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# Mandatory Reassignment As a Reasonable Accommodation Under the Americans With Disabilities Act Turns "Nondiscrimination into Discrimination"

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# Mandatory Reassignment as a Reasonable Accommodation Under the Americans With Disabilities Act Turns "Nondiscrimination into Discrimination"[1]

## INTRODUCTION

Imagine an employer is hiring for a position requiring three years of experience. The employer is choosing between two applicants within its company: one who is highly qualified and has over fifteen years of experience, and the other who is less qualified and has only three years of experience. Although both meet the necessary qualifications, an employer will likely choose the more-qualified applicant. The decision to hire the more qualified candidate, however, can be complicated and may not even be permissible if the less-qualified applicant manifests a disability.[2] This is because the employer is required to comply with the Americans With Disabilities Act (ADA), which contains an ambiguous provision that allows for employee reassignment as a mandatory reasonable accommodation.[3] The ADA is designed to prevent discrimination and to preserve the integrity of an employer's hiring system when an employee becomes disabled.[4] However, Congress lists suggestions for reasonable accommodations an employer may utilize but it is unclear if reassignment is mandatory.[5] Employment agencies and courts have interpreted the ambiguous provision differently, which has

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[1] U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp., 842 F.3d 1333, 1346 (11th Cir. 2016) (internal quotation marks omitted) (quoting Terrell v. Usair, 132 F.3d 621, 627 (11th Cir. 1998)).

[2] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12102(1)(A), 12111(9)(B), (2012); Richard Meneghello, Fisher Phillips, *Court: Employees Seeking Accommodation Must Compete for Reassignment—Split in the Circuits Could Lead to Supreme Court Intervention*, JDSUPRA (Dec. 28, 2016), http://www.jdsupra.com/legalnews/court-employees-seeking-accommodation-74575/ [https://perma.cc/S746-B7YR].

[3] 42 U.S.C. § 12111(9)(B).

[4] 42 U.S.C. §§ 12112(a), (b)(5)(A); *see also St. Joseph's Hosp.,* 842 F.3d at 1345.

[5] *See infra* Section I.C.

led to different interpretations and a lack of a consistent standard.[6] This is precisely the issue at hand: to which interpretation should the employer adhere, mandatory reassignment or not?

The problem lies in the interpretation of the ADA's provision that suggests reassignment "may" be a reasonable accommodation.[7] The statute's provision containing the word "*may*"[8] creates confusion over whether reassignment is *always* reasonable.[9] Reasonable accommodation in the ADA refers to any accommodation required for an employee with a disability to equalize success and opportunity in the workplace.[10] The United States Supreme Court attempted to provide a framework for interpreting the term "reasonableness" regarding reassignment as a reasonable accommodation in *Barnett*.[11] Absent special circumstances, employer compliance for reassignment offered as a reasonable accommodation is not required to comply with the ADA if such a reassignment violates the company's existing seniority rules.[12] This framework was narrowly extended to reassignment cases that violated a disability-neutral rule[13] categorically with respect to seniority systems.[14] The standard is subjective and creates even more uncertainty regarding how employers not using a seniority system should comply with the ADA.[15]

Hence, when confronted with the question of whether reassignment is mandatory outside the seniority system, circuit courts have issued contradictory rulings.[16] The United States Court of Appeals for the Tenth and District of Columbia Circuits and the Equal Employment Opportunity Commission (EEOC) contend that reassignment is always a required reasonable accommodation

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[6] Meneghello, *supra* note 2.

[7] 42 U.S.C. § 12111(9)(B); *St. Joseph's Hosp.*, 842 F.3d at 1345.

[8] *Id.*

[9] Meneghello, *supra* note 2.

[10] NAT'L COUNCIL ON DISABILITY, POLICY BRIEF SERIES: RIGHTING THE ADA NO. 10, REASONABLE ACCOMMODATION AFTER *BARNETT* 5 (2003).

[11] U.S. Airways, Inc., v. Barnett, 535 U.S. 391 (2002).

[12] *Id.* at 406.

> The typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment. These benefits include job security and an opportunity for steady and predictable advancement based on objective standards. . . . [T]o require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations.

*Id.* at 404.

[13] A disability-neutral rule is one that "seeks only 'equal treatment'" regardless of a disability, such as a seniority system. *Id.* at 397.

[14] *Id.* at 402–06.

[15] NAT'L COUNCIL ON DISABILITY, supra note 10.

[16] Meneghello, *supra* note 2.

regardless of who is the most-qualified applicant.[17] These circuits support the proposition that reassigning a disabled employee must always bypass the best-qualified application process in order to comply with the ADA.[18] By contrast, the United States Court of Appeals for the Eighth and Fifth Circuits concluded that disabled employees applying for reassignment are required to compete in the application process and should not be given priority over more qualified applicants due to their disability status.[19]

On December 15, 2016, the Eleventh Circuit further polarized the positions by rejecting the mandatory position adopted by the Tenth and D.C. Circuits, and adopting the position of the Eighth and Fifth Circuits.[20] The Eleventh Circuit correctly argues that mandatory reassignment creates uncertainty and unfairness.[21] Mandating reassignment would require employers to sacrifice more qualified employees at the expense of less qualified employees to satisfy the ADA, negatively impacting business efficacy and profit.[22] To justify abandoning the mandatory reassignment position, the Eleventh Circuit reasoned that the best-qualified applicant process emulates the seniority system in *Barnett*, because it functions as a disability-neutral rule.[23] This justification seems to suggest that the decision rendered in *Barnett* extends beyond the scope of seniority systems and can be extrapolated to all similar decisions.[24]

Consequently, the split is widening, and employers are left with little guidance on how to comply with the ADA regarding employee reassignment.[25] This note argues that the best way to appease all circuit courts and the contentions of the EEOC is through a two-prong test addressing: (1) the qualification of the applicant; and (2) a cost-benefit analysis that will outline some of the factors that the Court should consider.[26] The Supreme Court should use this two-prong test because it will bind all the circuit courts to one interpretation and illuminate the compliance issues for employers while taking into consideration the rights owed to employees with disabilities under the ADA. Additionally, the two-

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[17] *Id.*

[18] *Id.*

[19] Patrick Dorrian, *Disabled Workers Must Compete for Job Reassignments*, BLOOMBERG BNA (Dec. 12, 2016), https://www.bna.com/disabled-workers-compete-n73014448413/ [https://perma.cc/9D8G-445C].

[20] U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp., 842 F.3d 1333, 1345. (11th Cir. 2016).

[21] *See id.* at 1345–46.

[22] *Id.* at 1346.

[23] *Id.* at 1346; *see also* U.S. Airways, Inc., v. Barnett, 535 U.S. 391, 397–98 (2002).

[24] *St. Joseph's Hosp.*, 842 F.3d at 1346.

