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THE ACCOMMODATION OF LAST RESORT: THE AMERICANS WITH DISABILITIES ACT AND REASSIGNMENTS

Abstract: In 1990, Congress enacted the Americans with Disabilities Act (“ADA”) to eliminate widespread discrimination against disabled persons. The Act requires private employers to provide reasonable accommodations to disabled employees to allow them to continue performing essential job functions. One accommodation in particular has divided the U.S. Circuit Courts of Appeals: reassigning disabled employees to vacant positions. Due to a current circuit split, it is unclear if employers must reassign disabled employees despite maintaining policies of choosing the best-qualified employees for reassignment. This Note argues that both the text of the ADA and the ADA’s legislative history support automatic reassignments when no other reasonable accommodations allow a disabled employee to perform his or her essential job functions. Although reassignments pose several unique concerns, they are adequately addressed through existing statutory safeguards and U.S. Equal Employment Opportunity Commission regulations. Noncompetitive reassignments should be given teeth either through a congressional amendment or through future court cases.

Congress [has] acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

—Associate Justice William J. Brennan, Jr.¹

INTRODUCTION

Pam Huber, a dry grocery order filler employed at Wal-Mart’s Clarksville, Arkansas distribution center, permanently injured her right arm and hand.² Because Huber could no longer perform the essential functions of a dry grocery order filler, she sought reassignment to a vacant router position.³

¹ Sch. Bd. of Nassau Cnty., Fla. v. Arline, 480 U.S. 273, 284 (1987).

² Huber v. Wal-Mart Stores, Inc. (*Huber I*), No. 04-2145, 2005 WL 3690679, at *1 (W.D. Ark. Dec. 7, 2005), *rev’d*, Huber v. Wal-Mart Stores, Inc. (*Huber II*), 486 F.3d 480 (8th Cir. 2007). An order filler is an employee charged with packaging and shipping goods to customers in response to their orders. *Order Filler Job Description*, AMERICA’S JOB EXCHANGE: JOBS FOR EVERYONE, <http://www.americasjobexchange.com/order-filler-job-description>, archived at <http://perma.cc/3VCH-AXHS> (last visited Oct. 12, 2014).

³ *Huber I*, 2005 WL 3690679, at *1. Although it is unclear what the router position entailed, the parties agreed that the position was equivalent to the dry grocery order filler position and was neither a promotion nor demotion. *See id.*

Both the dry grocery order filler position and the router position paid approximately \$13.00 an hour.⁴ At the time, Wal-Mart maintained a policy of awarding each reassignment to the most qualified candidate who applied for the reassignment, commonly referred to as a “best-qualified reassignment policy.”⁵ Under this policy, Huber was required to compete with nondisabled employees who also sought the router position.⁶ Wal-Mart eventually filled the router position with a nondisabled employee who was more qualified than Huber.⁷ Huber was then reassigned to a janitorial position at a different location that only paid \$6.20 an hour.⁸

In 2010, an estimated 56.7 million Americans, like Pam Huber, suffered from disabilities.⁹ Numerous polls and statistics repeatedly demonstrate that disabled Americans experience high levels of unemployment and earn less income than nondisabled Americans.¹⁰ In an effort to address the economic problems of the disabled community Congress enacted the Americans with Disabilities Act (“ADA”).¹¹ Under certain circumstances the ADA requires, among other things, that employers reassign disabled employees to vacant

⁴ *Id.*

⁵ *Id.* Merit based best-qualified reassignment policies are distinguishable from seniority systems, which are based on the amount of time an employee has worked for his or her employer. *See* EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (recognizing that a best-qualified reassignment policy is not equivalent to a seniority system).

⁶ *Huber I*, 2005 WL 3690679, at *1.

⁷ *Id.*

⁸ *Id.* at *2.

⁹ MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 4 (2012), available at <http://www.census.gov/prod/2012pubs/p70-131.pdf>, archived at <http://perma.cc/FX9C-PW65> [hereinafter AMERICANS WITH DISABILITIES: 2010].

¹⁰ *See, e.g.*, AMERICANS WITH DISABILITIES: 2010, *supra* note 9, at 10 (reporting that 41.1% of disabled individuals between the ages of twenty-one and sixty-four were employed whereas 79.1% of nondisabled individuals in the same age range were employed); Economic News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Persons with a Disability: Labor Force Characteristics Summary (June 11, 2014), available at <http://www.bls.gov/news.release/disabl.nr0.htm>, archived at <http://perma.cc/PKG2-NSVZ> (reporting that, in 2013, 17.6% of disabled people were employed while 64% of nondisabled people were employed); *see also* 42 U.S.C. § 12101(a)(6) (2012) (finding that “census data, national polls, and other studies” have determined that disabled persons are economically disadvantaged); H.R. REP. NO. 101-485(II), at 32–33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (citing to several studies indicating that disabled persons are more likely to be unemployed and subject to poverty).

¹¹ *See* Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)); 42 U.S.C. § 12101(a)(7) (stating that the goals of the ADA include assuring “equality of opportunity, full participation, independent living, and economic self-sufficiency” for disabled individuals); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001) (noting that Congress passed the ADA to address pervasive discrimination against disabled persons). In 1990, when the ADA was enacted, there were approximately forty-three million disabled Americans. *See* Pub. L. 101-336, 104 Stat. 327, 328. The ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(1).

positions (“reassignment clause”).¹² Courts have struggled with the scope of this statutory requirement because nondisabled employees can be adversely affected by the reassignment of disabled employees.¹³

Pam Huber never received the router position because the U.S. Court of Appeals for the Eighth Circuit held that the ADA only provides disabled employees with the opportunity to compete for vacant positions.¹⁴ In that Circuit, employers are not required to reassign disabled employees to vacant positions if there are more qualified nondisabled candidates.¹⁵ If Pam Huber had worked in neighboring Oklahoma instead of Arkansas, however, she likely would have received the router position.¹⁶ This is because the U.S. Court of Appeals for the Tenth Circuit holds that the ADA requires employers to do more than simply allow disabled employees to compete with nondisabled employees for reassignments.¹⁷ These dueling interpretations of the ADA’s reassignment clause have led to the unequal treatment of disabled employees from Circuit to Circuit.¹⁸ Although the U.S. Supreme Court has had the op-

¹² See 42 U.S.C. § 12112(b)(5)(A) (stating that employers must provide disabled employees with reasonable accommodations); *id.* § 12111(9)(B) (indicating that reasonable accommodations may include “reassignment to a vacant position”).

¹³ Compare, e.g., *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996) (holding that the ADA does not require an employer to reassign a disabled employee if the reassignment would violate a seniority system established in a collectively bargained agreement), with *Emrick v. Libbey-Owens-Ford Co.*, 875 F. Supp. 393, 396–97 (E.D. Tex. 1995) (finding that when a reassignment would conflict with a collectively bargained agreement, the fact finder must weigh the conflict in determining if a reassignment would be reasonable). See also 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, 944–46 (2003) (arguing that reassignments have generated more litigation than any other reasonable accommodation partly because of their impact on nondisabled employees).

¹⁴ See *Huber II*, 486 F.3d at 481, 483–84.

¹⁵ See *id.* at 483–84 (holding that an employer does not need to reassign a qualified disabled employee if such a reassignment would violate the employer’s legitimate nondiscriminatory policy of hiring the most qualified applicant).

¹⁶ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1165 (10th Cir. 1999) (holding that the reassignment clause grants disabled employees more than just the opportunity to compete for vacant positions).

¹⁷ See *id.* at 1166–67; see also *United Airlines*, 693 F.3d at 764–65; *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc).

¹⁸ Compare *Huber II*, 486 F.3d at 483 (holding that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation), with *United Airlines*, 693 F.3d at 764–65 (holding that disabled employees are entitled to noncompetitive reassignments as a reasonable accommodation), *Midland Brake*, 180 F.3d at 1166 (same), and *Aka*, 156 F.3d at 1304–06 (same). Although there is currently a 1–3 circuit split, five other Circuits have held that the ADA does not provide disabled employees with preferential treatment and are therefore closely aligned with the *Huber II* court. See *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995). Indeed, there may be no meaningful difference between these five Circuits and the Eighth Circuit. See *Supreme Court Declines to*

portunity to resolve this circuit split, it recently declined to grant a petition for writ of certiorari in a case that would have put the ADA's reassignment clause before the Court.¹⁹

This Note discusses the development of the circuit split and offers a solution for resolving the split in favor of entitling disabled employees to non-competitive reassignments.²⁰ Employers would thus have to reassign disabled employees to vacant positions before considering any nondisabled employees.²¹ Part I of this Note discusses the background of the ADA and the mechanics of the ADA's reassignment clause.²² Part I then highlights a landmark U.S. Supreme Court decision that has further divided the lower courts.²³ Part II analyzes the circuit split and the underlying rationales.²⁴ Finally, Part III argues that the text and legislative history of the ADA support noncompetitive reassignments when no other reasonable accommodations allow a disabled employee to perform his or her essential job functions.²⁵ Additionally, Part III discusses how noncompetitive reassignments have the potential to reduce government spending, whereas safeguards in both the ADA and U.S. Equal Employment Opportunity Commission ("EEOC") Guidelines mitigate possible negative side effects of noncompetitive reassignments.²⁶ Part III also offers several recommendations that could resolve the circuit split in favor of noncompetitive reassignments.²⁷

I. THE AMERICANS WITH DISABILITIES ACT'S REASSIGNMENT CLAUSE

The current clash between the ADA's reassignment clause and employers that utilize best-qualified reassignment policies has slowly developed over two decades.²⁸ During the ADA's early years, litigation focused on how the

Decide ADA Reassignment Question, THOMPSON'S ADA COMPLIANCE GUIDE, July 2013, at 1, 9–11 (characterizing the circuit split as 6–3 as opposed to 3–1).

