MANDATORY REASSIGNMENT UNDER THE AMERICANS WITH DISABILITIES ACT: THE FOURTH CIRCUIT WEIGHS IN

INTRODUCTION

The Americans with Disabilities Act ("ADA" or "the Act")[1] celebrated its thirtieth anniversary in 2020.[2] The Act, which was signed into law by President George H.W. Bush, was enacted to eliminate discrimination against individuals with disabilities, especially in critical areas of life like employment.[3] With the ADA's passage came the promise of "full and equal access to civic, economic and social life for individuals with disabilities."[4] Employment discrimination against persons with disabilities persisted, however, and courts facilitated this discrimination through narrow readings of the statute.[5] Though the Act was intended to provide broad protections to persons with disabilities,[6] it was limited by courts, and

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

2. *Anniversary of Americans with Disabilities Act: July 26, 2020*, U.S. CENSUS BUREAU: FACTS & FEATURES (June 17, 2020), https://www.census.gov/newsroom/facts-for-features/2020/disabilities-act.html.

3. *See* 42 U.S.C. § 1210(b)(1); *see also id.* § 1210(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as employment"); 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, 1046 (2000) (stating that one of Congress's principal reasons for enacting the ADA was to help disabled people enter and stay in the workplace).

4. U.S. DEP'T OF JUST., ADA SERIES COMMEMORATES UPCOMING ANNIVERSARY (2017), https://www.justice.gov/archives/opa/blog/ada-series-commemorates-upcoming-anniversary.

5. *See* Lawrence D. Rosenthal, *Most-Qualified-Applicant Hiring Policies or Automatic Reassignment for Employees with Disabilities? Still a Conundrum Almost Thirty Years After the Americans with Disabilities Act's Enactment*, 70 BAYLOR L. REV. 715, 716 (2018) (finding that much of the early litigation concerning the ADA resulted in many pro-defendant opinions to the detriment of disabled employees); *see also* Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 440 (2002) (stating that during the ADA's early years there was heavy litigation concerning the scope of the "disability" definition); CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., QUESTIONS AND ANSWERS ABOUT THE DEPARTMENT OF JUSTICE'S NOTICE OF PROPOSED RULEMAKING TO IMPLEMENT THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008 (Jan. 30, 2014), https://www.ada.gov/nprm_adaaa/adaaa-nprm-qa.htm (stating that amendments to the ADA were passed as a result of Supreme Court decisions that narrowly interpreted the ADA).

6. 42 U.S.C. § 12101(b).

early litigation resulted in pro-defendant opinions.[7] As a result, Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which broadened the definition of disability.[8] Despite its maturity, as well as congressional efforts to create broader protections for persons with disabilities,[9] the ADA continues to create disagreement among courts regarding how far the protections of the Act stretch.[10] Today, most of this disagreement centers on the ADA's reasonable accommodation clause—a key provision of the Act.[11]

The Fourth Circuit is no exception as it too has contributed to this disagreement. In *Elledge v. Lowe's Home Centers, LLC*,[12] the court was asked to decide the scope of the reasonable accommodation clause. The court addressed whether the ADA requires an employer to automatically reassign a disabled employee to a vacant position when that reassignment would conflict with the employer's nondiscriminatory best-qualified hiring policy.[13] Essentially, the court had to decide if the ADA requires an employer to fill a job vacancy with a less-qualified employee who has a disability even though the employer has a policy of hiring the best-qualified candidate for the position.[14] Ultimately, the Fourth Circuit decided that the ADA does not require mandatory reassignment when an employer utilizes a best-qualified hiring policy.[15]

Mandatory reassignment requires courts to delve deep into the ADA's statutory text and legislative history while also considering

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7. *See generally* Rosenthal, *supra* note 5 (finding that early litigation concerning the ADA resulted in many pro-defendant opinions).

8. *Id.* at 716–17; *see also* ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553. The "Findings and Purposes" section of the ADAAA states that the amendments are a direct response to some Supreme Court decisions, which narrowly interpreted the ADA. *See id.* at 3554.

9. *See* Rosenthal, *supra* note 5, at 716–17 (explaining that the ADAAA was passed to make the ADA more helpful for individuals with disabilities as a result of too many pro-defendant court opinions).

10. *See, e.g.*, John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 722 (2000) (stating that courts disagree as to the scope and parameter of an employer's duty to accommodate its disabled employees, specifically through reassignment).

11. *See generally* Befort, *supra* note 5 (stating that the attention of courts has shifted to the reasonable accommodation clause); Michael Creta, Note, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693, 1697 (2014). The reasonable accommodation clause includes the reassignment clause, which lists reassignment to a vacant position as a type of reasonable accommodation. 42 U.S.C. § 12111(9).

12. 979 F.3d 1004 (4th Cir. 2020).

13. *See id.* at 1007–09. A most-qualified (or best-qualified) hiring policy is a policy in which the employer hires the most-qualified applicant for a vacant position. *See id.* at 1016.

14. *Id.*

15. *Id.* at 1014–15.

complex policy implications,[16] demonstrating why it is one of the most litigated accommodations within the ADA.[17] Following the *Elledge* decision, there is now a split between five federal circuit courts, with the Fourth, Eighth, and Eleventh Circuits finding that the ADA does not require mandatory reassignment when an employer utilizes a most-qualified hiring policy to fill vacant positions, and the Seventh and Tenth Circuits finding that it does.[18] Though the Fourth Circuit aligned with two other circuit courts, its holding in *Elledge* went too far, essentially precluding employees with disabilities from ever being reassigned to a vacant position when an employer utilizes a best-qualified hiring policy.[19]

This Comment explores the complexity of the ADA's reasonable accommodation clause and an employer's duty to reassign. Part I discusses the relevant provisions of the ADA, specifically the reasonable accommodation and reassignment clauses.[20] Part II explores the split between the federal circuit courts, as well as the United States Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*,[21] which establishes a framework for ADA reassignment cases.[22] Additionally, Part II details the facts of the case in the Fourth Circuit's *Elledge* decision and explains the court's holding.[23] Part III analyzes the *Elledge* decision and explains how the Fourth Circuit's heavy reliance on *U.S. Airways* was misguided and how it limited the rights of disabled employees further than the Supreme Court or the other circuits ever intended.[24]

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16. *See* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 944 (2003) ("Of all the accommodations listed in the ADA, the reassignment accommodation has proven to be the most difficult to apply.").