[25] Meneghello, *supra* note 2.

[26] *See infra* Part V.

prong test will preserve the goals of businesses while simultaneously safeguarding individuals with disabilities. In order for employers to comply with the ADA,[27] there must be a unifying standard[28] to interpret ambiguous components of the statute, specifically, whether reassignment as a reasonable accommodation is mandatory or not.

Part I of this note addresses the history and purpose of the ADA, and explains the reasonable accommodation safeguards for disabled employees. Part II discusses the foundational Supreme Court case, *Barnett*, regarding the dubious standard the Court articulated, as well as the concurring and dissenting arguments. Part III details the circuit split regarding the differing interpretations of mandatory reassignment as a reasonable accommodation outlined in the ADA, and addresses the impact of the Eleventh Circuit's most recent decision. Part IV explains the impact of the circuit split on employers and workers with disabilities. Part V evaluates possible solutions to the split, addresses potential problems with the recommended solution, and suggests that the Supreme Court interpret the reasonableness of mandatory reassignment through a two-prong test using factors regarding the qualification and severity of the employee's disability as well as the impact to the employer. This note concludes that the most effective interpretation of the ADA is through a uniform approach for the future to bind all circuit courts and ensure compliance with the ADA.

## I. HISTORICAL BACKGROUND ON ADA SAFEGUARDS FOR REASONABLE ACCOMMODATIONS

### *A. Purpose and Creation of the ADA and EEOC*

The unemployment rate for individuals with disabilities is eight percent, which is nearly double the rate of non-disabled workers.[29] To help mitigate this disparity, Congress passed the Americans With Disabilities Act in 1990 to protect individuals with disabilities from discrimination in employment, education, and public accommodations.[30] Title I of the ADA states, "no covered

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[27] Americans With Disabilities Act, 42 U.S.C. § 12112(a), (b)(5)(A) (2012).

[28] Meneghello, *supra* note 2.

[29] U.S. DEP'T OF LABOR, BUREAU LAB. STAT.: ECON. NEWS RELEASE, USDL-19-0326, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS—2018 (2019) https://www.bls.gov/news.release/disabl.nr0.htm [https://perma.cc/Z4E6-Q6JR].

[30] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2012)); *see also What Is the Americans with*

entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee, compensation, [or] job training,"[31] which applies to employers with fifteen or more employees.[32] To enforce the employment non-discrimination compliance provision of the ADA, Congress extended the authority of the United States Equal Employment Opportunity Commission (EEOC).[33] Before determining if discrimination took place, a plaintiff must actually meet the definition of disability.[34]

### *B. Meeting the Definition of "Disability"*

Section 12102 of the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities."[35] A disability that falls within the ADA cannot be minor, but rather, it must "substantially limit"[36] the individual's ability to perform his or her job.[37] The term "substantially limits" means the disabled employee can no longer complete a major life activity or is severely restricted in performing a major life activity compared to an average person.[38] This interpretation is read in accordance with the ADA Amendments Act of 2008, which Congress passed to restore the goals and purpose of the original ADA of 1990 by loosening the threshold to increase coverage.[39]

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*Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada [https://perma.cc/E4ZD-F2PZ].

[31] 42 U.S.C. § 12112(a) (2012).

[32] *Id.* § 12111(5)(A) (2012) ("'employer' means a person engaged in an industry affecting commerce who has 15 or more employees").

[33] *Id.* § 12117; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/ [https://perma.cc/V8RG-BDKC].

[34] 42 U.S.C. § 12102 (2012); The EEOC investigates allegations of discrimination against employers. In order to prevail on an ADA claim, a plaintiff must prove a *prima facie* case that: (1) the individual has a disability; (2) the individual is qualified for the job; and (3) an adverse employment decision was made because of the individual's disability. U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp., 842 F.3d 1333, 1343 (11th Cir. 2016).

[35] 42 U.S.C. § 12102(1)(A) (2012). This section further suggests a non-exhaustive list of such major life activities and major bodily functions. *Id.* § 12102(2).

[36] 29 C.F.R. § 1630.2(j) (2018).

[37] *See* Kemp v. Holder, 610 F.3d 231, 237–39 (5th Cir. 2010) (finding a hearing impairment did not constitute as a substantial impairment because there were mitigating devices used to lessen the impact of the disability).

[38] 29 C.F.R. § 1630.2 (2018).

[39] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101(a) (2012)) ("Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high of a standard.").

Additionally, the EEOC interprets substantially limited as "an impairment [that] disqualifies an individual from a significant number of jobs for which the person would otherwise be qualified."[40] Thus, the term substantially limited does not extend to those individuals who are unable to perform a one job but rather encompasses those individuals, with respectively the same skills and training as an average person, who have a reduced ability to perform a wide range of jobs.[41] The United States Supreme Court initially ruled that an individual is not substantially limited and thus does not meet the definition of manifesting a disability if the individual has the ability to control his or her condition.[42] Under the original interpretation, the burden posed on a diabetic taking insulin is much higher than an individual without the benefit of medicine or assistance, and thus would not qualify as an individual with a disability.[43]

Congress changed this mitigation interpretation when it passed the ADA Amendments Act of 2008.[44] Under this version, Congress decided that the Court's determination was "an unduly restrictive view of what constitutes as substantial limitation,"[45] uncoupling the interpretation by assessing the status of the individual without the use of the necessary assistance to function normally.[46] Congress reinterpreted the Court's construction by classifying the individual as disabled although the individual maintains a method of controlling the disability.[47] Thus, an individual with diabetes prescribed insulin to control the disability now has a chance to qualify as disabled under the ADA, as a disability determination does not follow from merely having a diagnosis.[48] For instance, a temporarily disabled individual with a broken arm would not qualify under the "disability" definition under the ADA because this disability is

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[40] John E. Murray, *The ADA Amendments Act of 2008: Redefining Who Is Disabled*, 81 WIS. LAW. (2008), https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx/archives/article.aspx?Volume=81&Issue=12&ArticleID=1634 [https://perma.cc/FA5G-CP37].

[41] *Id.*

[42] Murray, *supra* note 40 (citing Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197–98 (2002)).