¹⁹ *United Airlines, Inc. v. EEOC*, 133 S. Ct. 2734 (2013) (*United Airlines II*) (denying certiorari). Although the U.S. Supreme Court did not provide any reasons for denying certiorari, it may have decided that the circuit split was not large enough to warrant attention. *See* Brief for the Respondent in Opposition at 8–9, *United Airlines II*, 133 S. Ct. 2734 (No. 12-707), 2013 WL 1771083, at *8–9 (characterizing the conflict among the U.S. Courts of Appeals as only a “shallow” 3–1 circuit split).

²⁰ *See infra* notes 106–225 and accompanying text.

²¹ *See infra* notes 155–225 and accompanying text.

²² *See infra* notes 28–79 and accompanying text.

²³ *See infra* notes 80–105 and accompanying text.

²⁴ *See infra* notes 106–154 and accompanying text.

²⁵ *See infra* notes 155–186 and accompanying text.

²⁶ *See infra* notes 187–202 and accompanying text.

²⁷ *See infra* notes 203–225 and accompanying text.

²⁸ *Compare Daugherty*, 56 F.3d at 700 (becoming, in 1995, the first circuit to hold that the ADA does not grant disabled employees preferential treatment), *and Huber II*, 486 F.3d at 483 (holding, in 2007, that the ADA does not require noncompetitive reassignments when employers

Act defined disability.²⁹ As this issue of what constitutes a disability has been resolved, the focus of the courts has shifted to the ADA's reasonable accommodation requirement, which includes the reassignment clause.³⁰

Section A of this Part discusses the early stages of disability discrimination legislation and the origins of the ADA.³¹ Section B discusses both the ADA's reasonable accommodation requirement and the reassignment clause.³² Lastly, Section C discusses the U.S. Supreme Court's 2002 ruling in *U.S. Airways, Inc. v. Barnett*, which held that the seniority rights of nondisabled employees ordinarily trump the statutory right of disabled employees to be reassigned to vacant positions.³³

A. Early Efforts at Remediating Disability Discrimination and the Birth of the ADA

Disabled Americans slowly gained statutory protections over the latter half of the twentieth century.³⁴ As a result of the African American Civil

maintain best-qualified reassignment policies), with *United Airlines*, 693 F.3d at 764–65 (supporting, in 2011, noncompetitive reassignments for disabled employees).

²⁹ See 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 litigation regarding the scope of the ADA's disability definition "occupied center stage" in the courts during the 1990s). In one year alone five U.S. Supreme Court decisions addressed the scope of the term "disability." See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 562–67 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521–25 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481–94 (1999); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801–04 (1999); *Bragdon v. Abbott*, 524 U.S. 624, 630–48 (1998). In 2008, Congress passed the ADA Amendments Act ("ADAAA") partly to clarify the intended meaning of disability. See Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in various provisions of 42 U.S.C. §§ 12101–12213) (noting in the Act's findings and purposes that Congress's intended interpretation of the term disability had not been adhered to); EMILY A. BENFER, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, *THE ADA AMENDMENTS ACT: AN OVERVIEW OF RECENT CHANGES TO THE AMERICANS WITH DISABILITIES ACT 2–3* (2009) (explaining how the ADAAA realigned the meaning of disability to comport with Congress's original intent).

³⁰ Befort, *supra* note 29, at 440 (indicating that although the ADA's first decade of litigation focused on the scope of the definition of disability, current litigation focuses on the reasonable accommodation requirement); Reagan S. Bissonnette, Note, *Reasonably Accommodating Nonmitigating Plaintiffs After the ADA Amendments Act of 2008*, 50 B.C. L. REV. 859, 873–74 (2009) (stating that the ADAAA broadened the definition of disability and therefore shifted the focus of ADA litigation towards the meaning of the reasonable accommodation requirement).

³¹ See *infra* notes 34–52 and accompanying text.

³² See *infra* notes 53–79 and accompanying text.

³³ See *infra* notes 80–105 and accompanying text.

³⁴ See Allison Duncan, Note, *Defining Disability in the ADA: Sutton v. United Airlines, Inc.*, 60 LA. L. REV. 967, 967–70 (2000) (providing a brief overview of the history of disability discrimination legislation); see also Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 415–30 (1997) (discussing the history surrounding the enactment of the 1973 Rehabilitation Act).

Rights Movement, Congress enacted the Civil Rights Act of 1964.³⁵ Title VII of this landmark piece of legislation made it unlawful for employers to discriminate against individuals on the basis of “race, color, religion, sex, or national origin.”³⁶ Despite this sweeping language, the statute does not bar employers from discriminating against individuals with disabilities.³⁷ This exclusion of disability from Title VII may have been caused by a continuing perception that disability, unlike race or sex, can be a valid basis for making an employment determination.³⁸ Less than a decade later, however, Congress passed the 1973 Rehabilitation Act, which became the first federal statute to offer limited protections to the disabled.³⁹ This legislation would serve as the framework for the modern-day ADA.⁴⁰

³⁵ Jenny Rivera, *The Violence Against Women Act and the Construction of Multiple Consciousness in the Civil Rights and Feminist Movements*, 4 J.L. & POL’Y 463, 490 (1996) (observing that the civil rights movement of the 1960s increased public awareness of discrimination and led to the passage of the Civil Rights Act of 1964); Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148 (2005) (arguing that the civil rights movement of the 1960s was the primary impetus for the Civil Rights Act of 1964); see *The Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a–2000h-6 (2012)).

³⁶ 42 U.S.C. § 2000e-2(a)(1). The Civil Rights Act of 1964 is widely recognized as both the broadest and most important federal anti-discrimination statute. See Rosenberg, *supra* note 35, at 1147 (arguing that the Civil Rights Act of 1964 is both the most important and the most powerful anti-discrimination statute ever passed by Congress); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 957 (2005) (arguing that the Civil Rights Act of 1964 is the most far reaching anti-discrimination statute passed by Congress).

³⁷ See *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007) (concluding that Title VII does not prevent employers from discriminating on the basis of disability); *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) (stating that Title VII does not provide a remedy for employment discrimination based solely on “physical and mental limitations”); *Torres-Alman v. Verizon Wireless P.R., Inc.*, 522 F. Supp. 2d 367, 381 (D.P.R. 2007) (indicating that the text of Title VII does not extend to disability discrimination claims).

³⁸ Compare *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (declining to extend “heightened scrutiny” protection to individuals suffering mental illnesses), and *D’Amato v. Wis. Gas Co.*, 760 F.2d 1474, 1486 (7th Cir. 1985) (stating that “handicaps can be legitimate reasons for exclusion from some jobs—unlike discrimination based on race, ethnic origin, sex, religion or politics”), with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973) (stating that Title VII bars employers from engaging in racial discrimination in any employment decisions), and *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (recognizing sex as a “suspect criteria” for employment decisions, whereas physical disability is a “non-suspect status”).

³⁹ Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–796 (2012)), amended by Workforce Innovation and Opportunity Act, Pub. L. No. 113-128, 128 Stat. 1425 (2014); *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990) (observing that the Rehabilitation Act was the first significant federal statute to protect disabled persons). Section 504 of the Rehabilitation Act states that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” of a federal agency or a private employer receiving federal funding. 29 U.S.C. § 794(a). The Rehabilitation Act defines an “individual with a disability” as an individual who “has a physical or mental impairment which for such individual constitutes or

Although the 1973 Rehabilitation Act was originally designed to help states devise and execute vocational rehabilitative programs for the disabled, the statute was soon expanded to prohibit all federal agencies and private employers receiving federal funding from discriminating against the disabled.⁴¹ Throughout the 1970s and 1980s it became apparent that America's disabled population was growing and that the Rehabilitation Act failed to protect a sizable portion of this population.⁴² The legislation was ineffective primarily because it did not bar private employers not receiving federal funding (the majority of private employers) from discriminating against the disabled.⁴³ Congress, in an effort to fill this considerable gap in anti-discrimination protection, enacted the ADA in 1990.⁴⁴

results in a substantial impediment to employment; and . . . can benefit in terms of an employment outcome from vocational rehabilitation services.” 29 U.S.C. § 705(20)(A)(i)–(ii).