17. *See id.* (stating that reassignments have generated more litigation than any other reasonable accommodation).

18. *Compare Elledge*, 979 F.3d at 1016–18 (finding mandatory reassignment to be unreasonable when an employer utilizes a best-qualified hiring policy), *and* EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1346–47 (11th Cir. 2016) (same), *and* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (same), *with* EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012) (finding that the ADA mandates reassignment to another position when there is no other reasonable accommodation the employer can make), *and* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1181, 1183 (10th Cir. 1999) (same).

19. *See, e.g.*, *Elledge*, 979 F.3d at 1018 ("In order to prove a *prima facia* case that a removal violated the ADEA, [a plaintiff] must show *inter alia* that he was qualified for his job."). *See also* discussion *infra* Part III.

20. *See infra* Part I.

21. 535 U.S. 391 (2002).

22. *See infra* Part II.

23. *See infra* Part II.C.

24. *See infra* Part III.

Finally, Part IV argues that finding reassignment as a reasonable accommodation, despite an employer's best-qualified hiring policy, better suits the provisions of the ADA for three reasons.[25] First, the text and legislative history of the ADA support finding reassignment as a reasonable accommodation when there are no other accommodations an employer can make to employ their employees with disabilities.[26] Second, reassignment maintains the ADA's burden-shifting test, which the Supreme Court outlines in *U.S. Airways*, and allows the fact-intensive inquiry as to whether an accommodation is reasonable to stay with the jury.[27] Lastly, the ADA's reassignment clause sufficiently protects employers as to not make reassignment unreasonable.[28]

I. THE AMERICANS WITH DISABILITIES ACT AND THE REASONABLE ACCOMMODATION CLAUSE

The ADA prohibits discrimination by an employer "against a qualified individual on the basis of disability" in any of the "terms, conditions, and privileges of employment."[29] A qualified individual under the ADA is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[30] An individual's essential job functions are the "fundamental job duties of the employment position."[31] Thus, the ADA requires employers to identify the essential functions of the job and then determine if the employee can perform them with a reasonable accommodation.[32] If the employer determines the employee can perform the essential functions of the job with an accommodation, the employer's failure to provide such an accommodation means the employer has engaged in a form of unlawful discrimination.[33] The only way for an employer to overcome the reasonable accommodation requirement is by demonstrating that such a requirement would impose an undue hardship on the operation of its business.[34]

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25. *See infra* Part IV.
26. *See infra* Part IV.A.
27. *See infra* Part IV.B.
28. *See infra* Part IV.C.
29. 42 U.S.C. § 12112(a).
30. *Id.* § 12111(8).
31. 29 C.F.R. § 1630.2(n)(1) (2021).
32. *See* Creta, *supra* note 11, at 1702 (explaining how the ADA requires employers to engage in a two-step inquiry); Befort & Holmes Donesky, *supra* note 3, at 1051 (same).
33. 42 U.S.C. § 12112(b)(5)(A) (defining discrimination as the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").
34. *Id.* An undue hardship is an "action requiring significant difficulty or expense." *Id.* § 12111(10)(A).

The ADA fails to provide a definition for what constitutes a reasonable accommodation,[35] but it does provide employers with a list of possibilities, one of them being reassignment of the employee to a vacant position.[36] Despite the inclusion of reassignment in the statute, reassignment is intended to be an accommodation of last resort, requiring employers to reassign an employee with a disability only when there is no other accommodation that can keep the employee employed or when all other accommodations would pose an undue hardship on the employer.[37] If keeping the employee in their current position is not possible, however, then the door to reassignment opens and must be considered.[38] Since reassignment to a vacant position is specifically listed within the statutory text of the ADA, proponents of mandatory reassignment argue that the Act mandates it so long as the disabled employee is qualified.[39] On the other hand, opponents of mandatory reassignment argue that because the ADA uses permissive language, it cannot require mandatory reassignment; these opponents believe Congress simply listed reassignment as something that "may" qualify as a reasonable accommodation.[40] This permissive language has undoubtedly contributed to the controversy surrounding an employer's duty to reassign;[41] the issue becomes more difficult when an employer normally fills job vacancies using a best-qualified hiring policy.

II. THE CIRCUIT COURTS SPLIT

During the last two decades, federal circuit courts have disagreed as to whether the ADA requires mandatory job reassignment, which would require an employer to reassign a qualified disabled employee

35. *See* Thomas F. O'Neil III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 349 (2001) (stating that the statute "provides no guidance whatsoever in determining whether a certain accommodation is reasonable").

36. *See* 42 U.S.C. § 12111(9)(B).

37. EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

38. *Id.*

39. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999).

40. *See* EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1345 (11th Cir. 2016) ("The ADA does not say or imply that reassignment is always reasonable. To the contrary, the use of the word 'may' implies just the opposite: that reassignment will be reasonable in some circumstances but not in others.").

41. *See, e.g.*, *Court Holds ADA Does Not Require Reassignment Without Compensation*, SHAWE ROSENTHAL LLP (Dec. 31, 2016), https://shawe.com/articles/court-holds-ada-does-not-require-reassignment-without-competition/.

to a vacant position even if there is a better qualified individual.[42] The Supreme Court has not addressed this specific question,[43] but it did address whether mandatory reassignment is reasonable when an employer utilizes a different nondiscriminatory hiring policy, specifically a seniority system, in *U.S. Airways*.[44] Though not directly on point, lower courts have relied on *U.S. Airways* to support their position on reassignment when an employer has a best-qualified hiring policy in place.[45] Unfortunately, the Supreme Court's guidance has only divided the lower courts further, resulting in inconsistent applications of the law.[46]

A. The Supreme Court's Decision in U.S. Airways, Inc. v. Barnett

In *U.S. Airways*, the Court was faced with the issue of whether an employer's nondiscriminatory seniority system trumps a disabled employee's accommodation request for a vacant position.[47] The majority found reassignment to be unreasonable when it violates the rules of a seniority system because of the importance seniority has to employee-management relations.[48] As the Court noted, seniority systems create "expectations of fair, uniform treatment" that would be undermined if a more junior employee were automatically reassigned to the vacancy.[49] The effect of *U.S. Airways* is that employers no longer need to prove an undue hardship resulting from reassignment on a case-by-case basis—reassignment is presumed unreasonable if it violates an employer's seniority system.[50]

In *U.S. Airways*, reassignment was held to be unreasonable.[51] But the holding was not a complete blow to employees with

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42. *See St. Joseph's Hosp.*, 842 F.3d at 1345 (holding that reassignment is not mandatory under the ADA). *But cf. Smith*, 180 F.3d at 1165 (holding that reassignment is mandatory).