[43] *Id.*

[44] Americans With Disabilities Act of 1990, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2008)).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] The EEOC uses individualized assessments to determine if the individual suffers from a substantial disability based off objective factual evidence. Americans With Disabilities Act, 42 U.S.C. § 1630.2 (j)(1)(iv), (3) (2018).

only temporary.[49] In order to uniform claims and prevent employment discrimination for disabled employees, Congress amended the ADA to address reasonable accommodations.[50]

### *C. Safeguards for Reasonable Accommodations to Prevent Employment Discrimination*

Three specific provisions in the ADA govern employer methods for reasonably accommodating disabled employees.[51] Section 12112(a) of the ADA prohibits employers from discriminating against disabled individuals, who are otherwise qualified, when hiring or conducting other business-related procedures.[52] To prevent employment discrimination and ensure compliance with the ADA, Section 12112(b)(5)(A) additionally requires employers to implement reasonable accommodations for disabled individuals unless it "would impose an undue hardship on the operation of the business." [53] Finally, Section 12111(9)(B) defines what a reasonable accommodation for an employee entails and lists examples of what an employer may do, such as reassignment to a vacant position.[54]

In order to prevent employment discrimination, the ADA provides the requisite foundation employers must comply with in order to reasonably accommodate their disabled employees.[55] Congress did not specify an exact method, but rather merely suggested some reasonable accommodations an employer may utilize.[56] After the passage of the ADA, the Supreme Court had to deal with whether filling an already occupied position based on a seniority system violated the ADA which then led to additional uncertainty amongst employers faced with the unanswered question of whether an employer had to reassign a disabled employee to a vacant position in violation of the employer's seniority system.[57] Due to the lack of clear direction from Congress, some employers have interpreted the provisions for

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[49] *The ADA: Your Responsibilities as an Employer Addendum*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Aug. 1, 2008) https://www.eeoc.gov/facts/ada17.html [https://perma.cc/V6S3-8H4R].

[50] 42 U.S.C. §§ 12111(9)(B), 12112(a), (b)(5)(A) (2012).

[51] *Id.* §§ 12111(9)(B), 12112(a), (b)(5)(A).

[52] *Id.* § 12112(a).

[53] *Id.* § 12112 (b)(5)(A).

[54] *Id.* § 12112(9)(B). "'[R]easonable accommodation' may include . . . reassignment to a vacant position." *Id.*

[55] *Id.* § 12112(a), (b)(5)(A); *see also* U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp., 842 F.3d 1333, 1345 (11th Cir. 2016).

[56] *See infra* Part II.

[57] U.S. Airways, Inc., v. Barnett, 535 U.S. 391(2002); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (noting a split among circuits on the answer to this question).

reasonable accommodations as suggestions, rather than requirements, resulting in litigation.[58] Consequently, circuit courts have been divided on the issue of reasonableness and whether it is contingent on specific factual circumstances.[59] To clarify the ambiguity as to what reasonable accommodation entails and instances where reassignment may not be required, the Supreme Court in *Barnett,* attempted to create a workable standard to guide employers in the seniority system context.[60]

## II. THE SUPREME COURT ADDRESSES REASONABLENESS IN *U.S. AIRWAYS, INC., V. BARNETT*

In *U.S. Airways, Inc v. Barnett*, the Supreme Court infamously wrestled with the interpretation of Section 12101 of the ADA with respect to the narrow issue of employer seniority systems.[61] Robert Barnett injured his back while on the job at U.S. Airways, and, because of his physical constraints, was relocated to a less laborious mailroom position.[62] The mailroom position was subject to U.S. Airway's seniority system whereby senior employees were allowed to bid on different positions within the company based on seniority.[63] Barnett requested to maintain his mailroom position despite bids by more senior applicants as per a reasonable accommodation under the ADA, but U.S. Airways refused due to his lack of 'senior status' within the company.[64] As a result, the Supreme Court was forced to balance the interests presented between the workers with disabilities and the senior workers.[65] Section 12112(a) prohibits an employer from discriminating against a disabled employee who can perform the essential functions of the job with "reasonable accommodation."[66] But Section 12112(a) is limited by Section 12112(b)(5) which rejects the reasonable accommodation if it "impose[s] an undue hardship on the operation of [its] business."[67] The primary issue the Supreme Court had to resolve was whether compliance with Title I of the ADA trumped U.S. Airway's established seniority system in order to provide a reasonable accommodation to Barnett as a result of his back injury.[68]

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[58] Meneghello, *supra* note 2.
[59] *See infra* Part III.
[60] *Barnett*, 535 U.S. at 394.
[61] *Id.* at 393.
[62] *Id.* at 394.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 393–94.
[66] 42 U.S.C. § 12112(a) (2012).
[67] *Id.* § 12112(b)(5).
[68] *Barnett*, 535 U.S. at 393–94.

The Court declined to extend preferential treatment violating a disability-neutral rule[69] as seniority systems are not per se unreasonable and accommodations that blatantly disregard them are ordinarily trumped.[70] U.S. Airways argued that reasonably accommodating Barnett, and violating its seniority system, unfairly advantaged the disabled workers over more-senior workers who are not disabled.[71] Describing U.S. Airways' argument, Justice Breyer wrote, "[the requested accommodation violates a disability-neutral workplace rule, such as a seniority rule, [because] it grants the employee with a disability treatment that other workers could not receive. Yet the Act . . . [only seeks] 'equal' treatment for those with disabilities."[72] The Court later dismissed this argument as not dispositive. It explained that accepting preferential treatment violating a well-established seniority system would extend beyond the ADA's intended coverage, creating a rights imbalance.[73] The Court limited the scope of the ruling to suggest that affirmative conduct is sometimes needed to "promote entry of disabled people into the work force,"[74] but seniority systems "ordinarily" are reasonable.[75] The only way a seniority system would not be reasonable, however, is if special circumstances exist, such as exceptions embedded within the seniority system that make the outright disregard of the accommodation unreasonable.[76] Thus, a plaintiff may overcome the undue hardship standard through a rebuttable presumption by presenting evidence of the existence of special

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[69] *Id.* at 393–94.

[70] *Id.* at 403.

[71] *Id.* at 397.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 401.

[75] *Id.* at 403.

[76] *Id.* at 405 (citing Borkowski v. Valley Cent. School Dist., 63 F.3d131, 137 (2d Cir. 1995)) ("[A]n accommodation that imposed burdens that would be unreasonable for most members of an industry might nevertheless be required of an individual defendant in light of that employer's particular circumstances.").

circumstances;[77] otherwise, the direct violation of a seniority system "warrants summary judgment for the employer."[78]

The Court's reasoning takes into account several factors.[79] Principally, by supporting established employer systems, it strengthens the employer-employee relationship by ensuring uniform treatment amongst employees through objective standards.[80] The logic behind this rule implies that an employee's effort is contingent on their success and security within their job, established by obtaining a senior position. Historically, seniority systems have been in place for decades, and disregarding them would constitute an undue hardship to both the company and non-disabled employee.[81] Additionally, there is a lack of congressional support suggesting the statute intended to destroy seniority systems to accommodate disabled employees.[82] Hence, accommodations that violate seniority systems are ordinarily unreasonable.[83]

Justice Sandra Day O'Connor, in her concurrence, modified the Court's test by requiring an analysis of the legal enforceability of the seniority system.[84] She addressed the reasonable accommodation of "reassignment to a vacant position" and asserted that the seniority system would be unreasonable if it "prevents the position in question from being vacant."[85] "Indeed, the legislative history of the Act confirms that Congress did not intend reasonable accommodation[s] to require . . . 'bumping' another employee out of a position. . . ."[86] O'Connor projected that an equitable remedy should not impose hardships on other

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[77] *Id.* at 405–06.

