issue.[225] The Second Circuit, in *Borkowski v. Valley Central School District*, ruled that an employee bears only a burden of production that is satisfied if the employee "suggest[s] the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[226] The employer, however, bears the ultimate burden of persuasion on the issue of reasonableness, which "merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."[227] The First Circuit has adopted a similar standard in *Reed v. LePage Bakeries, Inc.*[228] The *Barnett* Court's discussion of the burden of proof rules simply does not reach the level of precision to indicate which, if either of these two formulations, it intends to endorse.

Thus, regardless of whether this issue is viewed through the lens of determining which considerations are relevant to the reasonableness of an accommodation or, alternatively, through the lens of determining the proper allocation of burden of proof responsibilities, the unanswered question remains the same: what role should the matter of costs and other impacts on the employer play at the reasonable accommodation stage? If the issue of costs and other employer burdens are exclusively within the province of undue hardship analysis, then the employee, under any formulation of the burden of proof rules, will not carry a burden of non-persuasion on these issues. On the other hand, if the employee bears some responsibility for these issues at the reasonable accommodation stage, his or her road becomes more difficult.

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220. *Id.*

221. *Id.* at 402.

222. 2 F.3d 1180 (D.C. Cir. 1993).

223. *Id.* at 1186–87.

224. *Id.*

225. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).

226. *Borkowski*, 63 F.3d at 138.

227. *Id.*

228. *See Reed*, 244 F.3d at 258.

This is no trifling matter. The Ninth Circuit, in its *Barnett* decision, viewed the impact of the seniority system as relevant only at the undue hardship stage.[229] The Supreme Court, in contrast, analyzed the impact of the seniority system as a matter of reasonable accommodation.[230] That change in focus effectively reversed the applicable burden of proof and likely presages the eventual outcome of the *Barnett* case itself. Determining the appropriate analytical framework for assessing an accommodation's costs and other burdens on the employer may carry a similar significance.

b. When, if ever, does a preference in favor of a disabled individual fall beyond the scope of a mandated reasonable accommodation?

The *Barnett* majority rejected U.S. Air's contention that an employer is not required to provide a reasonable accommodation which results in the preferential treatment of a disabled employee. U.S. Air argued that the ADA only requires the equal treatment of individuals with disabilities, but not preferential treatment such as an exemption from a disability-neutral workplace rule that applies to all employees.[231] The Court rejected this argument stating, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[232]

While a request for preferential treatment does not create an "automatic exemption" from the reasonable accommodation requirement,[233] the Court did not foreclose the possibility that requests for preferential treatment, at some point, may be unreasonable or work an undue hardship. The unanswered question following *Barnett* is at what point, if any, does it becomes unreasonable to require an employer to provide preferential treatment as an accommodation to a disabled employee.

Justice Scalia's dissenting opinion offers one possible line of demarcation. As noted above,[234] Justice Scalia construes the ADA as only requiring accommodations that remedy "disability-related obstacles."[235] The ADA, in his view, is intended to eliminate workplace barriers "that would not be barriers *but for* the employee's disability."[236] To illustrate this approach, Justice Scalia stated that he would find that an employer is required to modify a work station that cannot accommodate a disabled employee's wheelchair, but not to pay a disabled

229. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000) (en banc).
230. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401–06 (2002).
231. *See id.* at 397.
232. *Id.* at 398 (emphasis in original).
233. *Id.* at 397–98.
234. *See supra* notes 180–86 and accompanying text.
235. *See Barnett*, 535 U.S. at 413–14 (Scalia, J., dissenting).
236. *Id.* at 413 (emphasis in original).

employee more than others at the same grade level to compensate for the costs of physical therapy that would enable the employee to work with as little discomfort as other employees.[237] Applying this analysis to the *Barnett* facts, Justice Scalia concluded that Barnett is not entitled to the mailroom reassignment since such an accommodation would displace a neutral seniority system rather than a disability-related obstacle.[238]

Justice Scalia's opinion cites with favor a number of lower court decisions that have ruled that the ADA's reasonable accommodation requirement does not compel employers to make exceptions to neutral transfer and assignment policies.[239] These decisions generally view the ADA as embodying an equal treatment model that simply bans discrimination on the basis of disability.[240] Pursuant to this view, compelling an employer to deviate from a legitimate non-discriminatory policy would amount to a prohibited preference akin to affirmative action.[241] The Fifth Circuit in *Daugherty v. City of El Paso*, aptly summarized this position as follows:

> [W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.[242]

The *Barnett* majority purportedly "reject[s] the position taken by U.S. Airways and Justice Scalia" with respect to the issue of preferential treatment.[243] But, as Justice Scalia noted, his position and that of U.S. Air are not identical.[244] In contrast to U.S. Air, Justice Scalia does not argue against preferences in all instances, but only when directed at obstacles that are not disability-related.[245] Moreover, the majority opinion ultimately agreed with Justice Scalia that reassignment generally is not reasonable in the face of a conflicting seniority system.[246] Thus, Justice Scalia's recommended approach may retain vitality in spite of the majority's criticism.

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237. *Id.*

238. *Id.* at 416.

239. *Id.* at 416–17.

240. *See, e.g.*, EEOC v. Humiston-Keeling, Inc. 227 F.3d 1024, 1028–29 (7th Cir. 2000); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).

241. *See, e.g.*, *Humiston-Keeling*, 227 F.3d at 1028–29 (describing the EEOC's view on reassignment as constituting "affirmative action with a vengeance").

242. 56 F.3d at 700.

243. *Barnett*, 535 U.S. at 398.

244. *Id.* at 417–18 (Scalia, J., dissenting).

245. *See id.* at 412–18.

246. *Id.* at 404–05.

The *Barnett* majority may have provided a somewhat different standard for assessing preferential accommodations. In rejecting U.S. Air's argument that preferential treatment is inherently unreasonable, Justice Breyer stated that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."[247] This statement, although not asserted as establishing a standard for testing the limits of preferential accommodations, may be interpreted as suggesting that preferential accommodations may be appropriate in order to provide a disabled worker with the *same opportunities* that those without a disability enjoy, but not those that provide different or more generous opportunities. Such a distinction, however, as discussed below,[248] may lack precision in predicting the contours of the reasonable accommodation obligation.