43. In 2007 the Supreme Court agreed to address whether reassignment would be reasonable in the context of most-qualified hiring systems, but the parties settled the case prior to oral argument rendering it moot. *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007).

44. *See* U.S. Airways, Inc, v. Barnett, 535 U.S. 391, 392 (2002).

45. *See, e.g.*, *St. Joseph's Hosp.*, 842 F.3d at 1345.

46. *Compare Huber*, 486 F.3d at 483 (finding that the Supreme Court's decision in *U.S. Airways* bolstered its decision that reassignment is unreasonable when an employer utilizes a best-qualified hiring policy), *with* EEOC v. United Airlines, Inc., 693 F.3d 760, 764–65 (7th Cir. 2012) (finding that the Supreme Court's decision in *U.S. Airways* provides support for noncompetitive reassignment).

47. *U.S. Airways*, 535 U.S. at 391.

48. *Id.* at 403.

49. *Id.* at 404.

50. Jared Hager, Note, *Bowling for Certainty: Picking Up the Seven-Ten Split by Pinning Down the Reasonableness of Reassignment After* Barnett, 87 MINN. L. REV. 2063, 2081–82 (2003).

51. *U.S. Airways*, 535 U.S. at 403.

disabilities. In its opinion, the Court acknowledged that the ADA requires employers to treat an employee with a disability *preferentially*, regardless of an employer's disability-neutral rule.[52] The Court emphasized that if it were not for the employer's seniority system, an employee's reassignment request would normally be reasonable within the meaning of the statute.[53] Additionally, the Court held that employees may show special circumstances, based on the particular facts of their case, that warrant a finding that reassignment is reasonable despite an employer's seniority system.[54] Since *U.S. Airways*, a collection of courts have considered whether other nondiscriminatory policies, such as a best-qualified hiring policy, would make reassignment unreasonable.[55] As a result, the split between the circuit courts on best-qualified hiring policies was borne.

B. The Disagreement Between the Circuit Courts

Before the Fourth Circuit's decision, the Eighth and Eleventh Circuits found mandatory reassignment to be unreasonable when an employer utilized a best-qualified hiring policy,[56] and the Seventh and the Tenth Circuits found it reasonable.[57]

1. Circuit Courts Finding Mandatory Reassignment Unreasonable

The Eleventh and Eighth Circuits held that the ADA does not provide disabled employees preferential treatment.[58] In these circuits, employers simply must identify to the employee that a

52. *Id.* at 397.

53. *Id.* at 403.

54. *Id.* at 405.

55. *See infra* notes 57–58.

56. EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1345 (11th Cir. 2016) ("[T]he ADA does not require reassignment without competition for, or preferential treatment of, the disabled."); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) (stating that the ADA "does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate").

57. EEOC v. United Airlines, Inc., 693 F.3d 760, 765 (7th Cir. 2012) (adopting the approach that "the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship"); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) (concluding that reassignment to a vacant position must be offered to the disabled employee if he or she is unable to perform their existing job). Some consider the D.C. Circuit to require mandatory reassignment to a vacant position; however, the court was not confronted with an employer's best-qualified hiring policy when it decided the case. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998).

58. *St. Joseph's Hosp.*, 842 F.3d at 1345; *Huber*, 486 F.3d at 483.

vacancy exists and then permit the employee to apply equally amongst other applicants; the employer is not required to automatically reassign the employee to the vacant position.[59] These circuits find the ADA's permissive language to be indicative that Congress did not intend for reassignment to be required in all circumstances.[60] Holding otherwise would "convert a nondiscrimination statute into a mandatory preference statute" that would be inconsistent with the nondiscriminatory purpose of the ADA.[61] Additionally, these circuits rely on the Supreme Court's decision in *U.S. Airways* to support their stance that a best-qualified policy automatically makes mandatory reassignment unreasonable.[62] Since employers operate their businesses for profit, it would be unreasonable for an employer to pass over the best-qualified job applicant in favor of an employee with a disability because it would hinder job efficiency and good performance.[63]

2. Circuit Courts Finding Mandatory Reassignment Reasonable

The Seventh and Tenth Circuits find themselves on the opposite side, interpreting the ADA to require mandatory reassignment despite an employer's nondiscriminatory best-qualified hiring policy.[64] These circuits believe that allowing an employee to compete for a job open to the public is not an accommodation at all.[65] For them, the ADA requires more; its "reference to reassignment would be redundant if permission to apply were all it meant."[66] Thus, an accommodation requires an active effort on the part of the employer—

59. *See St. Joseph's Hosp.*, 842 F.3d at 1345; *Huber*, 486 F.3d at 483.

60. *See St. Joseph's Hosp.*, 842 F.3d at 1345 ("To the contrary, the use of the word 'may' implies just the opposite: that reassignment will be reasonable in some circumstances but not in others.").

61. *Huber*, 486 F.3d at 483 (quoting EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000) (internal citations omitted), *overruled by United Airlines, Inc.*, 693 F.3d at 764–65). The Eighth Circuit viewed *U.S. Airways* as support for its position, even though the Supreme Court stated in that case that the ADA requires employers to sometimes treat an employee with a disability preferentially. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397–98 (2002).

62. *Huber*, 486 F.3d at 483 (stating that "[t]his conclusion is bolstered by the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*").

63. *St. Joseph's Hosp.*, 842 F.3d at 1346.

64. *United Airlines, Inc.*, 693 F.3d at 763; Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999).