> The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is "reasonable" on the particular facts. . . . 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. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make.

*Id.* at 405 (citations omitted).

[78] *Id.* at 406.

[79] *Id.* at 403–05.

[80] *Id.* at 393.

[81] *Id.* at 395.

[82] *Id.* at 405.

[83] *Id.* at 405–06.

[84] *Id.* at 408 (O'Connor, J., concurring).

[85] *Id.* at 408–09 (quoting 42 U.S.C. § 12111(9)(B) (1994)).

[86] *Id.* at 410 (quoting H.R. REP. NO. 101-485, pt. 2, at 63 (1990)).

employees, and if the position is by definition occupied, reassignment to that position by definition cannot be warranted.[87] Although O'Connor employed a different analysis than the majority opinion, she agreed with the Court's outcome.[88]

On the other hand, the dissent argued the Court's opinion is defective because the accommodation of "reassignment to a vacant position" would be rendered meaningless under the ADA if "the disabled employee [was only] *considered* for a vacant position."[89] Because the ADA's purpose is to prohibit discrimination with respect to hiring, it follows that "a disabled employee must be given preference over a non-disabled employee when a vacant position appears."[90] In accordance with the goals and purpose of the ADA, reassignment to a vacant position is a necessary accommodation because it abolishes the impediments "arising solely from the disability."[91] The dissent qualified this argument by limiting its conclusion to guaranteeing a disabled applicant reassignment to a vacant position only if no one else is seeking the position, or if a more qualified applicant exists, the position will not be granted automatically.[92]

The dissent also critiqued the rebuttable presumption, which allows employees to demonstrate special circumstances to overcome a seniority system preference.[93] The aforementioned framework is too ambiguous as there is no exact criterion to show "departure from seniority rules [are] 'not likely to make a difference.'"[94] In sum, this standard gives disabled employees a "vague and unspecified power . . . to undercut bona fide [seniority] systems"[95] which is inherently unclear and forms the basis for litigation.[96] Evidently, uncertainty exists as to what special circumstances overcome a seniority system and how this opinion extends to other situations outside of established seniority systems. Justice Souter's dissent contended that a holistic approach must be utilized to determine if reassignment to a vacant position qualifies as a reasonable accommodation.[97] After the U.S. Supreme Court issued its ruling, circuit courts,

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87 *Id.* at 410–11.
88 *Id.* at 411.
89 *Id.* at 414 (Scalia, J., dissenting) (citing 42 U.S.C. § 12111(9)(B)).
90 *Id.* at 414.
91 *Id.* at 415.
92 *Id.* at 416.
93 *Id.* at 418. "I have no idea what this [standard] means." *Id.*
94 *Id.*
95 *Id.* at 419.
96 *Id.* at 420.
97 *Id.* at 422–23. (Souter, J., dissenting).

next, had to rule on whether reassignment to a *vacant* position was mandatory as a reasonable accommodation.

## III. THE CIRCUIT SPLIT: MANDATORY REASSIGNMENT OR NOT?

Although *Barnett* attempted to resolve the ambiguity regarding reassignment to a vacant position as a reasonable accommodation, circuit courts are still split on the issue of whether reassignment to a vacant position is a *mandatory* accommodation.[98] The Supreme Court did not address the issue of whether reassignment to a vacant position is a mandatory reasonable accommodation, but rather only whether reassignment to a vacant position suffices as a reasonable accommodation with respect to seniority systems in a disability-neutral system.[99] Thus, the Supreme Court insufficiently resolved the ambiguity by failing to render a decision as to whether the ADA mandates noncompetitive reassignment. "By importing a reasonableness standard without definition, the Supreme Court create[d], rather than eliminate[d] or reduce[d], uncertainty in the ADA about when accommodations are required."[100] To demonstrate this divisive issue, circuit courts have adopted the "best-qualified applicant" approach as an extension of *Barnett*'s narrow ruling.

### *A. "Best-Qualified Applicant" Approach*

#### 1. "The ADA Is Not an Affirmative Action Statute"[101]

In *Huber v. Wal-Mart Stores, Inc.,* Pam Huber suffered "a permanent injury to her right arm and hand" while working for the defendant corporation, Wal-Mart.[102] Because of this, Huber requested "as a reasonable accommodation, reassignment to a router position."[103] Although Huber was qualified, Wal-Mart declined to extend an offer to Huber, as "she was not the most qualified applicant."[104] The issue was whether the ADA required Wal-Mart to, as a reasonable accommodation, give Huber preference in the general applicant pool where she was able to perform the duties but not the most qualified candidate.[105]

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98 Meneghello, *supra* note 2.

99 *See Barnett*, 535 U.S. at 397 (majority opinion).

100 NAT'L COUNCIL ON DISABILITY, *supra* note 10.

101 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2006) (citing Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996)).

102 *Id.* at 481.

103 *Id.*

104 *Id.*

105 *Id.*

The United States Court of Appeals for the Eighth Circuit concluded that "the ADA is not an affirmative action statute and does not require an employer to [mandatorily] reassign a qualified disabled employee to a vacant position" in violation of a legitimate best-qualified applicant policy.[106] Thus, the ADA does not mandate reassigning a disabled employee to a position filled by a higher-ranking applicant.[107] The Eighth Circuit correctly rendered a decision, as the ADA does not require an employer to do any more for a disabled employee than level the playing field.[108] Since the disabled employee was qualified for the position, and would be whether she maintained a disability or not, the ADA was of no use in this particular circumstance and thus mandatory reassignment was not justified.

The United States Court of Appeals for the Fifth Circuit ruled on a similar question in *Turco v. Hoechst Celanese Corp.*[109] In *Turco*, John Turco worked as a chemical operator for thirteen years at Hoescht Celanese Chemical Group, Inc.[110] During his employment, he developed adult onset diabetes but still remained a competent worker.[111] As per physician recommendation, and due to his worsening condition, Turco applied for a technician position but was not selected.[112] As a result, Turco argued Hoechst did not provide a reasonable accommodation pursuant to the ADA that resulted in unlawful discrimination based on his disability.[113]

The United States Court of Appeals for the Fifth Circuit considered Hoechst's compliance with the ADA for reasonably accommodating Turco and concluded Turco lacked the qualifications of the essential functions of a chemical operator and a technician position alike.[114] The court ruled that "the [ADA] does not require affirmative action in favor of individuals with disabilities. It merely prohibits employment discrimination against qualified individuals with disabilities, no more and no less."[115] Here, Turco was not even qualified for the position, so mandating reassignment to a vacant position would have undermined the goals of the ADA and violated the Supreme Court's standards by creating an undue hardship on the employer.[116] While the Eighth

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106 *Id.* at 483; Meneghello, *supra* note 2.