⁴⁰ See Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004) (describing the 1973 Rehabilitation Act as being a precursor to the ADA); Sarah J. Parrot, Note, *The ADA and Reasonable Accommodation of Employees Regarded as Disabled: Statutory Fact or Bizarre Fiction?*, 67 OHIO ST. L.J. 1495, 1500 (2006) (same).

⁴¹ See Boyd v. U.S. Postal Serv., 752 F.2d 410, 412 (9th Cir. 1985) (discussing the statute's evolution); Michael D. Moberly, *Letting Katz Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603, 607 (1998) (same). The Rehabilitation Act has always required federal agencies to adopt affirmative action plans for hiring disabled persons. § 501, 87 Stat. 355, 390–91 (1973) (codified at 29 U.S.C. § 791(b)) (providing for affirmative action policies at the time of the Act's passage). The original version of the Rehabilitation Act, however, did not provide disabled persons with a private right of action. See Boyd, 752 F. 2d at 412. In 1978, the Rehabilitation Act was amended to include such a right. Pub. L. No. 95-602, sec. 120, § 505, 92 Stat. 2955, 2982 (codified at 29 U.S.C. § 794a(a)(1) (2012)) (providing that the rights and remedies available under Title VII of the Civil Rights Act are available to a person filing a complaint under section 501 of the Rehabilitation Act).

⁴² See 42 U.S.C. § 12101(a)(3) (2012) (stating that discrimination against disabled persons continues in many areas including employment, education, housing, and transportation); Lissa Martinez, Note, *Prilliman v. United Air Lines, Inc.: Employers' Duty of Reasonable Accommodation Under California's Fair Employment and Housing Act*, 26 W. ST. U. L. REV. 71, 79 (1999) (stating that, although the Rehabilitation Act was a “significant first step” towards protecting disabled persons, it is limited to the federal government, federal contractors, and recipients of federal aid); see also Carrie L. Flores, Note, *A Disability Is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195, 203 (2008) (indicating that millions of Americans suffered from a disability in 1990 and that the number would continue to grow).

⁴³ Calero-Cerezo, 355 F.3d at 19 (stating that the Rehabilitation Act is limited to “federal agencies, contractors and recipients of federal financial assistance”); Shiring v. Runyon, 90 F.3d 827, 830 (3d Cir. 1996) (indicating that the Rehabilitation Act only applies to federal employers or private employers receiving federal funding).

⁴⁴ Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2012)); see Fink v. Kitzman, 881 F. Supp. 1347, 1368 (N.D. Iowa 1995) (citing Helen L. v. DiDario, 46 F.3d 325, 330 (3d Cir. 1995)). The ADA was supported by President George H.W. Bush and a substantial majority of both Houses of Congress. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990) (stating that President George H.W. Bush signed the bill into law on July 26, 1990); *House Overwhelmingly Approves Bill to Bar Employment Bias Against Disabled*, Daily Lab. Rep. (BNA) No. 100, at A-16 (May 23, 1990) (asserting that the House of Representatives passed the ADA by a vote of 403 to

The ADA, unlike its predecessor, prohibits all private employers of fifteen or more employees from discriminating against the disabled.⁴⁵ Consequently, covered employers cannot consider disability “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁴⁶ Many herald this expansion in protection for disabled persons as the crowning achievement of the disability rights movement.⁴⁷ In his final remarks at the ADA signing ceremony, President George H. W. Bush compared the new law to the fall of the Berlin Wall.⁴⁸

Although the ADA expanded the scope of disability discrimination protection, it also retained many core components of the Rehabilitation Act.⁴⁹ For example, the ADA’s definition of “disability” is nearly identical to the definition of “handicapped person” in the EEOC regulations implementing

20); *Senate Passage of Civil Rights Bill Moves Debate over Disabled to House*, Daily Lab. Rep. (BNA) No. 174, at A-5 (Sept. 11, 1989) (indicating that the Senate passed the ADA by a vote of seventy-six to eight).

⁴⁵ Compare 42 U.S.C. § 12112(a) (prohibiting covered entities from discriminating against disabled persons under the ADA), and *id.* § 12111(2), (5)(A) (stating that covered entities include employers of fifteen or more employees under the ADA), with 29 U.S.C. § 791(b) (requiring only that federal agencies establish affirmative action programs for disabled persons under the Rehabilitation Act). See also Matthew Graham Zagrodzky, Comment, *When Employees Become Disabled: Does the Americans with Disabilities Act Require Consideration of a Transfer as a Reasonable Accommodation?*, 38 S. TEX. L. REV. 939, 943 (1997) (discussing the expansion in disability protection with the passage of the ADA). Although the ADA covers private employers, it also prohibits states and local governments from discriminating against the disabled. 42 U.S.C. § 12132 (prohibiting public entities from discriminating against disabled persons); *id.* § 12131(1)(A) (stating that public entities include state and local governments).

⁴⁶ 42 U.S.C. § 12112(a).

⁴⁷ Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 30 (2000) (describing the ADA as the “culmination of the civil rights movement”); see 136 CONG. REC. 21,923 (1990) (statement of Sen. Harkin (describing the ADA as the “emancipation proclamation for people with disabilities”). The ADA has also been labeled a “virtual revolution” for the rights of the disabled. *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993); see also Lynn J. Harris, Comment, *The Americans with Disabilities Act and Australia’s Disability Discrimination Act: Overcoming the Inadequacies*, 22 LOY. L.A. INT’L & COMP. L. REV. 51, 97 (1999).

⁴⁸ Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1067, 1069 (July 26, 1990) (“[N]ow I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp.”). Nearly two thousand disabled Americans filled the White House lawn to listen to the President’s signing ceremony speech and celebrate the passage of the Act. Don Shannon, *Spirits Soar as Disabled Rights Become the Law*, L.A. Times, July 27, 1990, http://articles.latimes.com/1990-07-27/news/mn-573_1_disabled-rights, archived at <http://perma.cc/4SVJ-XP6>. Evan Kemp, a commissioner of the U.S. Equal Employment Opportunity Commission, described it as “the greatest day of [his] life.” *Id.*

⁴⁹ See Flores, *supra* note 42, at 202 (observing that Congress integrated the language and requirements of the Rehabilitation Act into the ADA).

the Rehabilitation Act.⁵⁰ Moreover, cases interpreting the Rehabilitation Act are frequently relied upon in litigation involving the ADA.⁵¹ One major difference between the original version of the Rehabilitation Act and the ADA is that only the ADA requires employers to consider reassigning disabled employees to vacant positions.⁵²

B. Reasonable Accommodations and the Reassignment Clause

Title I of the ADA prohibits private employers of fifteen or more employees from discriminating against “qualified individual[s] on the basis of disability.”⁵³ To bring a discrimination claim under the ADA, an employee must establish that he or she (1) is a qualified individual, (2) has a disability, (3) suffered an adverse employment action because of his or her disability, and (4) that at least fifteen employees work for the employer.⁵⁴ The Act defines “qualified individual” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁵⁵ Under this definition, an em-

⁵⁰ Compare 42 U.S.C. § 12102(1) (2012) (defining “disability” under the ADA), with 34 C.F.R. § 104.3(j)(1) (2014) (defining “handicapped person” under the Rehabilitation Act’s implementing regulations). A disabled or handicapped person is an individual with “a physical or mental impairment that substantially limits one or more major life activities of such individual . . . a record of such an impairment; or . . . being regarded as having such an impairment.” 42 U.S.C. § 12102(1); see 34 C.F.R. § 104.3(j)(1) (defining “handicapped person” with minor grammatical differences).

⁵¹ See *White v. York Int’l Corp.*, 45 F.3d 357, 360 n.5 (10th Cir. 1995) (noting that the language of the ADA tracks the language of the Rehabilitation Act and that the ADA mandates interpretations that avoid inconsistent standards between the two statutes); Robert J. Brookes, *Recent ADA and Rehabilitation Act Cases*, 44 SYRACUSE L. REV. 861, 864 (1993) (observing that Rehabilitation Act cases are persuasive authority when considering ADA claims); see also 42 U.S.C. § 12201(a) (stating that the ADA’s standards are as strict as the standards of the Rehabilitation Act).

⁵² See Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1058 (2000) (indicating that although the language of the ADA closely follows the language of the Rehabilitation Act, the ADA departs from the Rehabilitation Act with its reassignment clause). In 1992, however, the Rehabilitation Act was amended to include a reassignment requirement. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §§ 503 & 505, 106 Stat. 4344, 4424, 4428 (1992) (codified at 29 U.S.C. §§ 791(g), 794(d) (2012)) (incorporating the ADA’s standards, including a reassignment requirement).

⁵³ 42 U.S.C. § 12112(a); see *id.* §§ 12111(2), 12111(5)(A).