65. *Smith*, 180 F.3d at 1165 ("Allowing the plaintiff to compete for jobs open to the public is no accommodation at all. . . . [The employer's] policy or practice that all reassignments are made through competitive hiring prevents the reassignment of employees with disabilities to vacant positions for which they are qualified and discriminates against qualified individuals with disabilities." (quoting Ransom v. State of Ariz. Bd. of Regents, 983 F. Supp. 895, 902–03 (D. Ariz. 1997) (internal citations and quotation marks omitted)).

66. *Id.* (citing Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998)).

simply allowing an employee to compete does not fulfill this obligation.[67]

Like the Eighth and Eleventh Circuits, which rely on the ADA's language to support their position, the Seventh and Tenth Circuits do as well. The ADA defines reasonable accommodation to include "reassignment to a vacant position" rather than "consideration of reassignment to a vacant position."[68] Thus, these circuits rely on the ADA's language to argue that if consideration of an applicant were all that was required by the ADA, then employers

> could adopt a policy in favor of hiring the most qualified candidate such that a disabled employees could never rely on reassignment to establish the existence of a reasonable accommodation . . . . Such a result would effectively and improperly read 'reassignment to a vacant position' out of the ADA's definition of 'reasonable accommodation.'[69]

Additionally, the Seventh and Tenth Circuits gave considerable deference to guidelines issued by the Equal Employment Opportunity Commission ("EEOC"), which Congress authorized to implement the ADA.[70]

These circuits deferred to the EEOC's interpretation of the ADA, which views the ADA as requiring mandatory reassignment when no other accommodations can accommodate the employee with a disability.[71] "Reassignment means that the employee gets the vacant position if s/he is qualified for it."[72] In contrast to the Seventh and Tenth Circuits' consideration of the EEOC's interpretation, and despite the EEOC's clear belief that employers are required to reassign employees with disabilities as an accommodation of last resort, the Eighth and Eleventh Circuits gave no consideration to the EEOC's interpretation of the statute in their opinions.[73]

The Seventh Circuit, prior to the Supreme Court's decision in *U.S. Airways*, originally held that employers utilizing best-qualified hiring policies were not required to reassign employees with disabilities to vacant positions if there was a more qualified candidate

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67. *Aka*, 156 F.3d at 1304.

68. *Smith*, 180 F.3d at 1164.

69. Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1205 (10th Cir. 2018).

70. *See* 42 U.S.C. § 12116 (authorizing the EEOC to create regulations to implement the ADA).

71. *See* EEOC, *supra* note 37.

72. *Smith*, 180 F.3d at 1166–67 (quoting EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 44 (1999)).

73. *See* EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1345–47 (11th Cir. 2016); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 482–83 (8th Cir. 2007).

seeking the same position.[74] But the court reversed its decision in light of the Supreme Court's holding in *U.S. Airways*.[75] The Seventh Circuit found *U.S. Airways* as support for mandatory reassignment, despite an employer's best-qualified hiring policy.[76] The court began by stating that the decision in *U.S. Airways* was a very narrow, fact-specific exception limited to cases where an employer uses a seniority system to fill job vacancies.[77] It then distinguished a seniority system, which involves the rights of other employees, from a best-qualified policy, which does not implicate the rights of others.[78] By distinguishing the two types of hiring policies, the Seventh Circuit explained why the holding in *U.S. Airways* does not survive in cases involving best-qualified policies.[79] Thus, while the Eighth and Eleventh Circuits interpreted the Supreme Court's decision in *U.S. Airways* as support for the view that reassignment is unreasonable when an employer utilizes a best-qualified hiring policy,[80] the Seventh Circuit found the opposite, going so far as to reverse its own precedent.[81]

C. The Fourth Circuit Weighs In

This past year, the Fourth Circuit in *Elledge* broke the even split between the federal circuit courts when it joined the Eighth and Eleventh Circuits by holding that employees with disabilities are not entitled to special priority for reassignment.[82] The holding is significant because it conflicts with district court decisions made within the Fourth Circuit.[83] But more importantly, it is significant because it goes beyond the decisions of its sister circuits and the Supreme Court by foreclosing the possibility of reassignment under

74. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by* EEOC v. United Airlines, Inc., 693 F.3d 760, 763 (7th Cir. 2012).

75. *See United Airlines*, 693 F.3d at 761, 764–65.

76. *Id.* at 763.

77. *Id.* at 764.

78. *Id.* (stating that "the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy").

79. *Id.*

80. *See supra* notes 59–64 and accompanying text.

81. *See United Airlines*, 693 F.3d at 765.

82. *See* Elledge v. Lowe's Home Ctrs., LLC, 979 F.3d 1004, 1014–15 (4th Cir. 2020) (stating that the ADA simply provides that employers do not need to create preferential accommodations that maximize workplace opportunities for employees with disabilities).

83. *See* Eustace v. Springfield Pub. Schs., 463 F. Supp. 3d 87, 106–09 (D. Mass. 2020); Kosakoski v. PNC Fin. Servs. Grp., Inc., No. 12-cv-00038, 2013 WL 5377863, at *17 (E.D. Pa. Sept. 26, 2013) (finding that an employer's best-qualified hiring policy does not create a per se undue hardship that would alleviate the employer's duty to reassign).

any circumstance when an employer utilizes a best-qualified hiring policy.[84]

Chuck Elledge was an employee of Lowe's Home Center ("Lowe's") and served as the company's Market Director of Stores ("MDS") for almost a decade—that is, until he began experiencing problems with his knee.[85] After several surgeries, Elledge's doctor restricted his walking to no more than four hours a day and his workday to no more than eight hours.[86] These restrictions conflicted with the MDS position, which required Elledge to walk the floors he supervised and work over forty hours a week.[87] Lowe's was a sympathetic employer; it accommodated Elledge's disability by temporarily limiting his working hours and offering him the use of a motorized scooter to ease the strain on his knee during store visits.[88] Elledge refused, however, to use the scooter[89] and accommodated himself by assigning subordinates to drive him to different store locations.[90] When it was determined that Elledge would need reduced hours indefinitely, Lowe's found that Elledge could not remain in his present position and discussed other career opportunities with him, including a less demanding and lower-paying position.[91] Elledge rejected the offer from Lowe's and applied for two lateral director positions.[92] When he did not receive the lateral positions, Elledge brought suit against Lowe's for violating its obligations under the ADA by removing him from the MDS role and refusing to automatically reassign him to either of the other two vacant director positions.[93] Lowe's' maintained that it did not violate the ADA for failing to reassign Elledge because it selected its candidates based on its "succession planning and best-qualified hiring policies."[94]