107 *Huber*, 486 F.3d. at 484.

108 Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12111(9)(B) (2012)).

109 Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996).

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 1093.

114 *Id.*

115 *Id.* at 1094 (citing Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995)).

116 *Id. see also* US Airways, Inc., v. Barnett, 535 U.S. 391, 416 (2002).

and Fifth circuits noted that the ADA was not an affirmative action statute, the United States Court of Appeals for the Eleventh Circuit looked into whether the best-qualified applicant policy could be judged as equivalent to a seniority system.

### 2. The Best-Qualified Applicant Policy Is Synonymous with Seniority Systems

The United States Court of Appeals for the Eleventh Circuit rendered the most recent decision regarding the reasonable accommodation provision pursuant to the ADA. In *U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp.*, Leokadia Bryk, "a nurse in the psychiatric ward of St. Joseph's Hospital," developed spinal stenosis and arthritis, necessitating the use of a cane.[117] Bryk's cane usage raised concerns with performing her job, as it would pose a safety hazard if the psychiatric patients attempted to use the cane as a weapon.[118] The hospital allowed Bryk to apply to other positions within the Hospital, despite Bryk's limited qualifications for other positions.[119] Additionally, "the Hospital allowed Bryk to compete with other internal candidates," rather than the general pool of applicants.[120] The principal issue considered was whether the ADA mandates noncompetitive reassignment.[121]

The Eleventh Circuit attempted to extend the *Barnett* framework to guide the analysis, stating that the ADA does not ordinarily require reassignment if it violates an employer seniority system, unless a plaintiff can present evidence of special circumstances.[122] This framework, however, did not specifically cater to the facts of *St. Joseph's Hosp.*, as it involved a best-qualified applicant policy rather than a seniority system.[123] Here, the court equated the employer's best-qualified hiring policy with a seniority system to argue that mandating reassignment would not be reasonable.[124] This justification suggested that the decision rendered in *Barnett* extends beyond the scope of seniority systems and can be extrapolated to all similar decisions.[125]

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[117] EEOC v. St. Joseph's Hosp., 842 F.3d 1333, 1337–38 (11th Cir. 2016).

[118] *Id.* at 1338.

[119] *Id.* The hospital also waived two requirements which normally applied to internal candidates for transfer: (1) that the candidate be in his or her current position for at least six months; and (2) that no final written warnings exist in the candidate's record. *Id.*

[120] *Id.*

[121] *Id.* at 1345.

[122] *Id.* at 1346 (citing U.S. Airways, Inc., v. Barnett, 535 U.S. 391, 406 (2002)).

[123] *Id.*

[124] *Id.*

[125] *Id.*

The court rationalized that disregarding a best-qualified hiring policy would "impose[] substantial costs on the hospital and potentially on patients."[126] This is mainly because "employers operate their businesses for profit, which requires efficiency and good performance,"[127] so automatically reassigning a less-qualified employee would undermine employer's goals, especially in a hospital setting.[128]

Ultimately, the court found that "the ADA does not require reassignment without competition for, or preferential treatment of [people with] disab[ilities]."[129] The court construed the ADA generally to mean employers must reasonably accommodate their disabled employees, but did not specify the exact method for doing so.[130] The use of the word "may"[131] in the ADA's non-exhaustive list of reasonable accommodations implied that reassignment to a vacant position can be reasonable, but it is not always reasonable.[132] The argument suggests that because Congress failed to use binding language, the intent for reassignment as a mandatory reasonable accommodation does not comport with Congress' intent.[133] The court interpreted the ADA to only require a disabled employee to equally compete in the general applicant pool, not to create additional challenges for the non-disabled employees.[134] The impact of this decision adds to the split with other circuit courts' rulings contending that reassignment is mandatory.

### *B. Reassignment Is Mandatory*

#### 1. The Tenth Circuit Interpreted the ADA's Language as Mandatory

The United States Court of Appeals for the Tenth Circuit issued the first opinion interpreting reassignment to a vacant position to be a mandatory reasonable accommodation. In *Smith v. Midland Brake, Inc.*, Robert Smith worked as an employee for seven years at Midland Brake.[135] Smith's job required him to test

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* (citing *May*, MERRIAM-WEBSTER www.merriamwebster.com/dictionary/may) [https://perma.cc/6YPG-65J6].
[132] *Id.* (citing 42 U.S.C. § 12112(9)(B) ("The term 'reasonable accommodation' *may include* . . . reassignment to vacant position." (emphasis added)).
[133] *Id.* at 1345 n.5.
[134] *Id.* at 1346.
[135] Smith v. Midland Brake, Inc., 180 F.3d 1154, 1160 (10th Cir. 1999) (en banc).

air brakes for large vehicles, sometimes exposing him to irritants and chemicals.[136] As a result of his position, Smith developed severe chronic dermatitis that prevented him from working for periods of time.[137] As per Smith's physical limitations, Smith was unable to perform and qualify for any of the positions Midland Brake had to offer.[138] Consequently, Midland Brake declined to reassign Smith to a vacant position within the company as a reasonable accommodation under the ADA.[139] Midland Brake justified its decision by arguing that Smith did not fall under the definition of a disabled individual because Smith was not an otherwise qualified individual who could perform the essential functions of any position.[140] The United States Court of Appeals for the Tenth Circuit had to first address if Smith still met the definition of a qualified individual under the ADA although he was unable to perform the essential requirements of his position and, if so, whether Midland Brake failed to reasonably accommodate Smith.

The court did not preclude Smith's ADA claim for an accommodation of reassignment based on Midland's argument that Smith did not meet the definition of a qualified individual.[141] The court reasoned that in order to give the reassignment requirement under the ADA teeth it "must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position."[142] The Tenth Circuit noted that the language used by other circuits in interpreting the ADA's reassignment provision "is instructive."[143] In other words, reassignment is listed as a reasonable accommodation because otherwise firing an employee due to his disabling limitations would be "no accommodation at all"[144] and would function as discriminatory.[145] Thus, according to the Tenth Circuit, reassignment means automatically giving a position to a qualified employee with a disability regardless of the more qualified applicant pool.[146]

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136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at 1161. "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12112(8) (2012).

141 *Smith*, 180 F.3d at 1167.

142 *Id.* at 1165.

143 *Id.*

144 Ransom v. State of Ariz. Bd. of Regents, 983 F. Supp. 895, 902–03 (D.Ariz.1997).

145 *Smith*, 180 F.3d at 1164–65.

146 *Id.* at 1167; Meneghello, *supra* note 2.