⁵⁴ *Robinson v. Neodata Servs., Inc.*, 94 F.3d 499, 501 (8th Cir. 1996); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 30 (1st Cir. 1996); *White*, 45 F.3d at 360–61; see 42 U.S.C. §§ 12111(2), 12111(5)(A), 12112(a). Although employers with fewer than fifteen employees are not covered by the ADA, these smaller employers are frequently covered by state disability discrimination statutes. See, e.g., CONN. GEN. STAT. § 46a-51(10) (2014) (covering employers with at least three employees); MASS. GEN. LAWS ch. 151B, § 1(5) (2014) (covering employers with at least six employees); MINN. STAT. § 363A.03 (subd. 16) (2014) (covering employers with at least one employee).

⁵⁵ 42 U.S.C. § 12111(8).

ployer must first identify the essential functions of the employment position.⁵⁶ Then, the employer must determine if the disabled employee would be able to perform these functions with reasonable accommodations.⁵⁷

The ADA states that discrimination includes the failure to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁵⁸ In other words, if a disabled employee could perform the essential functions of his or her job with reasonable accommodations, his or her employer must provide those accommodations.⁵⁹ Most reasonable accommodations involve either the modification or adjustment of a workplace environment, working conditions, or application process.⁶⁰ The ADA also provides a nonexclusive list of accommodations that may be reasonable, which includes reassignments to vacant positions.⁶¹

Many courts hold that employers have a mandatory obligation to engage in an interactive process with disabled employees to determine which accommodations are most reasonable under the circumstances.⁶² This interac-

⁵⁶ Befort & Donesky, *supra* note 52, at 1051; see 42 U.S.C. § 12111(8) (2012). Essential functions are the “fundamental job duties of the employment position the individual with a disability holds or desires.” 29 C.F.R. § 1630.2(n)(1) (2014). For example, in most jobs, physical attendance in the workplace is an essential function. *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 726–27 (5th Cir. 1998) (per curiam).

⁵⁷ Befort & Donesky, *supra* note 52, at 1051; see 42 U.S.C. § 12111(8).

⁵⁸ 42 U.S.C. § 12112(b)(5)(A). Statutory accommodations, such as the ADA’s reasonable accommodation requirement, are designed to “prohibit employers from acting on the normally legitimate desire to save money.” Samuel R. Bagenstos, “*Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 828 (2003).

⁵⁹ See 42 U.S.C. § 12112(b)(5)(A) (providing the reasonable accommodation requirement); see also Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1430 (1991) (asserting that if an employer refuses to provide an accommodation that would allow a disabled employee to perform her job, and the accommodation would not impose an undue burden on the employer, the employer is violating the ADA). *But see infra* notes 66–68 and accompanying text (describing some instances when employers do not have to accommodate disabled employees).

⁶⁰ See 29 C.F.R. § 1630.2(o) (providing a broad definition of reasonable accommodation along with a nonexclusive list of possible accommodations).

⁶¹ 42 U.S.C. § 12111(9)(A)–(B). The ADA’s list of reasonable accommodations also includes making existing facilities accessible, job restructuring, providing part-time or modified work schedules, modifying or acquiring equipment, adjusting examinations or training materials, and providing interpreters or readers. *Id.* Apart from this list, the ADA does not provide a definition for reasonable accommodations. Jill S. Kingsbury, “*Must We Talk About That Reasonable Accommodation?*”: *The Eighth Circuit Says Yes, But Is the Answer Reasonable?*, 65 MO. L. REV. 967, 976 n.70 (2000) (stating that, instead of defining the term “reasonable accommodation,” the ADA provides a list of what a reasonable accommodation might be).

⁶² *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), *vacated sub nom.* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (stating that most circuits require employers to engage in an interactive process); *Midland Brake*, 180 F.3d at 1172 (noting that the duty to partic-

tive process is meant to be a flexible discussion that accounts for the physical and mental limitations of the disabled employee as well as the nature of the employment position.⁶³ The goal is to identify which accommodations will allow disabled employees to perform their essential job functions and then determine if providing these accommodations will be reasonable.⁶⁴ If no reasonable accommodation is possible, however, the employer cannot be sued for failing to engage in the interactive process.⁶⁵

Despite the ADA's reasonable accommodation requirement, an employer does not have to provide a particular accommodation if it would inflict an "undue hardship" on the employer's business.⁶⁶ According to the ADA, an undue hardship is an "action requiring significant difficulty or expense" when considered in light of several factors.⁶⁷ Absent an undue hardship defense, an employer's failure to provide a reasonable accommodation violates the ADA.⁶⁸

Reassigning disabled employees to vacant positions has proven to be one of the most difficult reasonable accommodations to implement.⁶⁹ Most reasonable accommodations, such as job restructuring or modified work

ipate in an interactive process is intrinsic in the statutory obligation of providing reasonable accommodations to disabled employees); *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (describing the interactive process as an employer's "obligation"). At least two legal scholars point out that, despite these court holdings, the ADA itself does not provide disabled employees with an independent right to an interactive process. Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who Is Disabled to Who Can Work*, 34 *HAMLIN L. REV.* 469, 484 (2011).

⁶³ See Befort, *supra* note 29, at 445–46 (citing 29 C.F.R. § 1630.9 (2014)).

⁶⁴ See Collins & Phillips, *supra* note 62, at 482.

⁶⁵ *E.g.*, *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000); *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 233–35 (3d Cir. 2000); *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (per curiam). An employer successfully demonstrates an absence of reasonable accommodations if no accommodations would allow the disabled employee to continue performing the essential functions of his or her job. See *Willis*, 108 F.3d at 284 (citing 29 C.F.R. § 1630.2(o)(2)(ii) (1997)) (indicating that for an accommodation to be reasonable it must allow the disabled employee to continue to perform the essential functions of his or her job).

⁶⁶ 42 U.S.C. § 12112(b)(5)(A) (2012); see Rachel Schneller Ziegler, Note, *Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act*, 101 *MICH. L. REV.* 840, 868 (2002) (indicating that undue hardship is an affirmative defense that can always be raised by an employer).

⁶⁷ 42 U.S.C. § 12111(10)(A). These factors include, but are not limited to, the nature and cost of the accommodation, the resources of the facility providing the accommodation, the resources of the disabled employee's employer, and the type of operations of the employer. *Id.* § 12111(10)(B)(i)–(iv).

⁶⁸ *Id.* § 12112(b)(5)(A); see also Befort, *supra* note 29, at 447. If an employer violates the ADA, a court may grant equitable relief, back pay of up to two years, and reasonable attorney's fees. 42 U.S.C. § 12117(a); *id.* § 2000e-5(g) (2012).

⁶⁹ Befort, *supra* note 29, at 447 (arguing that reassignments and leave of absences are the most difficult reasonable accommodations); Befort & Donesky, *supra* note 52, at 1056 (arguing that reassignments have generated more litigation and fueled more controversy than any other accommodation).

schedules, have little impact on nondisabled employees who can continue to perform their jobs as normal.⁷⁰ Reassigning disabled employees to vacant positions, however, directly affects nondisabled employees by preventing them from applying for the vacant positions.⁷¹ Furthermore, when a disabled employee is reassigned to a vacant position, an employer must expend resources to locate and train a new employee to fill the position formerly held by the disabled employee.⁷² Perhaps most problematic is the fact that an employer may be confronted with the undesirable choice of reassigning a disabled employee to a vacant position or instead filling the position with a more qualified applicant.⁷³

Recognizing these unique difficulties, the EEOC's regulations interpreting the ADA place additional restrictions on the reassignment clause.⁷⁴ Ac-

⁷⁰ See *Aka*, 156 F.3d at 1314–15 (Silberman, J., dissenting) (stating that most reasonable accommodations only affect the disabled employee and the employer).

⁷¹ Befort, *supra* note 29, at 448. Admittedly, when a disabled employee is reassigned to a vacant position, nondisabled employees have the opportunity to apply for the disabled employee's old position. *Aka*, 156 F.3d at 1305 n.29; see also Befort, *supra* note 29, at 448 (discussing the "reshuffling of the workplace environment"). With that said, the case law indicates that disabled employees tend to request reassignment to a more desirable position than the position they occupied before becoming disabled. See, e.g., *Huber II*, 486 F.3d at 481 (attempting to be reassigned from a dry grocery order filler to a more coveted router position); *Sara Lee*, 237 F.3d at 351 (attempting to work on the first shift instead of the less preferable second or third shifts).

⁷² Befort, *supra* note 29, at 448. At least one study estimates that it costs employers approximately one fifth of a departing employee's salary to train a replacement employee. HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. AM. PROGRESS, THERE ARE SIGNIFICANT COSTS TO REPLACING EMPLOYEES 1 (Nov. 16, 2012), available at <http://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>, archived at <http://perma.cc/3RAB-3MYW>.

⁷³ See *Huber II*, 486 F.3d at 481 (choosing a more qualified nondisabled employee for a vacant position instead of a disabled employee).