3. Suggested Solutions

a. Components of Reasonable Accommodation and the Burden of Proof Allocation

In looking for the most suitable approach for allocating the parties' respective evidentiary burdens in implementing the ADA's reasonable accommodation/undue hardship calculus, it may be helpful to start by identifying that part of the formula that is not in dispute. As the *Barnett* majority suggested, the matter of how an accommodation impacts an employer should be a subject for inquiry primarily at the undue hardship stage.[249] The ADA defines "undue hardship" to mean "significant difficulty or expense" and expressly makes relevant such factors as the cost of the accommodation, the financial resources of the employer, and the impact of the accommodation on the employer's business operations.[250] These factors all relate to information that is most easily accessible to the employer, and it is well established that the employer carries the burden of proof to establish the undue hardship defense.[251]

The more difficult issue concerns the reasonable accommodation portion of the formula. On this score, the Second Circuit's decision in *Borkowski* appears to best balance the competing interests at stake. In *Borkowski*, the Second Circuit split the burden of establishing the reasonable accommodation element between

247. *Id.* at 397.

248. *See infra* notes 295–98 and accompanying text.

249. *See Barnett*, 535 U.S. at 400.

250. 42 U.S.C. § 12111(10) (2003).

251. *See Barnett*, 535 U.S. at 400 (stating that the ADA's imposition of the burden of demonstrating an undue hardship upon the employer "seems sensible in that an employer can more frequently and easily prove the presence of business hardship than an employee can prove its absence").

the parties by taking into account the reasonableness of an accommodation's cost.[252]

The Second Circuit, first of all, properly determined that the financial costs of an accommodation are relevant at both the reasonable accommodation and undue hardship stages.[253] As the Supreme Court in *Barnett* explained, the reasonable accommodation stage asks whether an accommodation generally is reasonable in the run of cases, while the undue hardship stage asks whether the accommodation poses an undue burden in the particular circumstances.[254] The costs of a proposed accommodation are relevant to each of these questions. The ADA explicitly recognizes that costs are central to undue hardship analysis by focusing on whether the cost of a proposed accommodation would pose an undue financial burden on that particular employer.[255] But, costs also are relevant at the more generalized reasonable accommodation stage in terms of focusing on whether a proposed accommodation generally provides benefits that are commensurate with the cost of the accommodation.[256] As the Seventh Circuit has recognized, a proposed accommodation generally may be unreasonable because its costs are disproportionate to the resulting benefits, even though the employer may not be faced with significant expense or financial ruin if required to provide such an accommodation.[257] Thus, as a matter of reasonable accommodation, an accommodation should be deemed reasonable only if it passes a rough cost-benefit analysis.

The remaining unanswered question concerns the appropriate division of responsibilities for proving the impact of costs at the reasonable accommodation stage. The EEOC[258] and those courts[259] that have suggested that the employee should bear no portion of the burden of proof with respect to the issue of costs are misplaced. The employee, after all, is the party who is in the best position to have information relevant to his or her impairments and to the type of accommodation the employee believes is desirable and appropriate to enable successful job performance. On the other hand, those circuit court decisions that place the burden of proof at the reasonable accommodation stage entirely on the employee go too far in the opposite direction.[260] The employer, after all, is the party who is in the best position to have information relevant to the actual costs and administrative impacts of a proposed accommodation. Finally, each party potentially has

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252. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 137–38 (2d Cir. 1995). The *Borkowski* decision is discussed *supra* at notes 225–27.

253. *Borkowski*, 63 F.3d at 138.

254. *Barnett*, 535 U.S. at 401–02.

255. *See* 42 U.S.C. § 12111(10).

256. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001); *Borkowski*, 63 F.3d at 138.

257. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995).

258. *See supra* notes 53–54 and accompanying text.

259. *See supra* note 46 and accompanying text.

260. *See supra* notes 47–49 and accompanying text.

information relevant to the relative weight of an accommodation's general costs and benefits.

The test adopted by the Second Circuit in *Borkowski* properly takes these considerations into account. Under that approach, the employee bears a burden of production to identify a plausible accommodation, "the costs of which, facially, do not clearly exceed its benefits."[261] This is a relatively low hurdle that an employee clears by producing evidence to show that a proposed accommodation is likely to enable job performance without being wholly disproportionate in terms of costs. The employer then is charged with carrying the ultimate burden of persuasion on the issue of reasonableness, which, in effect, merges, with burden of showing that the proposed accommodation would impose an undue hardship.[262] Under this approach, the employer bears the principal burden of showing that an accommodation is too costly or that it otherwise would impose significant operational burdens on the employer's business. The *Borkowski* test, accordingly, appropriately balances the pertinent policy interests at issue, and further benefits from the fact that it has been endorsed by a growing number of other circuit court decisions.[263]

b. Preferences, Affirmative Action, and Reasonable Accommodations

American society is widely skeptical of the appropriateness of affirmative action on the basis of race or gender.[264] Some potential forms of reasonable accommodation entail the preferential treatment of disabled individuals in a manner that arguably resembles affirmative action.[265] Courts and commentators alike have raised the alarm that the reasonable accommodation concept must be cabined by strict guidelines to prevent the ADA from becoming a vehicle for affirmative action.[266] This attempt at line-drawing, however, is misguided. Reasonable accommodation under the ADA is not only different from affirmative

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261. *Borkowski*, 63 F.3d at 139.

262. *Id.* at 138.

263. *See, e.g.*, Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001); Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995).

264. *See, e.g.*, Diller, *supra* note 9, at 44 ("affirmative action has been controversial at every turn"); William Bradford Reynolds, *An Experiment Gone Awry*, *in* THE AFFIRMATIVE ACTION DEBATE 130 (George E. Curry ed., 1996) (arguing that affirmative action is inherently discriminatory); Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 145 (1998) ("Affirmative action on the basis of race has been the subject of immense controversy.").

265. *See* Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1081–82 (2000) (discussing the similarities between reasonable accommodation and affirmative action).

266. *See supra* notes 108–12, 123–28 (courts), *infra* note 271 (commentators), and accompanying text.

action under Title VII or the equal protection clause,[267] but it serves a different purpose. Since the reasonable accommodation notion calls for certain types of preferential adjustments in order to assist the disabled in becoming and remaining productive members of the workforce,[268] we would do better to evaluate the merits of individual accommodations in terms of serving this purpose than to draw lines in the sand attempting to identify the permissible parameters of preferential accommodations.