### 2. The D.C. Circuit Arrives at Mandatory Reassignment Through an Unclear Standard

In *Aka v. Washington Hospital Center*, Etim Aka had a job that "required a substantial amount of heavy lifting and pushing."[147] As a result of heart and circulatory problems, Aka underwent bypass surgery, involving a rehabilitation period during which he could not perform the functions of the job.[148] Washington Hospital Center's policy outlined that former hospital employees would be considered preferentially in the applicant pool over nonhospital employees, as a collective bargaining agreement.[149] As Aka applied for jobs, he did not receive any interviews.[150] Washington Hospital Center contended that because Aka was no longer a qualified applicant due to his physical limitations, he did not fall within the limits of section 12112(b)(5)(A), and were therefore not required to reassign him.[151]

Ultimately, the United States Court of Appeals for the District of Columbia Circuit rejected Washington Hospital Center's contention that Aka was ineligible for reassignment as a means of reasonable accommodation.[152] The court considered a multitude of arguments but failed to state the boundaries of compliance by skirting the issue.[153] Specifically, the court "decline[d] to decide the precise contours of an employer's reassignment obligations" by listing many reasons but no unified standard.[154] Thus, it is unclear what exact standard the D.C. Circuit adopted, but it rejected the dissenting opinion that defined reassignment as simply submitting an application to the general applicant pool.[155]

Overall, circuit courts are divided on the issue of whether mandatory reassignment is always a reasonable accommodation under the ADA and whether mandatory reassignment should be extrapolated outside of the seniority system realm.[156] Some employers endorse the "best-qualified applicant" approach, without running afoul of the ADA that proposes disabled employees are required to compete in the application process and should not be given priority over more qualified applicants due to

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147 Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1286 (D.C. Cir. 1998).
148 *Id.*
149 *Id.* at 1286–87.
150 *Id.* at 1287.
151 *Id.* at 1300 (citing 42 U.S.C. § 12112(a), (b)(5)(A) (1994)).
152 *Id.* at 1305.
153 Dorrian, *supra* note 19.
154 *Aka*, 156 F.3d at 1305.
155 *Id.*
156 Meneghello, *supra* note 2.

their disability status.[157] However, other circuit courts and the EEOC endorse the proposition that reassignment is always mandatory, regardless of the disabled employee being the most qualified.[158] Such a split must be resolved as the uncertainty created by the split negatively impacts an employer's ability to comply with the law and the legal rights of workers.

## IV. THE CIRCUIT SPLIT IMPACTS EMPLOYER COMPLIANCE AND WORKERS RIGHTS WITH THE ADA

Perhaps the most pervasive problem of the split directly impacts employer's compliance with the ADA.[159] Because employers operate for profit, eliminating mandatory reassignment is an appealing standard to follow, although the standard may not be lawful.[160] Even if an employer errs on the side of the EEOC's interpretation, the EEOC website is silent as to whether a disabled employee should be given preferential treatment in a general applicant pool, as was rejected by the Eighth Circuit.[161] The EEOC only contends that an employer must consider reassigning the disabled employee as a reasonable accommodation.[162] The ambiguity surrounding this provision creates issues with compliance, leaving employers in the dark and subject to litigation.[163] By the same token, lacking a uniform standard "may . . . create unnecessary confusion and encourage forum shopping or vigorous jurisdiction-based legal battles."[164] Additionally, it is more appealing for employers to select the more qualified applicant over a less-qualified disabled applicant for purposes of efficiency and effectiveness.[165] This inherently forces employers to make uninformed business decisions and "adopt inconsistent reassignment policies."[166]

Additionally, the circuit split impacts the rights of workers with disabilities under the ADA. Disabled employees will either be mandatorily reassigned or subject to competitive reassignment solely contingent on the employer's choice. Disabled workers' rights are also contingent on their physical geographical location that may afford them more or less rights than other disabled

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157 Dorrian, *supra* note 19.

158 Meneghello, *supra* note 2.

159 *See id.*

160 *See id.*

161 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2006); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 49.

162 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 49.

163 Meneghello, *supra* note 2.

164 Nicholas A. Dorsey, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability,* 94 CORNELL L. REV. 443, 468 (2009).

165 EEOC v. St. Joseph's Hosp., 842 F.3d 1333,1345–46 (11th Cir. 2016).

166 Dorsey, *supra* note 164, at 468.

workers.[167] Even if disabled workers are automatically reassigned without meeting the necessary qualifications, their coworkers may harbor resentment and ostracize the employee.[168] Thus, disabled employees do not have a concrete standard to determine if their rights are actually being violated. Moreover, disabled employees are at an inherent disadvantage when suing deep-pocketed employers as litigation costs are expensive, and if the suit is unnecessary, resources will be wasted.[169]

Overall, the ADA's goals are rendered meaningless and cannot be achieved if employers are not complying with a uniform interpretation. Without a consistent and uniform standard, employers are incentivized to do the exact opposite of what the ADA purports to achieve.[170] Employers will avoid hiring disabled applicants because of the unpredictable adherence consequences and the exorbitant cost associated with such ambiguity.[171] These types of decisions force employers to make discretionary value decisions that "elevate[] workplace norms over individualized assessments."[172] This can undermine disabled employee's rights because employers are allowed to prioritize employer policies over individual's rights and the ADA's goals via their own discretion.[173] However, the U.S. Supreme Court may correct for this lack of uniformity that may resolve this discretionary decision once and for all.

## V. HOW AND WHY THE SUPREME COURT SHOULD RESOLVE THE SPLIT

### *A. "Best-Qualified Applicant" Approach: Interpreting Reassignment Is Not Mandatory*

Although many critiques argue that competitive reassignment would render the ADA meaningless, employing a non-competitive reassignment would actually render the act moot by discriminating against the most-qualified applicant just because the applicant does not maintain a disability that would automatically guarantee the position. In order to create a consistent standard, the Supreme Court must step in and clarify the law. Implications from *Barnett* suggest that the Court's

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167 *Id.* at 469.

168 *See id.*

169 *See id.* at 468–69 n.190.

170 Scott C. Thompson, Note, *Open for Business: The ADA Beyond an Employer's Front Door*, 18 TEX. WESLEYAN L. REV. 383, 388 (2011).