⁷⁴ 29 C.F.R. § 1630.2(o) (2014) (indicating that reasonable accommodations may include "reassignment to a vacant position"); INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT, APPENDIX TO PART 1630 (2013) [hereinafter APPENDIX], available at <http://www.gpo.gov/fdsys/pkg/CFR-2013-title29-vol4/xml/CFR-2013-title29-vol4-part1630.xml>, archived at <http://perma.cc/BN6K-QGT3> (providing a brief explanation of the reassignment clause's requirements and restrictions); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION & UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, NO. 915.002 (2002), 2002 WL 31994335, at *20–23 [hereinafter EEOC Enforcement Guidance] (providing an explanation of what the reassignment clause requires and does not require). The EEOC is the agency charged with interpreting and implementing the ADA. See 42 U.S.C. § 12116 (2012) (stating that the "Commission" must issue regulations to implement Title I of the ADA); *id.* § 12111 (defining the "Commission" as the U.S. Equal Employment Opportunity Commission); see also *id.* § 2000e-4 (2012). To accomplish this mission, the EEOC has issued formal regulations, interpretive guidance, and informal enforcement guidance. See 29 C.F.R. § 1630; APPENDIX, *supra*; EEOC Enforcement Guidance, *supra*. This Note emphasizes the enforcement guidance because it addresses the reassignment clause in much greater detail than the EEOC's formal regulations or interpretive guidance. Compare EEOC Enforcement Guidance, *supra*, at *20–34 (referring to the reassignment clause close to one hundred times), with 29 C.F.R. § 1630.2(o) (referring to the reassignment clause fewer than twenty times), and APPENDIX, *supra* (referring to the reassignment clause over a dozen times). The EEOC guidance, however, is not

ording to the EEOC, reassignment is the accommodation of last resort, which means an employer only needs to consider reassignment if no other accommodation would allow a disabled employee to continue to perform the essential functions of his or her job.⁷⁵ An employer is also not required to create a new position or remove a nondisabled employee from a position to reassign a disabled employee.⁷⁶ If no equivalent position is vacant, an employer may reassign a disabled employee to a lower level position.⁷⁷ On the other hand, a disabled employee cannot be reassigned to a higher-level position without first competing for it.⁷⁸ Moreover, unlike other reasonable accommodations, the reassignment clause only applies to employees and does not apply to job applicants.⁷⁹

C. U.S. Airways v. Barnett: The Clash Between Seniority Systems and the Reassignment Clause

Moving a disabled employee to a vacant position—and overriding a seniority system's rules—is a classic example of nondisabled employees being adversely affected by the reassignment clause.⁸⁰ A seniority system is a framework that, alone or in connection with other non-seniority criteria,

binding upon courts and is only persuasive authority. See Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST L.J. 1533, 1535 n.9 (1999) (stating that the ADA's enforcement guidance is entitled to only a small amount of deference); see also *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 n.3 (10th Cir. 1997) (stating that EEOC's interpretative guidance, which was attached as an appendix to the formal regulations, does not carry the force of law).

⁷⁵ EEOC Enforcement Guidance, *supra* note 74, at *20 (indicating that reassignment is the "reasonable accommodation of last resort," unless both the employer and disabled employee voluntarily agree to a reassignment); see APPENDIX, *supra* note 74 (asserting that "reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship"); see also H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 (stating that a reassignment should only be considered after the employer makes efforts to accommodate the disabled worker in the position he or she was hired to fill).

⁷⁶ EEOC Enforcement Guidance, *supra* note 74, at *21 (stating that an employer "does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position"). According to the EEOC enforcement guidance, "vacant" means that the employment position is "available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time." *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (noting that disabled employees must compete for promotions).

⁷⁹ APPENDIX, *supra* note 74; EEOC Enforcement Guidance, *supra* note 74, at *22.

⁸⁰ See Befort, *supra* note 29, at 456 (describing seniority systems as a common method for filling job vacancies that can conflict with the ADA's reassignment clause). This Note addresses best-qualified reassignment policies, which are distinct from seniority systems. See *United Airlines*, 693 F.3d at 764 (finding that best-qualified reassignment policies are not identical to seniority systems). Although not directly on point, *U.S. Airways, Inc. v. Barnett* is a critical component of any reasonable accommodation discussion because it provides the analytical framework for determining if an accommodation is either reasonable or an undue hardship. See 535 U.S. 391, 401-02, 405 (2002).

grants employees improving employment rights and benefits as the length of their employment increases.⁸¹ Employers commonly use these systems as an objective method to make decisions regarding salary increases, promotions, layoffs, or even position reassignments.⁸² Under a seniority system, the rules for career advancement are clearly articulated and each employee expects that all other employees must abide by the system's rules.⁸³ A strict application of the ADA's reassignment clause could be problematic because it would circumvent the established rules upon which employees rely.⁸⁴

In 2002, in *U.S. Airways, Inc. v. Barnett*, the U.S. Supreme Court addressed a conflict between the reassignment clause and seniority systems.⁸⁵ The plaintiff, an employee of U.S. Airways, injured his back in 1990 while working as a cargo handler.⁸⁶ At that time, the airline maintained a seniority bidding system where employees could bid on a job position and the most senior bidder would receive the position.⁸⁷ Following his back injury, the plaintiff successfully used this seniority bidding system to obtain a job in the airline's mailroom.⁸⁸ In 1992, however, the plaintiff lost his mailroom position because a more senior employee had bid on it through the seniority system.⁸⁹ The plaintiff failed to convince his employer to make an exception to the rules of the seniority system to accommodate his disability.⁹⁰

Justice Stephen Breyer, writing for the five-justice majority, explained that if an employer demonstrates that a reassignment of a disabled employee conflicts with the rules of a seniority system, the reassignment will normally

⁸¹ *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605–06 (1980).

⁸² See *U.S. Airways*, 535 U.S. at 404 (discussing a few of the benefits that seniority systems provide); Blake Sonne, Note, *Employment Law: Reasonable Accommodation Under the Americans with Disabilities Act vs. Employee Seniority Rights: Understanding the Real Conflict in U.S. Airways v. Barnett*, 57 OKLA. L. REV. 225, 229 (2004) (discussing additional benefits of seniority systems).

⁸³ See *U.S. Airways*, 535 U.S. at 404 (noting that employer-established seniority systems are useful because they “provide[] important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment”).

⁸⁴ See *id.* at 405 (suggesting that Congress did not intend to use the ADA to undermine the expectations that seniority systems create).

⁸⁵ *Id.* at 406. This was the first time the U.S. Supreme Court interpreted the reasonable accommodation requirement. Befort, *supra* note 13, at 933; see *U.S. Airways*, 535 U.S. at 396–406.

⁸⁶ *U.S. Airways*, 535 U.S. at 394.

⁸⁷ *Id.*

⁸⁸ *Id.* The plaintiff sought the mailroom position because it was less physically demanding than the cargo handler position. *Id.*

⁸⁹ *Id.* Earlier that year, U.S. Airways laid off over seven thousand employees due to poor financial performance. Brief for Petitioner at 5, *U.S. Airways*, 535 U.S. 391 (No. 00-1250), 2001 WL 747864, at *5. Due to these layoffs, U.S. Airways reopened the competitive bidding process for all mailroom positions. *Id.*

⁹⁰ *U.S. Airways*, 535 U.S. at 394.

be considered unreasonable.⁹¹ As a general rule, however, the Court stated that an accommodation for a disabled employee is not automatically unreasonable solely because it allows the disabled employee to violate an employer-established rule that nondisabled employees must follow.⁹² Instead, it will sometimes be reasonable and will sometimes be unreasonable to allow disabled employees to depart from employer-established rules.⁹³ The Court adopted a multi-step analysis to determine if a particular accommodation would qualify as reasonable under the ADA.⁹⁴

Under this new analytical framework, a disabled employee can prove that an accommodation is reasonable in one of two ways.⁹⁵ First, an employee can demonstrate that an accommodation “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”⁹⁶ If the employee is able to show that the accommodation is reasonable through this first method, the burden then shifts to the employer to prove that the accommodation would be an undue hardship.⁹⁷ According to the Court, determining if an accommodation is an undue hardship is a case-specific inquiry that focuses on how the accommodation will adversely affect the employer.⁹⁸ Second, an employee also has the option of demonstrating that an accommodation is reasonable “on the particular facts.”⁹⁹

⁹¹ *Id.* at 406 (holding that ordinarily the ADA does not require an employer to reassign a disabled employee to a position that a nondisabled employee is entitled to under the employer's established seniority system).

⁹² *Id.* at 398; *see Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002) (applying this general rule).

⁹³ *See U.S. Airways*, 535 U.S. at 398.

⁹⁴ *See id.* at 401–02, 405; *Shapiro*, 292 F.3d at 361; *see also* 42 U.S.C. § 12112(b)(5)(A) (2012) (providing the reasonable accommodation requirement). In fashioning this new method of analysis, the Court noted that its approach aligned with the practice of lower courts. *See U.S. Airways*, 535 U.S. at 401–02.

⁹⁵ *U.S. Airways*, 535 U.S. at 401–02, 405; *Shapiro*, 292 F.3d at 361.