To begin with, it is clear that the ADA's reasonable accommodation obligation requires some preferential treatment of the disabled. For example, if a disabled employee requests a workplace adjustment such as a slightly elevated work station in order to perform his or her job duties, the fact that the employer provides only lower work stations to other employees does not automatically make such a request unreasonable. The ADA quite clearly compels employers to provide favorable workplace adjustments to the disabled regardless of whether those same adjustments are provided to the nondisabled.[269] As the *Barnett* Court itself acknowledged, "[b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."[270]

The preferential nature of the reasonable accommodation obligation is discomforting to many. A number or commentators have characterized the ADA as imposing a radical affirmative action requirement.[271] Similarly, negative affirmative action rhetoric has found its way into a number of court decisions, particularly those examining the applicability of the reassignment accommodation.[272]

As this Author has argued elsewhere in more detail,[273] however, significant differences distinguish affirmative action with respect to race and gender, on the one hand, and reasonable accommodation under the ADA, on the other. Conventional affirmative action programs consist of pre-designed policies

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267. *See infra* notes 273–80 and accompanying text.

268. *See infra* notes 284–88 and accompanying text.

269. *See* Diller, *supra* note 9, at 43 (stating that the affirmative action and reasonable accommodation concepts both "rely on visions of equality that call for differential treatment of the subordinated individual or group").

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

271. *See, e.g.*, CHARLES LAWRENCE III & MARI MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 108 (1997) (calling the ADA the most radical affirmative action program in U.S. history); Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*, 18 LAW & INEQ. 85, 85 (1999) (describing the ADA as "one of the most radical affirmative action laws in recent U.S. history").

272. *See supra* notes 108–12, 123–28 and accompanying text; *see also* Ruth Colker, *Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities under United States Law*, 9 YALE J.L. & FEMINISM 213, 222 (1997) ("The controversy surrounding whether or not the ADA is an 'affirmative action' statute has largely centered on [the reassignment to a vacant position] requirement.").

273. Befort & Donesky, *supra* note 265, at 1082–86.

by which employers seek to increase the proportion of a historically underrepresented minority group in its overall workforce.[274] Employers typically establish target goals through a statistical comparison of their workforce with the relevant labor market. Once a plan is established, an employer implements the plan throughout its recruitment and hiring processes until the numerical goals for the underrepresented group are met.[275] In contrast, reasonable accommodation under the ADA occurs on a much more individualized basis.[276] The reasonable accommodation process occurs only after the employer and disabled employee have engaged in an interactive process designed to identify both the essential functions of the position and the special needs of the disabled person.[277]

Viewed in this light, reassignment under the ADA is much less pervasive than conventional affirmative action programs in several respects. First, the reassignment accommodation applies only to employees and not to applicants.[278] Second, reassignment does not involve the setting of pre-determined numerical goals or quotas. Third, no other employee loses employment as a result of a job reassignment since such a transfer occurs only to an already vacant position.[279] In short, reassignment operates only as a post-hire mechanism by which an employer may retain the services of a current employee with a disability, while affirmative action operates as a pre-hire formula that reserves employment opportunities for one group of applicants at the expense of another group of applicants.[280]

An even more significant distinction flows from the different anti-discrimination formulas embodied in Title VII and the ADA. Title VII utilizes an *equal treatment* model of discrimination.[281] By prohibiting discrimination

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

275. *See id.*

276. *See id.* at 14 (stating that "accommodation is far likelier to involve personalized special treatment").

277. *See* C.F.R. § 1630.2(o)(3) (1999) (stating that determination of an appropriate reasonable accommodation requires the employer to engage in an "informal, interactive process" with the qualified individual with a disability).

278. *See supra* notes 70–72 and accompanying text (stating that reassignment is available to employees, not applicants).

279. *See supra* notes 75–79 and accompanying text (stating that an employer need only reassign a disabled employee to a vacant position).

280. *See* Befort & Donesky, *supra* note 265, at 1085.

281. For a discussion of the equal treatment model of anti-discrimination statutes, see generally Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (describing Title VII's "norm of colorblindness"); Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 515 (1998) (describing the traditional civil rights paradigm as one requiring an "equal playing field" for all workers).

"because of" certain listed characteristics such as an employee's race or gender,[282] Title VII compels employers to make employment decisions without reference to those listed traits. Prohibited discrimination occurs whenever an employer decides not to hire someone because of a specific trait, or conversely, whenever an employer takes *favorable* account of a person's race or gender in making an employment decision. Thus, except for very narrowly tailored, voluntary plans,[283] most employer efforts at affirmative action are prohibited under statutes containing an *equal treatment* model of discrimination.

The ADA goes beyond the equal treatment model to also require *different treatment* by compelling employers to provide reasonable accommodations to otherwise qualified individuals with a disability.[284] Under this different treatment model, an employer who merely refrains from treating disabled employees differently than non-disabled employees may be engaging in prohibited discrimination.[285] The incorporation of the reasonable accommodation requirement in the ADA, accordingly, represents Congress' recognition that "in order to treat some persons equally, we must treat them differently."[286]

The preamble to the ADA provides some guidance as to why preferences are not only lawful, but are required, under the ADA. One of Congress's principal motivations for enacting the ADA was to help disabled individuals enter into and remain in the American workplace.[287] In its "findings and purposes" section, Congress states that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[288]

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282. *See* 42 U.S.C. § 2000e-2(a) (1994). Title VII also protects against discrimination on the basis of color, religion, or national origin. *Id.*

283. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 628–30 (1987) (describing criteria necessary to validate voluntary affirmative action program); Taxman v. Bd. of Educ., 91 F.3d 1547, 1560 (3d Cir. 1996) (rejecting a school board's affirmative action plan designed to increase cultural diversity).

284. For a discussion of how the ADA adopts a different treatment model of anti-discrimination law, see generally Diller, *supra* note 9, at 40–44 (noting that the "ADA relies on a different treatment vision of equality"); Miller, *supra* note 281, at 514, 516–21 (describing the new civil rights paradigm as one that "recasts the notion of a 'level' playing field into one of an 'accessible' playing field").

285. *See* Miller, *supra* note 281, at 514 ("For disabled people who need reasonable accommodations in order to perform the essential functions of their jobs, 'equal' treatment is tantamount to a barrier to employment, not a gateway."); Weber, *supra* note 264, at 146 ("[I]t is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.").

286. Karlan & Rutherglen, *supra* note 274, at 10.

287. *See* Vikram David Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 GREEN BAG 2D 361, 368 (2002) (finding that the ADA's intended goal is "to increase opportunities for disabled individuals to live productive lives").