171 *Id.*

172 NAT'L COUNCIL ON DISABILITY, *supra* note 10, at 14.

173 *Id.* at 15.

reasonableness standard extends to guide "outside of the seniority context."[174] This previous standard suggests that once an accommodation is judged to be reasonable it is automatically mandatory. The Supreme Court seems to unanimously agree, based on the majority and minority opinions, that the ADA should only eliminate the impediments created by the disability.[175] In fact, the dissenters justified their position that a disabled applicant should not automatically be guaranteed the position if a more qualified applicant exists because of the inequality this preferential treatment creates amongst equally qualified, if not more-qualified, applicants.[176]

### *B. Two-Prong Test Solution*

If the Supreme Court should take up the case, instead of using the "reasonable[ness] in the run of cases"[177] framework, the Court should implement a two-prong test[178]: (1) the qualification of the applicant; and (2) a cost-benefit analysis that will outline some of the factors that the Court should consider. The purpose and usefulness of this test will address all circuit court contentions and ensure a fair outcome for both employers and disabled applicants, creating an amicable solution. Moreover, the solution comports with the ADA and incentives of both parties. In order to meet the test, a qualified applicant meets the first prong and satisfies the test, however, not being qualified fails the first prong and sends the applicant to the second prong.

For the first prong, the Court should consider if the applicant is capable of performing the essential functions of and is qualified for the position or, for that matter, any positions within the company at all. If the answer is "yes," then the disabled employee should be considered within the general applicant pool and the inquiry ends there. Because reasonable accommodation refers to any accommodation, the disabled employee "may need in order to have an equal opportunity to succeed in the employment position,"[179] allowing preferential treatment of a disabled applicant

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[174] *Id.* at 10; *see also* U.S. Airways, Inc., v. Barnett, 535 U.S. 391, 406 (2002).

[175] *Barnett,* 535 U.S. at 408.

[176] *Id.* at 414–15 (Scalia, J., dissenting).

[177] *Id.* at 402–03 (majority opinion).

[178] Readers should note that I have created this two-prong test as an extrapolation from Court's opinion in *Barnett* in efforts to extend the "reasonable[ness] in the run of cases" framework as a workable standard for all types of cases. *Id.* at 402–03 (majority opinion). Additionally, I have accounted for different scenarios presented in the circuit court cases addresses in *infra* Part 0 to develop the cost-benefit analysis.

[179] NAT'L COUNCIL ON DISABILITY, *supra* note 10, at 5.

is unnecessary as the disabled applicant already possesses the necessary qualifications to succeed at the employment position.

Similar to the Eighth Circuit's decision in *Huber*,[180] reassignment is not mandatory simply because the applicant was qualified for the position. Both the majority and minority opinions agree in *Barnett* that mandating workers with disabilities to automatically get the position over another applicant is not permissible.[181] Even without the ADA's existence, the disabled employee still has the opportunity to compete for the job, and the disabled employee is not at a disadvantage due to his disability. Allowing a disabled worker to have preferential treatment over another qualified applicant undermines democracy and disregards the goals of the ADA, such as equality.[182] Thus, if the disabled employee is qualified for the position, the inquiry should end there because inevitably there will be someone more qualified for a position, regardless of a disability, and preferential treatment would disrupt the balance of rights all applicants are entitled to.

If the answer to the question whether the disabled employee meets the ADA Statutory and Regulatory definition of "qualified" for a position in the company is "no," then the disabled employee should be considered in the internal applicant pool instead, similar to the process employed by the Eleventh Circuit.[183] An internal applicant pool will already advantage the disabled employee over the general applicant pool and bypass some individuals who are more qualified for the position.[184] The internal applicant pool will leverage the disabled employee over many other individuals, although the applicant may not even be fully qualified for the position. If the disabled employee is the only applicant within the internal applicant pool, the disabled employee should acquire the position, ensuring that the employer meets the ADA requirement of providing a reasonable accommodation for the employee, given the employer exhausted all other forms of

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[180] Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2006).

[181] *Barnett*, 535 U.S. at 399; *see also Barnett*, 535 U.S. at 410 (O'Connor, J., concurring).

[182] *See* ADA NAT'L NETWORK, *supra* note 30.

[183] 42 U.S.C. § 12112(8) (2012); EEOC v. St. Joseph's Hosp., 842 F.3d 1333, 1338 (11th Cir. 2016).

[184] "Limiting the pool provides a legally justifiable defense for excluding people from the hiring process." Michael Roberts, *Why Are Some Jobs Posted for Internal Applicants Only?*, BALANCE, (Oct. 17, 2017) https://www.thebalance.com/why-are-some-jobs-posted-for-internal-applicants-only-1669557 [https://perma.cc/4PU9-68XA]. This solution is legally justifiable because it serves as a compromise to the polarized solution that the ADA proposes. An internal applicant pool for disabled workers strikes the perfect balance between discriminating against outside better-qualified applicants and discriminating against internal disabled applicants.

reasonable accommodations. The justification for this lies in the interpretation of the ADA and the fact that the disability would be the sole impediment to employment. If the disabled employee is not qualified, the employee fails the first prong, then the decision for reassignment becomes contingent on the second prong that is analyzed under a cost-benefit analysis.

The second prong should analyze the rights of both the employer and the disabled employee by using a cost-benefit analysis. This assessment will largely be implemented on a case-by-case basis, but the Court's consistent analysis will create the desired goal of a uniform interpretation. By analyzing each unique case in a consistent way, the Court will formulaically achieve its desired goal of uniformity. If the individual is not qualified for the position, but because of their disability will permanently disqualify the applicant from the position, the applicant should be considered by undergoing a cost-benefit analysis that analyzes the applicant's specific circumstances.

Different than the rebuttable presumption laid out in *Barnett*[185] this analysis should determine the undue hardship to the employer considering factors such as: (1) severity of the disability; and (2) the impact of disability on the employer. For instance, if the disabled employee is not qualified for the position because he is one-year shy of experience, the cost to the employer is not severe because the employee can presumably still perform basic functions. On the other hand, if the disabled employee is across the board not qualified and cannot perform the basic functions of the position then the cost would be overwhelming to the employer, akin to an undue hardship.[186] Here, the rights of the employer matter greatly as his primary goal is to hire based on efficiency and potential profit.[187] Thus, the hardship a non-qualified disabled employee would have on the employer should factor into the Court's analysis.[188]

The analysis should also be done through the lens of the disabled employee as well by considering factors such as: (1) opportunity for future employment; (2) contribution to the company;[189] and (3) special circumstances.[190] If the disabled employee has no opportunity for future employment because of the

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[185] *Barnett*, 535 U.S. at 405.

[186] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12111(10)(A)-(B) (2012).

[187] EEOC v. St. Joseph's Hosp., 842 F.3d 1333, 1346 (11th Cir. 2016).

[188] Readers should note this test is similar to *Barnett* but considers an unqualified employee rather than a qualified one.

[189] Roberts, *supra* note 184 ("The hiring manager might need someone with particular organizational knowledge . . . [and] at least has an idea of their reputations.").