⁹⁶ *U.S. Airways*, 535 U.S. at 401–02; *see Shapiro*, 292 F.3d at 360–61. For an accommodation to be reasonable on its face or in the run of cases it only needs to be feasible or plausible. *U.S. Airways*, 535 U.S. at 401–02. For example, if the essential functions of a hearing impaired employee's position required her to contact the public by telephone, installing a teletypewriter (“TTY”) would be reasonable on its face because installation is both feasible and plausible. *See EEOC Enforcement Guidance*, *supra* note 74, at *3. A TTY is a device that allows hearing impaired individuals to communicate by telephone. *Id.* at *3 n.11.

⁹⁷ *U.S. Airways*, 535 U.S. at 402; *Shapiro*, 292 F.3d at 361; *see also* 42 U.S.C. § 12112(b)(5)(A) (establishing the undue hardship affirmative defense).

⁹⁸ *See U.S. Airways*, 535 U.S. at 402; *see also Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (stating that an undue hardship analysis examines the hardships created by the plaintiff's requested accommodation with an eye to the employer's unique situation).

⁹⁹ *U.S. Airways*, 535 U.S. at 405; *Shapiro*, 292 F.3d at 361. If an employee is successful under this second method, it is difficult for the employer to raise an affirmative defense of undue hardship because most accommodations are not simultaneously reasonable on the particular facts and unduly burdensome. *See Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (noting that describing an accommodation as unreasonable or an undue hardship can “merge” into

Applying this multi-step analysis, the Court held that it is ordinarily unreasonable for a disability-related reassignment to violate an established seniority system.¹⁰⁰ The primary rationale for this holding, according to the Court, is that the case law for other types of discrimination claims highlights the importance of employer-established seniority systems in the workplace.¹⁰¹ Building on this case law, the Court reasoned that a seniority system is beneficial to the workplace because it establishes employee expectations of standardized treatment.¹⁰² Employees, understanding that they will be treated equally under a seniority system, make a long-term investment in the employer in return for benefits later in their careers.¹⁰³ A reassignment of a disabled worker, in violation of a seniority system's rules, ordinarily is unjustified because it disrupts these expectations of standardized treatment.¹⁰⁴ After holding that a disability reassignment in violation of a seniority system is invalid on its face, the Court remanded the case to the lower court to provide the parties with an opportunity to argue if reassignment would be a reasonable accommodation in this particular case.¹⁰⁵

II. AN ENDURING CIRCUIT SPLIT: THE MODERN LANDSCAPE OF THE AMERICANS WITH DISABILITIES ACT'S REASSIGNMENT CLAUSE

Following the decision in *U.S. Airways, Inc. v. Barnett* in 2002, the U.S. Supreme Court has offered little guidance for interpreting the Americans with Disabilities Act's ("ADA") reassignment clause.¹⁰⁶ In 2007, the Court agreed to address the ADA reassignment clause in *Wal-Mart Stores v. Huber*; howev-

the same argument); *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1080 (6th Cir. 1988) (indicating that an unreasonable accommodation is identical to an accommodation imposing an undue hardship). *See generally* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010) (arguing that reasonable accommodation and undue hardship are "two sides of the same coin").

¹⁰⁰ *U.S. Airways*, 535 U.S. at 403 ("[I]t would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system.").

¹⁰¹ *See id.* at 403–04; *see also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79–81 (1977) (determining that an employer does not need to schedule around an employee's religious practices as a reasonable accommodation in a Title VII religious discrimination claim when doing so would violate the employer's established seniority system); *Eckles*, 94 F.3d at 1047 (observing that "courts have been unanimous in rejecting the claim that 'reasonable accommodation' under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system").

¹⁰² *U.S. Airways*, 535 U.S. at 404.

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 404–05.

¹⁰⁵ *Id.* at 406.

¹⁰⁶ *See* *United Airlines, Inc. v. EEOC*, 133 S. Ct. 2734 (2013) (denying certiorari without comment in a case involving an interpretation of the reassignment clause); *Jackson v. Fuji Photo Film, Inc.*, 132 S. Ct. 2104 (2012) (same).

er, the parties settled the case in 2008, prior to oral argument.¹⁰⁷ Then, in 2012, in *Jackson v. Fuji Photo Film, Inc.*, the Court declined without comment to interpret the reassignment clause.¹⁰⁸ Most recently, in 2013, in *EEOC v. United Airlines, Inc.*, the Court again declined to confront the ADA's reassignment clause.¹⁰⁹

In the absence of U.S. Supreme Court guidance, lower federal courts have struggled to determine what employers must do to abide by the reassignment clause.¹¹⁰ In particular, the U.S. Courts of Appeals are divided on whether the reassignment clause compels employers to reassign disabled employees to vacant positions without first requiring them to compete with qualified nondisabled candidates.¹¹¹ Section A of this Part discusses the U.S. Courts of Appeals that either directly or implicitly require disabled employees to compete for vacant positions along with nondisabled persons.¹¹² Section B then discusses a minority of U.S. Courts of Appeals holding that disabled employees are entitled to noncompetitive reassignments as a reasonable accommodation.¹¹³

A. Disabled Employee vs. Nondisabled Employee: A Fight for Job Vacancies

Currently, the U.S. Court of Appeals for the Eighth Circuit is the only circuit court to have held that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation.¹¹⁴ Five other U.S.

¹⁰⁷ See 128 S. Ct. 742 (2007) (granting certiorari); 128 S. Ct. 1116 (2008) (dismissing certiorari without comment); Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 445 (2009) (noting that *Huber v. Wal-Mart Stores, Inc. (Huber II)*, 486 F.3d 480 (8th Cir. 2007) was dismissed because the parties agreed to a settlement).

¹⁰⁸ 132 S. Ct. 2104 (2012) (denying certiorari without comment).

¹⁰⁹ 133 S. Ct. 2734 (2013) (denying certiorari without comment).

¹¹⁰ See Befort & Donesky, *supra* note 52, at 1056 (noting that “federal courts have split on at least four issues concerning the scope of an employer’s reassignment duty”); Dorsey, *supra* note 107, at 459–60 (discussing the range of opinions among the U.S. Circuit Courts of Appeals regarding reassignments in the context of best-qualified reassignment policies).

¹¹¹ Compare *Huber II*, 486 F.3d at 483 (holding that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation), with *United Airlines*, 693 F.3d at 764–65 (holding that disabled employees are entitled to noncompetitive reassignments as a reasonable accommodation), *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1166–67 (10th Cir. 1999) (same), and *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304–05 (D.C. Cir. 1998) (en banc) (same).

¹¹² See *infra* notes 114–134 and accompanying text.

¹¹³ See *infra* notes 135–154 and accompanying text.

¹¹⁴ See *Huber II*, 486 F.3d at 483. At the time *Huber II* was decided, the U.S. Court of Appeals for the Seventh Circuit had also held that the ADA did not require noncompetitive reassignments. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). In 2012, however, the Seventh Cir-

Courts of Appeals, however, hold that the ADA never affords disabled employees preferential treatment and are therefore closely aligned with the Eighth Circuit.¹¹⁵ In these jurisdictions, disabled employees seeking reassignment to vacant positions must compete with qualified nondisabled candidates without any statutory preference.¹¹⁶ In other words, employers are permitted to choose a more qualified nondisabled candidate without ever considering reassigning a less qualified disabled employee.¹¹⁷

The primary rationale for requiring disabled employees to compete with nondisabled employees is that the ADA is not an affirmative action statute.¹¹⁸ In this context courts implicitly use affirmative action as a synonym for preferential treatment.¹¹⁹ Therefore, because noncompetitive reassignments are a form of preferential treatment, the ADA does not entitle disabled employees to avoid competing with nondisabled employees.¹²⁰ Under this theory, granting disabled employees automatic reassignments despite best-qualified reassignment policies would be “affirmative action with a vengeance.”¹²¹

Instead of being an affirmative action statute, these Circuits claim that Congress intended the ADA to be a nondiscrimination, or anti-discrimination,

cuit reconsidered its ruling and held that the ADA’s reassignment clause *does* require noncompetitive reassignments. *United Airlines*, 693 F.3d at 764–65.

¹¹⁵ See *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004) (holding that although the ADA may require an employer to reassign a disabled employee it does not require an employer to provide preferential treatment); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (holding that employers must be allowed to treat disabled employees and nondisabled employees equally under a seniority system); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (holding that Congress did not intend to provide disabled employees with preferential treatment); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996) (holding that employers are only required to treat disabled employees and other similarly qualified nondisabled employees equally); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (holding that disabled employees do not need to be granted priority over nondisabled employees for reassignments).

¹¹⁶ See *Huber II*, 486 F.3d at 483; *Hedrick*, 355 F.3d at 459; *Sara Lee*, 237 F.3d at 355; *Terrell*, 132 F.3d at 627; *Wernick*, 91 F.3d at 384–85; *Daugherty*, 56 F.3d at 700.

¹¹⁷ See *Huber II*, 486 F.3d at 484 (holding that the employer-defendant was not required to deny a more qualified applicant for a router position in order to provide the position to a disabled plaintiff).