288. 42 U.S.C. § 12101(8) (2003).

This objective likely explains Congress' decision to adopt a different treatment model of discrimination in the ADA. While consideration of a person's race and gender may be inappropriate because neither characteristic bears any inherent relationship to an individual's work-related abilities, consideration of a person's disability may be required because the individual's impairment often is directly related to his or her ability to perform the job.[289] Reasonable accommodation thus ensures that disabled persons are not deprived of job opportunities they otherwise might not have access to under a disability-blind statute.[290]

The bottom line, accordingly, is that preferential treatment is not inimical to the ADA's purpose, but part and parcel of the statutory design for enabling the disabled to move into the mainstream of American life and its workforce. Once it is recognized that preferential treatment in the form of reasonable accommodations is an integral part of the ADA, it becomes clear that line-drawing attempts to ban preferential accommodations are counter-productive.

This conclusion is underscored by the shortcomings of the two line-drawing attempts discussed above. Justice Scalia would require only those preferential accommodations that alleviate "disability-related obstacles."[291] In the context of the *Barnett* facts, Justice Scalia maintained that Barnett was not entitled to the mailroom reassignment because the obstacle in question, U.S. Air's seniority policy, was not disability-related.[292] Justice Scalia's proposed test, however, would largely remove reassignment from the available arsenal of available reasonable accommodations, even though that type of accommodation is expressly listed in the statute.[293] An employer could avoid the necessity of reassigning disabled employees simply by adopting various facially neutral

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289. *See* Diller, *supra* note 9, at 40 (observing that "unlike race, disability is frequently a legitimate consideration in employment decisions.").

290. *See* Ransom v. Ariz. Bd. of Regents, 983 F.Supp. 895, 901 (D. Ariz. 1997) (stating that the ADA's reasonable accommodation requirement "serve[s] as a method of leveling the playing field between disabled and nondisabled employees, in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer"); Diller, *supra* note 9, at 41 ("[T]he reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs."); Weber, *supra* note 264, at 146 ("[O]nce the need for different treatment is recognized, affirmative action for persons with disabilities emerges as one of many forms of different treatment that might be needed to achieve equality."); R. George Wright, *Persons with Disabilities and the Meaning of Constitutional Equal Protection*, 60 OHIO ST. L.J. 145, 162–73 (1999) (arguing that equality for individuals with severe disabilities requires treatment that takes these disabilities into account).

291. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 412–13 (Scalia, J., dissenting).

292. *See id.* at 414–16.

293. 42 U.S.C. § 12111(9)(B) (2003).

transfer and assignment policies that, according to Justice Scalia, would automatically trump any duty to reassign. Moreover, Justice Scalia's application of the disability-related concept in *Barnett* is questionable. Barnett sought a job reassignment only because his disability eliminated his capacity to perform the functions of his former position. Thus, Barnett's request for a job reassignment certainly was related to his disability, even if the seniority system, in the abstract, was not. Since the practical impact of whether a reassignment request is granted for someone in Barnett's shoes is to determine whether the disabled employee continues to have a job with that employer, the objectives of the ADA are not served by Justice Scalia's proposed line.[294]

The potential boundary gleaned from the *Barnett* majority opinion comes from Justice Breyer's assertion that preferential accommodations may be necessary to enable the disabled "to obtain the *same* workplace opportunities that those without disabilities automatically enjoy."[295] While this principle is far more preferable than that espoused by Justice Scalia and probably would suggest an appropriate outcome in most circumstances, it too overly restricts the availability of preferential accommodations needed to effectuate the ADA's objectives. Take for example, the case of a disabled employee who seeks, as a reasonable accommodation, to take a leave of absence for the purposes of obtaining medical treatment and recuperation.[296] If the length of the requested leave is beyond that afforded by the employer's documented leave policy, the request arguably is unreasonable in terms of asking for a more generous opportunity than that available to other employees. The First Circuit Court of Appeals in *Garcia-Ayala v. Lederle Parenterals, Inc.*,[297] however, flatly rejected such a rule. The court in that case refused to adopt a per se rule of unreasonableness and, instead, looked to the totality of the circumstances and found that the employer had failed to show that the longer leave period would cause an undue hardship.[298] Of course, the First Circuit, simply, may be wrong. But, I do not think so.

Ultimately then, the reach of the reasonable accommodation duty under the ADA should stand on its own merits and serve the ADA's unique purposes. An accommodation should be required under the ADA if it would enable the employee to perform the job, is reasonable in the run of cases, and would not impose an undue hardship on the particular facts. This standard should not be muddied further by importing inapplicable concerns about affirmative action or preferences.

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294. *See supra* notes 73–74 and accompanying text (discussing the EEOC's view that reassignment is the accommodation of last resort).

295. *Barnett*, 535 U.S. at 397.

296. *See* ENFORCEMENT GUIDANCE, *supra* note 40 (recognizing leave for obtaining medical treatment or for recuperating from an illness to be permissible bases for a reasonable accommodation request).

297. 212 F.3d 638, 646 (1st Cir. 2000).

298. *Id.* at 647–50.

B. Reassignment

1. Answers

The *Barnett* decision also provided some guidance on the application of the more specific reassignment accommodation. These answers include the following:

An employer's unilaterally established seniority system for filling vacant positions will trump the ADA's reassignment accommodation in the run of cases. The *Barnett* majority made it clear that reassignment generally will not be reasonable when such action requires an exception to an employer's established seniority system for filling vacant positions.[299] By placing the onus on the employee to prove the reasonableness of reassignment, as opposed to requiring the employer to show that such a transfer imposes an undue hardship, the Court assured that employers seldom will be compelled to deviate from such a seniority system.

An employee, nonetheless, may show that special circumstances warrant a finding that reassignment is reasonable in a particular context. The *Barnett* court recognized a limited set of circumstances in which an employee could establish the reasonableness of reassignment under the particular facts.[300] The Court described, as an example of such "special circumstances," the situation in which the employer did not routinely adhere to the terms of an espoused seniority policy, thereby reducing employee reliance expectations in such a policy.[301]

Seniority systems established by collective bargaining agreements invariably will prevail over ADA reassignment requests. Although the seniority system at issue in *Barnett* was not established through labor/management negotiations, the *Barnett* decision clearly signals that collectively-bargained seniority systems need not give way to the ADA's reassignment accommodation duty. This conclusion follows for two reasons. First, the *Barnett* majority cited with favor those circuit court decisions that have adopted a per se rule favoring contractual seniority systems over reassignment for the disabled.[302] Second, the exception recognized by Justice Breyer's opinion is unlikely to come into play in the collective bargaining setting. Because seniority rules established in a collective bargaining agreement are enforceable through labor grievance and arbitration procedures,[303] a pattern of deviations from seniority-based contract rules will seldom occur.