[190] *Barnett*, 535 U.S. at 405–06.

impediment imposed by the disability, then the employer must take into consideration his reassignment as mandatory if no other method could accommodate the individual. This is different than a substantial limitation analysis because although the individual may qualify as disabled, the disability may not limit him from every possible position within the company, but rather a broad spectrum of positions.[191] If the individual was an asset to the company and contributed positively for many years but his disability manifested later in life, preventing him from completing the required tasks of his job, the employer should consider preferential reassignment. Also, if the disabled employee developed the disability as part of his job, the employer should give preferential reassignment more weight, considering the employer was the proximate cause of the disability. Thus, the decision for reassignment is not per se mandatory, but rather contingent on the Court's consistent analysis and final judgment call considering the factors through each party's lens.

### *C. Potential Problems*

The two-prong test may have its costs such as contradicting previous EEOC rulings or permanently ending the claim that the ADA is an affirmative action statute. Regarding the first prong which considers the qualifications of the disabled employee, critics may argue that this prong is in direct conflict with the EEOC's framework as well as the decisions by the Tenth and D.C. Circuits.[192] These commentators may interpret the ADA as affording additional safeguards to those employees with disabilities because without them, a disabled employee's position in society would be neutral, which undermines the purpose of the ADA.[193] Even if these disabled employees are qualified for the position, disabled employees deserve additional measures to ensure equality.

In response to these criticisms, I argue that the exact opposite goal will be achieved, because highlighting disabled employees in society and advantaging these individuals over other applicants simply due to a diagnosis overlooks the ability and performance of a disabled employee. The internal applicant pool solution may create difficulties with compliance as well. Critics may argue that an internal applicant pool is akin to the general applicant pool because, although the pool is narrower,

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191 *See supra* Section I.B.
192 *See supra* Section III.B.
193 EEOC v. St. Joseph's Hosp., 842 F.3d 1333, 1346 (11th Cir. 2016).

the position is not guaranteed. In response, an internal applicant pool administers just enough of an advantage to these disabled employees. By striking the right balance of leverage over outside applicants, the internal applicant pool suffices as a nondiscriminatory mechanism of preferential treatment, appeasing both sides of the contentious debate.

The second prong of the test that outlines a cost-benefit analysis from both perspectives may attract criticism as well. Critics may contest the employer's cost-benefit analysis suggesting the ADA was created for disabled employees and not employers. Additionally, the cost-benefit analysis may not yield consistent results, which impacts compliance for future decisions by creating uncertainty. In response, the formulaic method outlined in the two-prong test methodically analyzes each case in the same way and ensures consistent weight be given to different factors present in each situation, considering undue hardship and special circumstance standards alike. As such, there will always be critiques of any proposed solution, but the two-prong test creates, on balance, an amicable solution to both sides of the debate.

### *D. Current Solution*

In the unlikely event the Supreme Court never faces this issue, employers should follow a qualified standard argued but not adopted in *Barnett,* suggesting that all disability-neutral rules, not just seniority systems, should trump mandatory reassignment positions.[194] Although circuit courts are divided on its interpretation, the standard elicited through a combination of the majority and minority opinions can be combined to create a holistic approach to bind all circuit courts' interpretations that have not yet addressed the issue.[195] The Court considered a holistic approach that can be extrapolated from the majority and dissenting opinion suggesting that, in light of the surrounding circumstances, the existence of a seniority system should only be a factor in the analysis.[196] As a result, courts should consider a company's hiring system as a factor in the reasonable accommodation analysis. If the hiring system is disability-neutral, courts should weigh in favor of that system unless presented with "special circumstances."[197] The majority and minority opinions indicate that mandatory reassignment is not always reasonable,[198] and thus circuit courts

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194 *Barnett*, 535 U.S. at 397.
195 *Id.*
196 *Id.* at 423–24 (Souter, J., dissenting).
197 *Id.* at 421–22.
198 *Id.*

should not disregard the best-qualified applicant in their hiring procedures. Therefore, circuit courts should not extend preferential treatment to disabled employees merely because he is disabled but rather consider factors such as undue hardship and special circumstances within their analysis as well.

## CONCLUSION

The best-qualified applicant method analyzed under a two-prong test should govern future decisions regarding mandatory reassignment because the ADA's definition of reassignment is unclear and subject to varying interpretations. The statute's definition that a "'reasonable accommodation' may include . . . reassignment to vacant position"[199] created a circuit split and confusion over whether reassignment is *always* reasonable.[200] Some circuits have held that reassignment is always a reasonable accommodation and thus should be interpreted as mandatory.[201] This approach suggests that employers should bypass the best-qualified applicant in order to give preferential treatment to their disabled employees. Other circuit courts contend that reassignment should not be interpreted as a mandatory reasonable accommodation.[202] This approach emphasizes that a disabled applicant should not be given preferential treatment over a more qualified applicant due to their disability status.[203]

Despite the Court addressing a similar issue with seniority systems in *Barnett*[204] the framework established does not clarify the Court's position outside of the seniority system realm.[205] The framework only resolves cases when an employer is faced with a disability-neutral rule and suggests that mandatory reassignment would not be reasonable in these types of cases.[206] The Court, however, failed to address cases where there is a lack of a disability-neutral rule. The Court's justifications seem to suggest that if the Court were to take up a case without a disability-neutral rule, it would rule the same way and decline to

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199 42 U.S.C. § 12111(9)(B) (2012).

200 Meneghello, *supra* note 2.

201 Smith v. Midland Brake, Inc., 180 F.3d 1154, 1160 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1286 (D.C. Cir. 1998).

202 U.S. Equal Emp't Opportunity Comm'n v. St. Joseph's Hosp., 842 F.3d 1333, 1346 (11th Cir. 2016); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2006); Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996).

203 Dorrian, *supra* note 19.

204 *Barnett*, 535 U.S. at 402.

205 EEOC v. St. Joseph's Hosp., 842 F.3d 1333, 1346 (citing *Barnett*, 535 U.S. at 406).

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

extend preferential treatment to a disabled applicant who is not the best-qualified applicant.[207]

The Eleventh Circuit said it best: mandatory reassignment for disabled employees turns "nondiscrimination into discrimination."[208] As such, circuit courts should not require mandatory reassignment as a method of preferential treatment for disabled employees but rather assess the best-qualified applicant method utilized by employers under a two-prong test. This solution appeases both the employers' and the EEOC's contentions and concerns regarding compliance with the ADA. The two-prong test solves the issue by ensuring equality as well as adding some weight to disabled employee applicants if absolutely necessary. The two-prong test serves as a compromise between two competing interests and ensures an amicable solution. In order for employers to comply with the ADA, the Court must take a case to resolve the dispute and create a unifying standard by adopting the two-prong test.

*Christina M. Loguidice*[†]

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[207] *Id.* at 403.

[208] *St. Joseph's Hosp.*, 842 F.3d at 1336 (internal quotation marks omitted) (quoting Terrell v. Usair, 123 F.3d 621, 627 (11th Cir. 1998)).

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