¹¹⁸ See *id.* at 483 (agreeing with other courts that the ADA is neither an affirmative action statute nor a mandatory preference statute); *Daugherty*, 56 F.3d at 700 (stating that the ADA does not require affirmative action in favor of disabled workers because it does not require prioritizing disabled workers over nondisabled workers in hiring or reassignment decisions).

¹¹⁹ See *Hedrick*, 355 F.3d at 459 (indicating that an employer does not have to grant a disabled employee “preferential treatment” when considering them for a vacant position); *Terrell*, 132 F.3d at 627 (stating that Congress did not intend to grant preferential treatment to disabled workers); *Wernick*, 91 F.3d at 384–85 (holding that, although employers must treat disabled employees and nondisabled employees equally, employers do not have an “affirmative duty” to provide disabled employees with new positions).

¹²⁰ See *Wernick*, 91 F.3d at 384–85; *Daugherty*, 56 F.3d at 700.

¹²¹ *Huber II*, 486 F.3d at 484 (quoting *Humiston-Keeling*, 227 F.3d at 1029). Disabled employees would be reassigned only because of their membership in a statutorily-protected class. *Id.*

statute.¹²² Nondiscrimination statutes ensure that members of a protected population are not subjected to discrimination.¹²³ More specifically, the ADA's nondiscrimination requirements bar employers from relying on disability-related prejudices in making employment decisions.¹²⁴ Nondiscrimination statutes, unlike affirmative action statutes, are not designed to provide members of statutorily-protected populations with preferential treatment as a means of remedying the effects of past discrimination.¹²⁵ In the words of the U.S. Court of Appeals for the Fourth Circuit, "the ADA operates as a shield against discrimination; the statute is not a sword used to punish non-disabled workers."¹²⁶ Thus, courts that view the ADA as a nondiscrimination statute reason that using the reassignment clause to grant disabled persons preferential treatment would pervert the purpose of the law.¹²⁷

Additionally, two U.S. Courts of Appeals have relied upon *U.S. Airways* to conclude that the ADA only affords disabled employees the opportunity to compete for vacant positions.¹²⁸ In 2002, just months after the U.S. Supreme Court's decision in *U.S. Airways*, the U.S. Court of Appeals for the Seventh Circuit, in *Mays v. Principi*, reasoned that an employer's policy of providing vacant positions to the most qualified employees is similar to an employer's policy of awarding vacant positions to the most senior employees.¹²⁹ The

¹²² See *Terrell*, 132 F.3d at 627 (reasoning that the ADA was not designed to eliminate discrimination against disabled persons and replace it with discrimination against nondisabled persons); *Daugherty*, 56 F.3d at 700 (stating that the ADA only prohibits employment discrimination against disabled persons and does not grant disabled persons preferential treatment). The U.S. Court of Appeals for the Eleventh Circuit also suggests that the language of the ADA itself indicates that the Act is a nondiscrimination statute. See *Terrell*, 132 F.3d at 627 (citing 42 U.S.C. § 12101(a)(8) (2012)) (finding that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").

¹²³ See, e.g., 42 U.S.C. § 2000e-2 (2012) (prohibiting employers from discriminating on the basis of an individual's race, color, religion, sex, or national origin); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 4948 (3d ed. 1992) (defining nondiscrimination as the "absence of discrimination" or as "the practice or policy of refraining from discrimination").

¹²⁴ See *Bagenstos*, *supra* note 58, at 828.

¹²⁵ See *Befort*, *supra* note 29, at 456 (noting that preferential treatment "cuts against the equal treatment model reflected in most anti-discrimination statutes"); see also Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 5 (2002) (distinguishing the concepts of affirmative action and nondiscrimination).

¹²⁶ *Sara Lee*, 237 F.3d at 356.

¹²⁷ See *id.* at 355 (quoting *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)) (stating that noncompetitive reassignments would transform a nondiscrimination statute into a mandatory preference statute and that this would be incompatible with the non-discriminatory goals of the Act); see also *Daugherty*, 56 F.3d at 700 (indicating that the ADA only prohibits employment discrimination and does not require affirmative action).

¹²⁸ See *Huber II*, 486 F.3d at 483–84; *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002), *abrogated by United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012).

¹²⁹ See 301 F.3d at 872. Because the plaintiff worked for a federal agency and not a private employer, she brought her disability discrimination claim under the Rehabilitation Act. *Id.* at 868.

Seventh Circuit noted that because the facts aligned closely with the facts of *U.S. Airways*, the reasoning and logic of *U.S. Airways* was directly applicable.¹³⁰ In short, the Seventh Circuit reasoned that if an employer does not have to make exceptions to its seniority policy, an employer should not have to make exceptions to its policy of awarding job vacancies to the most qualified employees.¹³¹

In 2007, in *Huber v. Wal-Mart Stores, Inc. (Huber II)*, the U.S. Court of Appeals for the Eighth Circuit also held that *U.S. Airways* does not support noncompetitive reassignments.¹³² For the *Huber II* court, allowing disabled employees to circumvent an employer's policy of hiring the most qualified candidates is just as problematic as allowing a disabled employee to circumvent a seniority system.¹³³ Exceptions to either of these policies grant disabled employees preferential treatment at the expense of nondisabled employees or applicants, which the *Huber II* court reasoned was not Congress's intent when it enacted the ADA.¹³⁴

B. If All Other Options Fail, a Disabled Employee Must Receive a Vacant Position

On the opposite side of the circuit split, three U.S. Courts of Appeals have held—and the U.S. Equal Employment Opportunity Commission (“EEOC”) has determined—that disabled employees are entitled to noncom-

As discussed above, cases interpreting the Rehabilitation Act are persuasive authority for analyzing the ADA. Brookes, *supra* note 51, at 864; *see supra* note 51 and accompanying text (discussing the use of Rehabilitation Act cases in ADA claims).

¹³⁰ *See Mays*, 301 F.3d at 872. The plaintiff, a nurse at a Veterans Administration hospital, suffered a permanent injury to her back while helping lift a 400 pound patient. *Id.* at 868. The hospital reassigned the plaintiff to a clerical support position that did not involve heavy lifting but also paid a much lower salary. *Id.* The plaintiff argued that the hospital should have allowed her to continue to work as a nurse, but without lifting responsibilities, or reassigned her to an administrative nursing position. *Id.* at 870.

¹³¹ *See id.* at 872. In 2012 the U.S. Court of Appeals for the Seventh Circuit held that *U.S. Airways* supports noncompetitive reassignments, thereby abrogating the *Mays* decision. *United Airlines*, 693 F.3d at 764 (stating that the *Mays* court incorrectly determined that violating best-qualified reassignment policies always constitutes an undue hardship); *see infra* notes 147–154 (discussing the Seventh Circuit's departure from *Mays* in its 2012 *United Airlines* decision).

¹³² *See* 486 F.3d at 483–84. Like *Mays*, the facts of *Huber II* bore a close resemblance to the facts of *U.S. Airways*. *See id.* at 481; *see also supra* notes 2–8 and accompanying text (outlining the facts of *Huber II*).

¹³³ *See Huber II*, 486 F.3d at 483–84 (stating that the U.S. Supreme Court's decision in *U.S. Airways* supports requiring disabled employees to compete with nondisabled employees when an employer maintains a nondiscriminatory policy of granting reassignments to the most qualified candidates).

¹³⁴ *See id.* at 484 (quoting *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1089 (8th Cir. 2000)) (per curiam) (stating that “an employer is not required to make accommodations that would subvert other, more qualified applicants for the job”).

petitive reassignments to vacant positions as a reasonable accommodation.¹³⁵ In these jurisdictions, disabled employees are entitled to automatic reassignment to vacant positions without competing against qualified nondisabled candidates.¹³⁶ This means that employers must fill vacant positions with qualified disabled employees if no other accommodations would allow the employees to continue performing their essential job functions.¹³⁷

These courts reason that disabled employees are entitled to more than an opportunity to compete for reassignments because holding otherwise would render the ADA's reassignment clause meaningless.¹³⁸ The D.C. Circuit Court of Appeals noted that the central provision of the ADA bars employers from discriminating against the disabled "in regard to job application procedures."¹³⁹ This alone provides employees with an opportunity to compete.¹⁴⁰ The ADA, however, went further by requiring employers to reassign disabled employees to vacant positions.¹⁴¹ To hold otherwise, according to the D.C. Circuit Court, would make the ADA's reassignment clause "redundant."¹⁴²

Apart from these statutory interpretations, the EEOC has also determined that the reassignment clause mandates noncompetitive reassignments.¹⁴³ In its 2002 enforcement guidance, the EEOC stated that a qualified disabled employee must be reassigned to a vacant position if no other accommodation would allow the disabled employee to continue to perform the

¹³⁵ *United Airlines*, 693 F.3d at 764–65 (holding that disabled employees are entitled to non-competitive reassignments as a reasonable accommodation); *Midland Brake*, 180 F.3d at 1166 (same); *Aka*, 156 F.3d at 1305 (same); EEOC Enforcement Guidance, *supra* note 74, at *23. The U.S. Court of Appeals for the Eighth Circuit, however, has questioned whether the D.C. Circuit's decision in *Aka* truly supports noncompetitive reassignments. *Huber II*, 486 F.3d at 483 n.2 (asserting that the D.C. Circuit's decision in *Aka* only requires employers to do more than allow disabled employees to apply for reassignments but does not expressly condone noncompetitive reassignments); *see also Aka*, 156 F.3d at 1305 (declining to decide the exact boundaries of an employer's reassignment duties).