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299. *Barnett*, 535 U.S. at 403.

300. *See id.* at 405–06.

301. *Id.* at 405.

302. *Id.* at 403–04.

303. *See* LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 17 (2000) (reporting that ninety-nine percent of collective bargaining agreements contain grievance procedures culminating in binding arbitration for at least some grievances).

2. Questions

a. What is the scope of the "special circumstances" exception recognized in *Barnett*?

In carving out a "special circumstances" exception to the presumption that it generally is not reasonable to require an employer to violate seniority rules by reassigning a disabled employee, the *Barnett* majority provided two related examples of when such circumstances might occur:

> The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure . . . will not likely make a difference . . . . The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.[304]

The majority opinion then went on to state that "[w]e do not mean these examples to exhaust the kinds of showings that a plaintiff might make."[305] Since this language leaves open the possibility that other types of "special circumstances" also could justify reassignment in the face of a conflicting seniority system, the scope of this exception remains unclear.

Justice Scalia is highly critical of the "special circumstances" exception. His dissenting opinion chides the majority for creating "a state of uncertainty that can be resolved only by constant litigation."[306] Justice Scalia particularly criticizes what he views as an exception that goes beyond the debunking of "sham" seniority systems to also give disabled workers "a vague and unspecified power . . . to undercut *bona fide* systems."[307]

b. Does the ADA require an employer to transfer a qualified disabled employee to a vacant position despite the superior qualifications of another applicant or employee who also desires that position?

The only one of the five *Barnett* opinions to expressly mention the "better qualified" debate,[308] is the dissenting opinion of Justice Scalia. In that opinion, Justice Scalia listed the *Humiston-Keeling* decision,[309] in which the Seventh Circuit held that the ADA does not compel an employer to reassign a disabled employee

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304. *Barnett*, 535 U.S. at 405.

305. *Id.*

306. *Id.* at 420 (Scalia, J., dissenting).

307. *Id.* at 419.

308. *See supra* notes 108–17 and accompanying text (discussing the "better qualified" debate).

309. 227 F.3d 1024, 1028–29 (7th Cir. 2000).

over a better qualified applicant, among a number of circuit court decisions that he sees as correctly ruling that the ADA does not mandate exceptions to legitimate nondiscriminatory policies.[310] More specifically, in his view, an employer's policy of filling vacancies on the basis of qualifications is not a disability-related barrier that necessitates an accommodation.[311]

A more recent Seventh Circuit decision, *Mays v. Principi*,[312] reads the *Barnett* majority opinion to support a somewhat similar result. In affirming the district court's grant of summary judgment sustaining an employer's denial of a reassignment request for various positions filled by better qualified applicants, the appeals court stated:

> This conclusion is bolstered by a recent decision of the Supreme Court holding that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system (citation omitted). If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break," *U.S. Airways* becomes our case.[313]

The Seventh Circuit, by this passage, presumably believes that the *Barnett* majority's analysis should be applied without adjustment in the "better qualified" context. Under this approach, a requirement that an employer fill a vacancy with a minimally qualified disabled employee, instead of a better qualified applicant or employee, would be unreasonable in the run of cases, with the burden on the employee to show special circumstances in order to overcome that burden.

It is quite plausible, however, to construe *Barnett* as authorizing a quite different approach in this context. In *Barnett*, the Court placed the burden on the employee to prove reasonableness because of the negative impact Barnett's proposed reassignment would have on the seniority-driven expectations of his fellow employees.[314] Arguably, an ADA preference for a minimally qualified disabled worker in the "better qualified" context, would impact more significantly on the employer's administrative operations than on co-employee expectations. As discussed above,[315] the ADA generally contemplates that the employer-based impacts of an accommodation will be scrutinized as part of the undue hardship analysis rather than at the reasonable accommodation stage. As such, this alternative interpretation of *Barnett* could justify a reversal in the applicable burden of proof such that reassignment in the "better qualified" context should be

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310. *Barnett*, 535 U.S. at 416–17 (Scalia, J., dissenting).
311. *Id.* at 414–16.
312. 301 F.3d 866 (7th Cir. 2002).
313. *Id.* at 872.
314. *See Barnett*, 535 U.S. at 400–03.
315. *See supra* notes 248–50 and accompanying text.

deemed reasonable unless the employer demonstrates that the transfer will impose an undue hardship under the particular facts of the case.

c. Does the ADA's reassignment accommodation compel employers to make exceptions to non-discriminatory transfer and assignment policies?

Much the same can be said for this issue. The only mention of the broader issue of employer transfer and assignment policies in general is in Justice Scalia's dissenting opinion, which approvingly cites to a number of lower court decisions holding "that the ADA does not mandate exceptions to a 'legitimate nondiscriminatory policy.'"[316] As one commentator has noted, a broad reading of *Barnett* could lead to the result that "there is a presumption of reasonableness in 'neutral' policies that the plaintiff must overcome."[317] On the other hand, if the principal impact of an exception to such a policy would fall upon the employer, an undue hardship analysis perhaps is more appropriate.

Once again, the key question is whether the policies should be analyzed, as in *Barnett*, through the lens of reasonable accommodation, or through the optic reverse so as to require the employer to show that a reassignment exception to such a policy would impose an undue hardship upon that employer. The answer to this question likely will be outcome-determinative in most instances.[318]

3. Suggested Solutions

a. The Scope of the Special Circumstances Exception

The scope of the "special circumstances" exception recognized by the *Barnett* majority is uncertain because of two unknowns. The first unknown is whether the examples provided by the Court are exhaustive of the types of situations in which such circumstances may arise. While Justice Breyer states that this is not necessarily so,[319] I believe that the opposite is more likely to be the case.

Both of the examples provided by the Court would justify an exception to a seniority policy in circumstances where the "employees expectations that the system will be followed" are not reasonably based.[320] This rationale is likely to serve as the only appropriate basis for overcoming the presumption against

316. *Barnett*, 535 U.S. at 416 (Scalia, J., dissenting).

317. Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of US Airways v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 35 (2002).