The Fourth Circuit began its inquiry by determining whether Elledge was a qualified individual within the meaning of the ADA, meaning that he could perform the essential functions of the job with or without reasonable accommodation.[95] Because the MDS position required Elledge to walk sixty-six percent of working hours and to work in excess of eight hours a day, the court concluded he could not

84. *Elledge*, 979 F.3d at 1016.
85. *Id.* at 1007–08.
86. *Id.* at 1008.
87. *Id.* at 1009–10.
88. *Id.* at 1008.
89. *Id.*
90. *Id.* at 1008, 1012 (according to Elledge, this restructuring also allowed him to perform the true essential functions of his job).
91. *Id.* at 1008.
92. *Id.*
93. *Id.*
94. *Id.* at 1008, 1017.
95. *Id.* at 1009 (citing 42 U.S.C. § 12111(8)).

perform the essential functions of the job.[96] But the court still had to confront whether Lowe's was required to automatically reassign Elledge to a vacant director position that did not require as much walking, even though Lowe's normally would fill that vacancy with whom it believed to be the best-qualified candidate.[97] The court began by emphasizing that reassignment is an accommodation of last resort because it protects not just the disabled employee but employers and other employees as well.[98] Next, the court relied on the Supreme Court's decision in *U.S. Airways* where the Supreme Court held that the ADA does not "require employers to construct preferential accommodations."[99] It requires only that "preferential treatment be extended as necessary to provide [employees with disabilities] with the *same* opportunities as their non-disabled colleagues."[100] The Fourth Circuit interpreted this as requiring employers to simply allow disabled employees to compete for vacancies equally with other candidates.[101]

The court next highlighted how the Supreme Court identified "the value of stability in employee expectations" as the most important reason for rejecting reassignment when the employer uses a seniority system.[102] The court equated Lowe's' merit-based system— which had an "Enterprise Succession Management Process" nested within it—to a seniority system.[103] Like in *U.S. Airways*, the *Elledge* court found that the policy created employee expectations and that in the "run of cases," reassignment in contravention of such a policy would be unreasonable.[104] The court's heavy reliance on *U.S. Airways* resulted in Lowe's not having to reassign its long-time employee and the subsequent termination of Elledge from his employment.[105]

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96. *Id.* at 1012. When determining whether an employee is a qualified individual when seeking reassignment as a reasonable accommodation, the relevant question is whether the employee is qualified for the new position, not whether the employee is qualified for her current position. *See* United States EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1344 (11th Cir. 2016).

97. *Elledge*, 979 F.3d at 1013–14.

98. *Id.* at 1014.

99. *Id.* at 1015.

100. *Id.*

101. *Id.* at 1016–17.

102. *Id.* at 1015 (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 404–05 (2002)).

103. *Id.* at 1015–16.

104. *Id.* at 1016 (Lowe's' policy "invites, rewards, and protects the formation of settled expectations regarding hiring decisions.").

105. *Id.* at 1015–16, 1018.

III. WHY THE FOURTH CIRCUIT'S DECISION GOES TOO FAR

The Fourth Circuit was right to conclude that Lowe's was not required to reassign Elledge to a vacant position based on the specific facts of the case before it. The court should not, however, have foreclosed the possibility of reassignment for future disabled employees whose last chance of employment at their company truly depends on reassignment. As the Fourth Circuit noted, reassignment is an accommodation of last resort and is only required when no other accommodation can keep the employee with a disability employed or when all other accommodations would pose an undue hardship on the employer.[106] Here, Lowe's extended a reasonable accommodation to Elledge; it provided him the use of a motorized scooter so he could move across the floors without straining his knee.[107] Thus, Lowe's fulfilled its obligation under the ADA by providing Elledge an accommodation that could keep him in his current position. But Elledge chose not to accept this accommodation and instead created his own accommodation without the approval of his employer.[108] While Elledge's self-created accommodation allowed him to perform his job, the ADA does not require employers to accommodate employees with the accommodation of their choosing,[109] especially when such an accommodation creates extra work for other employees.[110] As the court noted, "Lowe's made reasonable, sensitive attempts to accommodate an indisputably valued employee in his present position," but Elledge undermined his case by refusing these accommodations and demanding others.[111]

Additionally, Lowe's had a unique best-qualified hiring policy, which the court acknowledged as special;[112] the Fourth Circuit should not have interpreted this policy as if it were a typical best-qualified hiring policy. Within its best-qualified system, Lowe's nested an "Enterprise Succession Management Process," which it used to prepare its employees for promotion into the heightened

106. EEOC, *supra* note 37.

107. *Elledge*, 979 F.3d at 1016 (stating that "Lowe's offer of a motorized scooter was reasonably calculated to mitigate the disadvantages of Elledge's reduction in natural mobility").

108. *Id.* at 1012.

109. *The ADA: Your Responsibilities as an Employer (2021)*, EEOC, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited Jan. 27, 2022) ("It need not be the best accommodation or the accommodation the individual with a disability would prefer . . . .").

110. *Elledge*, 979 F.3d at 1013 (stating that an employer "do[es] not need to change a job's essential functions or split them across multiple employees" to accommodate an employee with a disability (citing 29 C.F.R. app. § 1630.2(o))).

111. *Id.* at 1013.

112. *Id.* at 1016 ("Lowe's advanced its employees in accordance with a *special* kind of best-qualified hiring system." (emphasis added)).

responsibilities of the department's director-level positions.[113] It was specifically used to promote talent interdepartmentally and provided lower-level employees with special training to prepare them for directorship positions.[114] This special system arguably creates the employee expectations at issue in *U.S. Airways* because Lowe's actively trained employees to prepare them for directorship positions were they to open up.[115] Thus, the Fourth Circuit's primary justification for rejecting mandatory reassignment in light of the best-qualified hiring policy was because of the impact it would have on the rights of other employees, which was the "most important" reason held by the Supreme Court in *U.S. Airways*.[116] For this reason, the court found this special kind of best-qualified system fell squarely within the ambit of *U.S. Airways*.[117]

The succession system built into the best-qualified system in *Elledge* was unique and unlike typical best-qualified hiring policies that do not disrupt the rights of other employees.[118] Typically, a best-qualified system does not disrupt employee expectations of fair and uniform treatment because the most-qualified applicant never has a right to the position to begin with.[119] This differs from a seniority system where employees have an objective way of knowing whether they are next in line for a vacant position.[120] When an employer utilizes a best-qualified hiring policy, applicants have no knowledge of whether they are the best-qualified or not.[121] Therefore, there are no preconceived expectations of job entitlement.[122] Only the employer

113. *Id.*

114. *Id.*

115. *Id.* (noting that this hiring policy was "a succession system within a best-qualified system").

116. *Id.* at 1015 (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 404–05 (2002)).

117. *Id.* at 1016.

118. *Id.*

119. *See* Hager, *supra* note 51, at 2091.

120. *See* Cal. Brewers Ass'n v. Bryant, 444 U.S. 598, 606, 613–14 (1980) (stating that seniority systems are objective and easily calculable since they are based on the length of employment with a particular employer).

121. EEOC v. Mfrs. & Traders Trust Co., 429 F. Supp. 3d 89, 115 (D. Md. 2019) ("Unlike a seniority system, a best-qualified candidate policy provides no guarantee of steady and predictable advancement. Indeed, by its very nature, a best-qualified employee policy undermines predictability, as employees cannot know the pool of applicants against whom they will compete.").

122. There is no legal entitlement to a vacant job position based on an employer's best-qualified hiring policy because the applicant does not have a contractual agreement with the employer that provides a right to the position. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 409 (2002) (O'Connor, J., concurring).

is impacted when the most-qualified applicant is passed over for a job vacancy by a disabled employee.[123]

Additionally, an exception to reassignment for seniority systems does not create the problems that would arise if the same exception were applied to best-qualified hiring policies. Seniority systems provide an objective way of deciding which employee receives the vacant position; the employer simply determines who the most senior employee is.[124] This contrasts with a best-qualified hiring policy where the employer must use a subjective analysis to determine who the "best" candidate is.[125] This subjectivity allows discrimination against employees with disabilities to go undetected because there is no objective way to determine who the employer believes is the "best." This distinction is notable because the Supreme Court was not faced with the threat of undetectable discrimination when it decided to exempt seniority systems from the case-by-case inquiry of whether reassignment creates an undue hardship on the employer.[126]

The differences between a seniority system and best-qualified hiring policy are profound. Because the Fourth Circuit found the policy in *Elledge* to resemble that of a seniority system,[127] it should not have foreclosed the possibility of reassignment in lieu of an employer's best-qualified hiring policy when that was not the precise policy at issue. A better outcome would have left open the possibility of reassignment and simply found it to create an undue hardship based on those facts, given that Lowe's had a succession system built into its best-qualified hiring policy, which created employee expectations within the company.[128]

The Fourth Circuit's decision ultimately aligned with the Eighth and Eleventh Circuits' decisions, which the Fourth Circuit referenced as support for its position.[129] But, while the other circuits, as well as the Supreme Court, left the door to reassignment cracked open for disabled employees, the Fourth Circuit's decision shut it closed. In *U.S. Airways*, the Supreme Court held that there may be special circumstances that warrant a finding that, despite the presence of a seniority system, the requested reassignment is reasonable on the particular facts of the case.[130] The Eleventh Circuit agreed, leaving

123. *Mfrs. & Traders Trust*, 429 F. Supp. 3d at 116.

124. *See Bryant*, 444 U.S. at 605–06.

125. *See* EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1346 n.5 (11th Cir. 2016) (acknowledging that a merit-based selection policy leaves more room for subjectivity and is inherently more susceptible to abuse for discriminatory purposes).

126. *See Barnett*, 535 U.S. at 421–22 (Souter, J., dissenting).

127. Elledge v. Lowe's Home Ctrs., LLC, 979 F.3d 1005, 1016 (4th Cir. 2020).

128. *Id.*

129. *Id.*

130. *Barnett*, 535 U.S. at 403–06.

open the possibility of reassignment despite an employer's best-qualified hiring policy.[131] But the Fourth Circuit's decision makes no mention of such a possibility, essentially precluding a disabled employee from ever being reassigned to a vacant position when its employer utilizes a best-qualified hiring policy. This critical omission could result in cases being disposed of prematurely at the summary judgment stage without affording employees the opportunity to prove that the facts of their case warrant reassignment.

IV. MANDATORY REASSIGNMENT IS CONSISTENT WITH THE PROVISIONS OF THE ADA

The Fourth Circuit's evidently pro-employer decision leaves employees with disabilities without the opportunity to present to a court why the ADA requires their employer to reassign them to a vacant position, affording them the right to remain employed at their place of employment. Such a decision goes against the spirit of the ADA and Congress' vision when it enacted the statute. Until the Supreme Court hears the precise issue, this Comment proposes that courts interpret the ADA as requiring mandatory reassignment to a vacant position when no other accommodations are available, despite an employer's nondiscriminatory best-hiring policy. Such a result better suits the provisions of the ADA.

A. The Text and Legislative History of the ADA Support Mandatory Reassignment

Congress enacted the ADA to protect persons with disabilities from discrimination in employment;[132] it explicitly chose to include reassignment to a vacant position as a way to achieve this outcome.[133] The provisions of the ADA are meant to be interpreted liberally in favor of the protected class.[134] When the ADA was first enacted, and the courts narrowly interpreted the definition of what it meant to be disabled, Congress amended the statute to make it easier for individuals with disabilities to qualify for protections under the ADA.[135] Congress's initiative to amend the statute evidences its intent that the provisions of the ADA, including the reassignment clause, be construed broadly. The congressional intent for mandatory reassignment is further evidenced by Congress's inclusion of reassignment within the statute despite its absence in the

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

132. 42 U.S.C. § 12101(b)(1).

133. 42 U.S.C. § 12111(9)(B).