318. *See supra* notes 229–30 and accompanying text (discussing the importance of which party bears the burden of persuasion).

319. *See Barnett*, 535 U.S. at 405 (stating that "[w]e do not mean these examples to exhaust the kinds of showings that a plaintiff might make").

320. *Id.*

reassignment in the seniority policy context because such a finding eliminates the only articulated basis offered by the *Barnett* Court for finding that a reassignment exception to a seniority policy is unreasonable in the run of cases. In its decision, the *Barnett* majority explicitly justified its conclusion on the grounds that such policies give rise to legitimate "employee expectation" that such policies will be followed.[321] As the policy behind the examples comprises a full mirror image of the rationale for the anti-reassignment presumption, it is difficult to imagine how any other set of circumstances could qualify for the exception.

The second unknown concerns how to identify the point at which employee reliance expectations on a seniority policy are no longer reasonable. The *Barnett* majority opinion provides little guidance here, simply stating that the anti-reassignment presumption may be overcome in circumstances "where one more departure [from the seniority policy] will not likely make a difference."[322] Justice Scalia states that he has "no idea what this means,"[323] and, in terms of setting a predictable standard, it is difficult to disagree with that assessment.

A preferable approach is offered by Justice O'Connor's concurring opinion. Although she joined in the majority opinion, Justice O'Connor suggested an alternative standard for determining the edge of reasonably preclusive seniority rules, stating: "I would prefer to say that the effect of a seniority system on the reasonableness of a reassignment as an accommodation for purposes of the ADA depends on whether the seniority system is legally enforceable."[324] Under this approach, an ADA-based exception is not reasonable if another employee has a legally enforceable claim on that position flowing from the terms of the seniority system. In contrast, if the seniority claim is so weak as not to be legally enforceable, the reassignment request should be granted.

Justice O'Connor's proposed standard comes with the benefit of utilizing recognizable legal standards for determining the scope of the special circumstances exception. The enforceability of a seniority policy will depend upon the application of well-established contract law concepts such as those involving the principles of offer, waiver, reliance, and disclaimer. Justice O'Connor's proposal also finds support in basic policy considerations. If an employer does not have a legally enforceable claim to a vacant position, it is difficult to see how his or her reasonable reliance expectations are disturbed by permitting a qualified disabled employee to retain employment by transferring into that position.

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321. *Id.* at 404–05.
322. *Id.* at 405.
323. *Id.* at 418 (Scalia, J., dissenting).
324. *Id.* at 408 (O'Connor, J., concurring).

b. Reassignment in the Face of Better-Qualified Applicants and Other Employer Transfer and Assignment Policies

In an article predating the *Barnett* decision, a co-author and I offered recommendations as to how the courts should balance the ADA's reassignment accommodation with various nondiscriminatory employer transfer and assignment policies.[325] In doing so, we reached a somewhat different conclusion with respect to the context in which a disabled employee is competing against a better-qualified applicant than with respect to other types of policies.

The former context poses a difficult choice between filling a vacant position with a qualified, disabled employee or with a better-qualified, non-disabled applicant or fellow employee. After balancing the various considerations, we concluded that the ADA's central purpose of helping disabled individuals to participate fully in the American workplace supports generally preferring the reassignment rights of the disabled employee.[326] The employer, however, should be able to overcome this presumption by establishing, as an affirmative defense, that the failure to fill the vacancy would result in an undue hardship under the particular circumstances.[327]

In contrast, we generally endorsed the road map provided by the Tenth Circuit's *en banc* decision in *Smith v. Midland Brake, Inc.*[328] for resolving the broader issue of when employers must set aside or make exception to non-discriminatory employer policies in general.[329] In *Smith*, the court stated that employers should not be required to abandon neutral transfer and assignment policies in order to reassign a disabled employee, unless the policy in question would "essentially vitiate" the employer's express statutory obligation under the ADA to reassign qualifying employees as a form of reasonable accommodation.[330] We noted that this general rule would preserve an employer's ability to adopt facially neutral policies in the management of the enterprise without eclipsing employee expectations that have developed in reliance on such policies.[331] On the other hand, a no-transfer policy,[332] or a policy requiring all employees to compete for vacant positions,[333] would appear to "essentially vitiate" the ADA's reassignment obligation. As such, we recommended that an employer should be

325. Befort & Donesky, *supra* note 265, at 1086–94.
326. *Id.* at 1087–90.
327. *Id.* at 1090.
328. 180 F.3d 1154 (10th Cir. 1999) (en banc).
329. Befort & Donesky, *supra* note 265, at 1091–94.
330. *See Smith*, 180 F.3d at 1175–76.
331. *See* Befort & Donesky, *supra* note 265, at 1092.
332. *See* Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), discussed *supra* notes 118–19 and accompanying text.
333. *See* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895 (D. Ariz. 1997), discussed *supra* notes 120–22 and accompanying text.

required to make an exception to such policies in order to reassign a qualified individual with a disability.[334]

Prior to the Seventh Circuit's 2000 decision in *EEOC v. Humiston-Keeling, Inc.*,[335] the courts generally treated the "better-qualified" issue as distinct from that of the employer policy issue.[336] In *Humiston-Keeling*, however, Judge Posner linked the two concepts by holding that an employer need not reassign a disabled employee over a better-qualified competitor for the same position "provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant."[337] In linking these two contexts, the Seventh Circuit was able to draw on existing precedent in the general policy arena to the effect that an employer need not abandon a neutral transfer and assignment practice in order to award preferential rights to a disabled employee.[338] In effect, *Humiston-Keeling* treated the better-qualified issue as a sub-species of the broader policies issue. A recent law review article authored by Professor Cheryl Anderson also makes this same connection, but argues that both issues should be resolved through a unified mode of analysis that is more deferential to disabled workers.[339] Upon reconsideration, I now agree that the two questions are sufficiently similar so as to warrant a similar analytical framework.

The key question is whether those policies should by tested via the *Barnett* framework or by some other mode of analysis. I think that the latter option is the more appropriate one.

The analytical focus in *Barnett* concentrated on the reasonable accommodation stage of the ADA's anti-discrimination formula. The *Barnett* majority focused on this stage because of the impact of U.S. Air's seniority system on co-employee expectations.[340] As the majority opinion explained, while the employer impacts of a proposed accommodation generally are a matter for undue hardship analysis, co-employee impacts are relevant at the earlier stage of determining the accommodation's reasonableness.[341] Because a typical seniority system creates "employee expectations of fair, uniform treatment,"[342] an ADA-compelled exception to such a system generally is not reasonable in the absence of

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334. Befort & Donesky, *supra* note 265, at 1093.

335. 227 F.3d 1024 (7th Cir. 2000).

336. *See generally* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

337. *Humiston-Keeling*, 227 F.3d at 1029.

338. *See id.* at 1028.

339. *See* Anderson, *supra* note 317, at 37–43.

340. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002).

341. *See id.* at 400 (stating that while "[t]he statute refers to an 'undue hardship on the operation of the business'. . . a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees").

342. *Id.* at 404.

special circumstances.[343] An employer, accordingly, is not required to demonstrate that such an exception would impose an undue hardship on its operations or resources unless the employee first overcomes the special circumstances hurdle.

Most types of employer transfer and assignment policies, however, are enacted for the benefit of the employer rather than for the covered employees. These policies typically provide employers with human resource tools that enhance management objectives. And, in contrast to seniority systems, such policies do not typically create objective expectations upon which employees genuinely rely. As such, the principal impact of a mandated exception to such a policy falls upon the employer rather than upon a disabled worker's fellow employees.

These conclusions may be illustrated in an analogous setting. Collective bargaining agreements typically contain provisions that call for the filling of vacant positions based upon a mix of seniority and relative-ability considerations.[344] Unions tend to desire strict seniority provisions because such clauses tend to "militate against personal retaliation or preference."[345] Because such clauses objectively entitle the most senior employee to a vacancy, labor arbitrators generally place the burden of proof on the employer to show that the most senior employee is not minimally qualified for the position.[346] In contrast, employers tend to desire relative-ability clauses because they enable an employer to fill the position in question based upon a variety of factors largely within the employer's discretion.[347] Because these relative-ability clauses give deference to the more subjective decision-making process of employers,[348] labor arbitrators generally put the burden of proof on the Union to show conclusively that the employee selected by management is not the more qualified.[349] This, of course, is a difficult task. Thus, the most senior employee frequently will have an enforceable claim to a position under a strict seniority clause, but few individual employees will be able to rely on a relative-ability clause as a basis to claim a legally enforceable entitlement to a position that management has chosen to fill with another employee.

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343. *Id.* at 404–05.

344. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 837 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997); CALVIN WILLIAM SHARPE, THE COMMON LAW OF THE WORKPLACE § 5.9 (Theodore J. St. Antoine ed., 1998).

345. Overly Mfg. Co. of Cal., 68 LA 1343, 1345–46 (Jones 1977), quoted in ELKOURI & ELKOURI, *supra* note 344, at 808.

346. *See* ELKOURI & ELKOURI, *supra* note 344, at 844; SHARPE, *supra* note 344, § 5.9.

347. See ELKOURI & ELKOURI, *supra* note 344, at 845 (describing the numerous criteria sometimes used in determining fitness and ability).

348. *See* Milbrook v. IBP, Inc., 280 F.3d 1169, 1176 (7th Cir. 2002) (noting that an employer's selection of candidates on the basis of qualifications often involves an element of subjective decision-making).

349. *See* ELKOURI & ELKOURI, *supra* note 344, at 841–43.

In circumstances such as this, the appropriate analytical focus in assessing most employer transfer and assignment policies should concentrate on the undue hardship stage. As discussed above, the undue hardship stage is uniquely suited to analyze the operational and resource burdens that a proposed accommodation will impose on an employer under the particular facts, and, owing to the employer's superior access to this information, the burden of proof with respect to these impacts appropriately rests with the employer.[350] Thus, given the different focus of the relative consequences of most transfer and assignment policies than that at issue in the *Barnett* case, the ADA's reassignment accommodation in these other contexts generally should be deemed reasonable, unless the reassignment either undercuts objective employee expectations or would impose an undue hardship on the employer.

Here again, Justice O'Connor's proposed test for determining reasonableness provides valuable guidance. As noted above, Justice O'Connor's concurring opinion in *Barnett* maintains that the reasonableness of reassignment in the *Barnett* context should depend upon whether an employer's seniority system is legally enforceable. If a non-disabled employee has a legal entitlement to a vacant position under such a system, Justice O'Connor's test would find that reassignment in the face of such a claim generally is not reasonable.[351]

A similar mode of analysis should be used with respect to employer transfer and assignment policies in general. If an employer's policy is stated and administered in an objective manner so as to create a legally enforceable claim to a vacant position, such as is true of many seniority systems,[352] a reassignment exception to such a policy usually will be unreasonable. But most transfer and assignment policies do not result in legally enforceable claims to a particular employment position. This is so for two different reasons. First, some of these policies, such as in the relative ability context[353] or in a competitive consideration context,[354] vest subjective decision-making authority in the employer. Second, other policies primarily serve to disqualify certain groups of employees from claiming vacant positions, such as in the no-demotion,[355] no-transfer,[356] and no

350. *See supra* notes 248–51 and accompanying text.

351. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 408 (O'Connor, J., concurring).

352. *See* ELKOURI & ELKOURI, *supra* note 344, at 844.

353. *See supra* notes 108–17 and accompanying text (discussing employer policies authorizing employer to prefer better-qualified applicants in terms of relative ability).

354. *See supra* notes 120–22 and accompanying text (discussing employer policies authorizing employer to fill vacancies on the basis of a competitive evaluation of all candidates).

355. *See supra* notes 127–28 and accompanying text (discussing employer policies that bar the filling of vacancies by means of demotion).

356. *See supra* notes 118–19 and accompanying text (discussing employer policies that bar the filling of vacancies by means of employee transfers).

transfer of part-time employee[357] contexts. In either setting, these policies do not confer a legally enforceable claim to a position on any particular employee. Under Justice O'Connor's proposed test, accordingly, the reassignment of a qualified, disabled employee as an exception to these types of policies is presumptively reasonable, subject only to rebuttal through an employer's demonstration that the reassignment would impose an undue hardship.

The undue hardship inquiry provides a suitable touchstone for this analysis. The essence of the undue hardship inquiry concerns a determination as to whether a proposed accommodation would impair employer operations by imposing "significant difficulty or expense."[358] Whether a particular reasonable accommodation amounts to an undue hardship is considered in light of several factors listed in the statute,[359] including "the impact . . . of such accommodation upon the operation of the facility."[360] According to the EEOC's Interpretive Guidance, an employer need not undertake "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[361] Therefore, in circumstances in which an employer's ability to follow the terms of a transfer and assignment policy is vital to the successful performance of the employer's business operations, an employer may be able to demonstrate that a compelled exception to such a policy in favor of a disabled employee would amount to an undue hardship.