134. ADA Amendments Act, Pub. L. No. 110–325, 122 Stat. 3553 § 2(a)(4) (2008). ("[T]he holdings of [recent Supreme Court cases] . . . have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect . . . .").

135. *See id.*

Rehabilitation Act, which served as the framework for the ADA.[136] During the ADA's legislation, legislators recognized the importance of reassignment by noting that "transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker."[137] The emphasis on reassignment during these various stages of the statute's life demonstrate Congress's intent for reassignment to be used by employers as a way to keep employees with disabilities employed.

While Congress's choice of the words "may include" before the list of possible accommodations is permissive, this permissive language can be reconciled with an employer's duty to reassign.[138] The use of the word "may" before the list of accommodations is simply to indicate that an employer must perform an individualized analysis when determining which accommodation is most appropriate for the employee's disability and essential job responsibilities.[139] It is "[not] an opportunity [to exchange] a 'best qualified" standard into the word 'reasonable.'"[140] The statutory text of the ADA only calls for the disabled employee to be qualified for the position they wish to retain or seek; it does not require the employee with a disability to be the best-qualified candidate.[141] To read the statute otherwise would require courts to judicially amend "the statutory phrase 'qualified individual with a disability' to read, instead, 'best qualified individual, notwithstanding the disability.'"[142] If Congress had wanted to protect most-qualified individuals, it could have stated that employers are not required to pass over more qualified candidates.[143]

The purpose and spirit of the ADA supports the need for mandatory reassignment. The ADA was enacted after Congress realized that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis."[144] Allowing an exception to reassignment due to an employer's best-qualified-hiring policy

136. Creta, *supra* note 11, at 1698; *see also* Befort, *supra* note 5, at 449 (stating that the ADA departed from the Rehabilitation Act by including "reassignment to a vacant position" in its list of reasonable accommodations (quoting 42 U.S.C. § 12111(9)(B))).

137. H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345.

138. *See* 42 U.S.C. § 12111(9); EEOC v. Mfrs. & Trust Co., 429 F. Supp. 3d 89, 112 (D. Md. 2019).

139. *Mfrs. & Trust*, 402 F. Supp. 3d at 112.

140. *Id.* at 113 (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1168 n.7 (10th Cir. 1999)).

141. 42 U.S.C. § 12112(a).

142. *Mfrs. & Trust*, 429 F. Supp. 3d at 112.

143. Creta, *supra* note 11, at 1719.

144. 42 U.S.C. § 12101(a)(8).

would provide employers with an easy and undetectable avenue to discriminate against individuals with disabilities. Congress explicitly acknowledged that prejudices against people with disabilities will prevent them from competing on an equal basis with those who do not have disabilities.[145] As such, the argument that the ADA simply requires disabled employees to compete for job vacancies is unwarranted, especially in light of the Supreme Court's acknowledgement that the ADA requires affirmative conduct and preferential treatment.[146] Thus, reassignment without competition is consistent with the plain meaning of the statute, its legislative history, and the Supreme Court's interpretation of the ADA.

A hiring policy which uses an employer's subjective determination on the relative strength of different applicants would allow bias and prejudice to influence the employer's ultimate hiring decision. In 2019, there were over twenty-four thousand ADA claims charged by the EEOC,[147] and the unemployment rate for employees with disabilities is nearly twice that of nondisabled workers.[148] With these numbers in mind, it is not surprising that in a study where mock job applications were sent to employers, applicants who disclosed disabilities received twenty-six percent fewer expressions of employer interests than those applicants who reported no disability.[149] These statistics support the position that reassignment to a vacant position should be mandatory because discrimination against persons with disabilities continues to persist today.[150] Since reassignment is the accommodation of last resort, it is often the last chance for an employee with a disability to remain employed.[151] The consequences for the passed over "best-qualified" candidate are not nearly as severe; they simply remain in their current position while the opportunity to move into another position is deferred rather than

145. *See* 42 U.S.C. § 12101(a)(2) (stating that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem").

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

147. EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH FY 2020 (2021), https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020.

148. Press Release, U.S. Bureau of Lab. Stats., Persons with a Disability: Labor: Force Characteristics Summary (Feb. 24, 2021), https://www.bls.gov/news.release/disabl.nr0.htm.

149. Sarah Parker Harris & Rob Gould, *Research Brief: Experience of Discrimination and the ADA*, ADA NAT'L NETWORK (2019) (citing J. E. Beatty, *Career Barriers Experienced by People with Chronic Illness: A US Study*, 24 EMP. RESP. & RTS. J., 91–110 (2012)), https://adata.org/research_brief/experience-discrimination-and-ada.

150. Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 224 (2009).

151. *See* Befort, *supra* note 5, at 469.

lost.[152] Because reassignment is the last saving grace to keep the employee employed, it should be read as a mandatory requirement to properly carry out the ADA's purpose of ensuring the "full participation, independent living, and economic self-sufficiency" of individuals with disabilities.[153]

B. Burden-Shifting Test and Fact-Intensive Inquiry

Rather than a per se rule that precludes reassignment in every circumstance when an employer utilizes a best-qualified hiring policy, courts should find reassignment as being generally reasonable, then allow employers to establish why reassignment would create an undue hardship given the specific facts of their case. Such an approach is consistent with the burden-shifting test framed by the Supreme Court in *U.S. Airways*.[154] Under this framework, the employee with a disability must first prove that an accommodation is reasonable on its face.[155] If "the employee cannot show the accommodation is reasonable 'in the run of cases,'" then summary judgment against the plaintiff-employee is appropriate.[156] It is already established that reassignment is generally a reasonable accommodation in ADA cases;[157] therefore, the burden is on the employer to establish special case-specific reasons demonstrating why reassignment would cause them an undue hardship.[158]

Following the Supreme Court's framework on a case-by-case basis better follows the provisions of the ADA than a rule precluding reassignment when an employer has a best-qualified policy because reasonable accommodation requests and undue hardship defenses are fact-intensive inquiries that are meant to be considered on a case-by-case basis.[159] A per se rule outwardly establishing reassignment as unreasonable when an employer has a best-qualified policy would prematurely dispose of cases at the summary judgment stage, denying employees with disabilities from presenting their cases to a jury and demonstrating why the specific facts of their case warrant reassignment. More importantly, if failure to reassign claims are prematurely disposed of, then employers may easily hide intentional

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152. *Id.* at 469–70.