The undue hardship defense represents Congress' attempt to balance the legitimate business interests of employers with the legitimate needs of the disabled. At bottom, the undue hardship inquiry is a more desirable means for testing an employer's decision to deny the reassignment of a disabled employee based upon the terms of a transfer and assignment policy, than the transplantation of *Barnett*'s presumption of unreasonableness into a context in which objective co-employee expectations are not at stake.

This approach to employer transfer and assignment policies also properly reflects the competing policy interests at stake. Consider, in this regard, the respective fates of two employees—one disabled and one not—who each desire the same vacant position. If the disabled employee is denied the requested transfer, he or she is out of a job. Since reassignment is the accommodation of last resort, the opportunity to be placed in this vacant position represents the disabled employee's "last chance" to remain employed with that particular employer.[362] In contrast, the consequences suffered by the non-disabled employee who does not

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357. *See supra* notes 123–24 and accompanying text (discussing employer policies that bar the filling of vacancies by transferring part-time employees into full-time positions).

358. 42 U.S.C. § 12111(10)(A) (2003).

359. *Id.* § 12111(10)(B). *See also supra* note 27 (listing the factors considered under § 12111(10)(B)).

360. 42 U.S.C. § 12111(10)(B)(ii).

361. *See* Interpretive Guidance, *supra* note 29, § 1630.2(p).

362. *See supra* notes 73–74 and accompanying text.

obtain the desired transfer are less severe. The non-disabled worker remains employed in his or her current position, and the chance to move into a more desirable position is deferred rather than lost. Given this significant disparity in consequences, the scale generally should tip in favor of the disabled employee in the absence of a showing of an undue hardship.

VI. CONCLUSION

The *Barnett* Court's holding is a relatively narrow one: an employer generally need not reassign a disabled employee as a reasonable accommodation if doing so would conflict with the terms of an employer's seniority policy, unless special circumstances justify a different result. I find little to quarrel with in this specific holding.[363] The *Barnett* majority appropriately recognizes that employees develop expectations in "fair, uniform treatment"[364] in seniority policies that would be undermined by an ADA-mandated exception. But, when such expectations are not reasonably based due to special circumstances, the operation of the seniority system should not trump the ADA's goal of enhancing the employment of disabled workers through reassignment.

The fundamental shortcoming of the *Barnett* decision, however, is in the Court's failure to provide adequate guidance for future controversies. The Court is imprecise with respect to the type of "special circumstances" that will overcome the presumption of unreasonableness in requiring a reassignment in the face of a conflicting seniority system. The Court does not explain how its ruling will impact the balance of reassignment and other types of transfer and assignment policies. The Court fails to articulate a clear allocation of the burden of proof responsibilities with respect to establishing a reasonable accommodation. And, finally, the Court falls short of demarcating when, if ever, an accommodation should be deemed unreasonable by virtue of the fact that it requires the provision of preferential treatment for the disabled.

In its defense, the Court quite likely did not answer these questions because it could not reach a consensus on these issues. The five separate opinions authored by the justices in *Barnett* reveal a Court that is quite sharply divided with respect to the proper construction of the ADA's text and its purposes. Nonetheless, these divergent views offer clues that may portend future developments.

These clues, along with an analysis of the statute's policy objectives, provide a basis for suggesting possible solutions for *Barnett*'s unanswered questions. With respect to the general reasonable assignment obligation, the Court should adopt an allocation that splits the burden of proving reasonableness between the employee and the employer. This approach, endorsed by the Second

363. *See* Befort & Donesky, *supra* note 265, at 1091–92 (suggesting that neutral transfer and assignment policies that engender reasonable expectations among employees, such as a seniority system, should be upheld under the ADA in most instances).

364. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 404 (2002).

Circuit in *Borkowski*,[365] adequately balances the respective interests and information access of the two parties. Under this model, the financial and operational impact of an accommodation on the employer is primarily a matter for the employer to establish as part of the undue hardship analysis. The Court also should dispense with the misguided search for boundaries that would prohibit or unduly limit accommodations on the grounds that they confer preferential treatment on the disabled. The ADA adopts a different treatment model of discrimination that utilizes some types of preferential treatment in order to achieve a level playing field for the disabled.[366] The appropriate limit on these preferential accommodations is the undue hardship defense, not the misplaced rhetoric of the affirmative action debate.

Justice O'Connor's concurring opinion in *Barnett* provides an appropriate touchstone for the unanswered questions relating to the reassignment accommodation. According to Justice O'Connor, reassignment is unreasonable if someone other than the disabled employee seeking a transfer has a legally enforceable entitlement to the position in question.[367] This standard provides a predictable basis for determining *Barnett*'s special circumstances exception to the presumption favoring seniority systems. More broadly, this standard calls for an undue hardship-based test for determining whether reassignment should prevail over other types of transfer and assignment policies.

Perhaps the most surprising, and most significant, aspect of the *Barnett* majority opinion was the Court's decision to analyze the propriety of Barnett's reassignment request as an issue of reasonable accommodation as opposed to that of an issue of undue hardship. This determination was premised upon the fact that an exception to the operation of a seniority system would trammel upon the legitimate expectations that employees have developed in reliance on the uniform operation of the seniority system. This characteristic, however, is absent with respect to most other types of employer transfer and assignment policies. These policies typically reserve an employer's discretion in filling vacancies or provide a basis for disqualifying certain groups of employees in filling vacancies. In contrast to seniority policies, these other policies do not typically create legally enforceable claims to vacant positions. As such, exceptions to these policies should be tested, not as a matter of reasonable accommodation, but as a matter of undue hardship.

While the Supreme Court may have passed on a golden opportunity in *Barnett* to resolve some of these significant issues, another opportunity undoubtedly will arise in the near future. The justices, at that time, hopefully will overcome their current divergent views of the ADA and adopt a policy-based approach to the treatment of reasonable accommodation and reassignment similar

365. The *Borkowski* decision is discussed *supra* at notes 225–27 and accompanying text.

366. *See supra* notes 284–86 and accompanying text.

367. *Barnett*, 535 U.S. at 409 (O'Connor, J., concurring).

to that proposed in this Article. Such an approach would go a long way toward achieving Congress' core objective of enhancing the employability of the disabled.

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