153. 42 U.S.C. § 12101(a)(7)–(8).

154. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

155. *Id.*

156. EEOC v. Mfrs. & Trust Co., 429 F. Supp. 3d 89, 103 (D. Md. 2019) (quoting *Barnett*, 535 U.S. at 394.

157. *Barnett*, 535 U.S. at 402–03 (stating that normally a reassignment request is reasonable within the meaning of the ADA).

158. *Id.* at 401–02.

159. *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (reasonable accommodation requests require "difficult, fact intensive, case-by-case analyses" and are "ill-served by per se rules or stereotypes").

discrimination in the name of hiring a "better-qualified" individual. The need for these cases to reach a jury is imperative given that discrimination may be easily covered up by an employer's justification of hiring the "best-qualified" candidate. The jury should be charged with deciding whether the employer's choice for the vacant position was actually the better-qualified individual or whether the "employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enter[ed] into the picture."[160]

Rather than shutting the door on reassignment, a better approach would require employers to demonstrate why reassignment is unreasonable given their business circumstances. Under this approach, an employee can survive a motion for summary judgment if the employer fails to reassign the employee to a vacant position. A jury can then decide whether (1) a vacant position existed; (2) the employee was qualified for the vacant position; and (3) reassignment would have caused the employer undue hardship.[161] This approach is consistent with the Supreme Court's framework in *U.S. Airways*, allows employees with disabilities to challenge their employer's determination of their qualifications, and retains the jury's role in these fact-intensive inquiries.

C. The ADA Sufficiently Protects Employers from Any Potential Abuse by the Reassignment Accommodation

Employers are naturally hesitant of a law that would require them to reassign employees to positions they were not hired for. A per se rule precluding reassignment when an employer utilizes a best-qualified hiring policy is unnecessary, however, because the ADA already provides employers with sufficient statutory protections.[162] To begin, reassignment is the accommodation of last resort, meaning that employers are only required to consider reassignment when no other accommodation is available or when any available accommodation would create an undue hardship on their business.[163] The ADA's last resort status protects employers by requiring employers and employees to consider all other possible accommodations before reassignment becomes a possibility.

The ADA only requires employers to accommodate disabled employees if the employee can first prove they are qualified, meaning

160. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998).

161. *See* Terrazas v. Medlantic Healthcare Group, Inc., 45 F. Supp. 2d 46, 54 (D.D.C. 1999).

162. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1170 (10th Cir. 1999) ("Congress has already significantly cabined the obligation to offer reassignment to a qualified employee who is disabled so as to ensure that it is not unduly burdensome, or even particularly disruptive, of an employer's business.").

163. EEOC, *supra* note 37.

they can perform the essential functions of the job.[164] When considering reassignment to a vacant position, the employee must prove they can perform the essential functions of the job they are seeking.[165] This qualification protects the employer and allows them to deny reassignment if the employee is not qualified for the vacant position. Further, an employer does not need to create a vacancy for the employee with a disability; reassignment is only necessary when there is already a vacancy in place.[166] This protects employers from potential backlash from other employees whose positions might be compromised if the employer were forced to create job vacancies. It also serves as a financial protection since employers will not need to create a new position and hire an extra employee. Additionally, the employer has the right to decide which vacant job position is to be offered to the employee;[167] the employee does not have the right to decide, and the reassignment need not involve a promotion.[168]

Finally, the employer is always free to show that reassignment would create an undue hardship on their business given the particular facts of their case.[169] As indicated in *Elledge*, there are circumstances where reassignment would prove an undue hardship on an employer who uses a best-qualified hiring policy.[170] This defense protects employers who find themselves in situations where reassignment may affect the rights of other employees or cause other hardships for the employer.[171] As such, the provisions of the ADA sufficiently protect employers from potential abuse. The Act's limitations mean it will be used infrequently, reserving its protections for those special circumstances where employees with disabilities are left with no other means to remain employed.

CONCLUSION

The split between the federal circuit courts with respect to an employer's duty to reassign has resulted in inconsistent applications of the law, leaving both employees and employers confused as to their rights and obligations under the ADA. The Supreme Court failed to

164. *See* 42 U.S.C. § 12112(b)(5)(A) (stating that an employer only needs to accommodate an "otherwise *qualified* individual with a disability" (emphasis added)).

165. *See* EEOC, *supra* note 109.

166. *See id.*; *see also id.*, *supra* note 109 (stating that an employer is "not required to create a position or to bump another employee in order to create a vacancy").

167. *Smith*, 180 F.3d 1154, 1170 (10th Cir. 1999).

168. *Id.*

169. 42 U.S.C. § 12112(b)(5)(A).

170. *See* Elledge v. Lowe's Home Ctrs., LLC, 979 F.3d 1004, 1016–18 (4th Cir. 2020).

171. *See* 42 U.S.C. § 12111(10).

resolve the ambiguity involving an employer's duty to reassign; it only complicated the inquiry as evidenced by the conflicting interpretations of *U.S. Airways* used by the lower courts. As a result, in some states, a qualified person with a disability will automatically be reassigned to a vacant position as a form of reasonable accommodation. In others, the person with a disability must either compete for the vacant position amongst other applicants and potentially still not receive the position or leave their job and face unemployment.

When Congress enacted the ADA, it realized the prejudice that people with disabilities face in employment; those prejudices are still very much alive today. In order to carry out the Act's main purpose, which is to allow more individuals with disabilities to enter the workplace and remain employed, reassignment should be required by employers, even if there is a better-qualified candidate for the vacancy. Until the Supreme Court hears the issue, courts should require employers to reassign their employees with disabilities when no other accommodation can keep them employed. Once an employee with a disability has established that they are otherwise qualified for the position, the burden should shift to the employer to demonstrate why reassignment would cause them an undue hardship. To read the provisions of the ADA otherwise would allow employers to always deny people with disabilities vacant positions in the name of a best-qualified hiring policy; such a rule would essentially remove the reassignment clause from the list of accommodations written in the ADA.

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