¹³⁶ *See United Airlines*, 693 F.3d at 764–65; *Midland Brake*, 180 F.3d at 1166; *Aka* 156 F.3d at 1305; *see also* EEOC Enforcement Guidance, *supra* note 74, at *23.

¹³⁷ *See United Airlines*, 693 F.3d at 764–65; *Midland Brake*, 180 F.3d at 1169; *Aka* 156 F.3d at 1305; *see also* EEOC Enforcement Guidance, *supra* note 74, at *23.

¹³⁸ *See Midland Brake*, 180 F.3d at 1167 (stating that the ADA's promise of reasonable accommodation is "empty" if an employer is only required to consider a disabled employee's application for reassignment); *Aka*, 156 F.3d at 1304 (noting that other sections of the ADA already require employers to allow disabled employees to compete for reassignments); *see also* Dorsey, *supra* note 107, at 460–62 (discussing textualist arguments made by courts in favor of mandatory reassignments).

¹³⁹ *Aka*, 156 F.3d at 1304 (quoting 42 U.S.C. § 12112(a) (2012)).

¹⁴⁰ *See id.* (indicating that 42 U.S.C. § 12112(a) already permits disabled employees to apply for reassignments).

¹⁴¹ *See* 42 U.S.C. § 12111(9)(B) (including reassignment as a possible reasonable accommodation); *Aka*, 156 F.3d at 1304 (stating that reassignment involves "active effort on the part of the employer").

¹⁴² *See Aka*, 156 F.3d at 1304.

¹⁴³ EEOC Enforcement Guidance, *supra* note 74, at *23.

essential functions of his or her position.¹⁴⁴ Therefore, a disabled employee does not merely have the ability to compete for vacant positions, but is instead given priority.¹⁴⁵ The enforcement guidance also notes that disabled employees are already able to compete for vacant positions without any statutory entitlements.¹⁴⁶

Prior to 2012, the U.S. Court of Appeals for the Seventh Circuit held that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation.¹⁴⁷ In 2012, however, in *EEOC v. United Airlines, Inc.*, the Seventh Circuit departed from precedent and held that disabled employees are entitled to noncompetitive reassignments as a reasonable accommodation.¹⁴⁸ The Seventh Circuit stated that its previous decision in *Mays* misinterpreted *U.S. Airways* and that the U.S. Supreme Court decision actually provided support for noncompetitive reassignments.¹⁴⁹ As the *United Airlines* court emphasized, the U.S. Supreme Court stated that the ADA sometimes requires employers to provide disabled employees with preferential treatment.¹⁵⁰ The fact that a reassignment allows a disabled employee to break a rule that other nondisabled employees must follow does not per se make the reassignment unreasonable or an undue hardship.¹⁵¹

¹⁴⁴ *Id.* at *20.

¹⁴⁵ *Id.* at *23 (“Reassignment means that the employee gets the vacant position if s/he is qualified for it.”). The EEOC indicated that any other interpretation would make reassignments of “little value.” *Id.* Reading the ADA to only provide disabled employees with the opportunity to compete for reassignments “nullifies” the reassignment clause. *Id.* at *23 n.90.

¹⁴⁶ *Id.* at *23 n.90 (“Even without the ADA, an employee with a disability may have the right to compete for a vacant position.”).

¹⁴⁷ *Mays*, 301 F.3d at 872, *abrogated by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Humiston-Keeling*, 227 F.3d at 1029, *overruled by* *United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *see supra* notes 129–131 and accompanying text (discussing the *Mays* decision). In 2000, in *EEOC v. Humiston-Keeling, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that employers maintaining best-qualified reassignment policies are not required to reassign disabled employees to vacant positions if there are more qualified nondisabled candidates seeking the same positions. 227 F.3d at 1029. The court reasoned that the ADA is a “nondiscrimination statute” and not a “mandatory preference act.” *Id.* at 1028 (quoting *Dalton*, 141 F.3d at 669). The court described noncompetitive reassignments as “affirmative action with a vengeance” because they involve giving a job to someone merely because of his or her inclusion in a statutorily protected group. *Id.* at 1029. Noncompetitive reassignments were problematic for the court because they do more than simply allow disabled employees to compete in the workplace. *Id.* Though the Seventh Circuit overruled this decision in *United Airlines*, 693 F.3d at 761, the *Humiston-Keeling* court’s reasoning is identical to the reasoning of courts that prohibit any preferential treatment for disabled employees. *See Humiston-Keeling*, 227 F.3d at 1028–29, *overruled by* *United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Terrell*, 132 F.3d at 627; *Daugherty*, 56 F.3d at 700.

¹⁴⁸ 693 F.3d at 764–65.

¹⁴⁹ *Id.* (stating that the *Mays* court mistakenly concluded that a best-qualified selection policy is the equivalent of a seniority system and will therefore be unreasonable in the run of cases).

¹⁵⁰ *Id.* at 763 (quoting *U.S. Airways*, 535 U.S. at 397) (determining that “preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal”).

¹⁵¹ *See id.* at 764 (stating that the *U.S. Airways* analysis must be used to determine if noncompetitive reassignment would be either reasonable or an undue hardship).

After departing from *Mays*, the U.S. Court of Appeals for the Seventh Circuit instructed the lower court to apply the *U.S. Airways* multi-step framework.¹⁵² Although the case was technically remanded for the district court to apply the framework, the Seventh Circuit also indicated what it believed to be the proper result of the analysis.¹⁵³ According to the *United Airlines* court, the Seventh Circuit must join the U.S. Courts of Appeals for the Tenth and D.C. Circuits and hold that the ADA mandates noncompetitive reassignments as long as they do not create an undue hardship.¹⁵⁴

III. A REASSIGNMENT REALIGNMENT: SHIFTING BACK TO CONGRESS'S ORIGINAL INTENT

Requiring noncompetitive reassignments prevents employers from discriminating against disabled employees and gives meaning to the Americans with Disabilities Act's ("ADA") reassignment clause.¹⁵⁵ Although a system requiring disabled employees to compete with nondisabled employees may appear fair, it becomes easy for employers to avoid reassigning disabled employees under the pretext of hiring more qualified employees.¹⁵⁶ Moreover, both the text of the ADA itself and its legislative history indicate that the Act was intended to provide limited preferential treatment to disabled employees.¹⁵⁷ Existing statutory limitations and administrative regulations provide an

¹⁵² *Id.*; see *U.S. Airways*, 535 U.S. at 401–02, 405.

¹⁵³ *United Airlines*, 693 F.3d at 764–65.

¹⁵⁴ *Id.* (“Two of our sister Circuits have already determined that the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship . . . [I]n light of [*U.S. Airways*] . . . we must adopt a similar approach.”). Because it adopted the *U.S. Airways* analysis, the *United Airlines* court must have determined that making an exception to a competitive disability-neutral employment process was either reasonable on its face or reasonable in this particular situation and was not an undue hardship to the employer. See *U.S. Airways*, 535 U.S. at 401–02, 405; *United Airlines*, 693 F.3d at 764–65.

¹⁵⁵ See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167 (10th Cir. 1999) (“If a disabled employee had only a right to require the employer to consider his application for reassignment but had no right to reassignment itself, even if the consideration revealed that the reassignment would be reasonable, then [the reassignment clause’s] promise within the ADA would be empty.”); Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 222–24 (2009) (discussing the difficulties disabled employees face when employers are allowed to grant reassignments to more qualified nondisabled employees).

¹⁵⁶ See *Midland Brake*, 180 F.3d at 1167 (noting that employers could go through the motions of considering disabled employees’ applications for reassignment and then deny each of them); Hickox, *supra* note 155, at 223 (arguing that it is easy for employers to deny disabled employees accommodations on the basis of insufficient qualifications).

¹⁵⁷ See 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring employers to provide reasonable accommodations); H.R. REP. NO. 101-485(II), at 57–58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 339–40 (discussing the reasonable accommodation requirement); John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 742 (2000) (recognizing that the only way to be “faithful to the language of the ADA, and its legislative history” is to uphold noncompetitive reassignments).

effective method of minimizing the reassignment clause's negative impact on nondisabled employees.¹⁵⁸ Furthermore, reassigning disabled employees can indirectly benefit society by reducing federal disability spending.¹⁵⁹

A congressional amendment would be the best avenue for remedying the circuit split in favor of noncompetitive reassignments because it is feasible and the result would be definitive.¹⁶⁰ Even if Congress does not revisit the ADA's reassignment clause, courts should interpret the ADA to require non-competitive reassignments, and can do so within the framework outlined by the U.S. Supreme Court's 2002 decision in *U.S. Airways, Inc. v. Barnett*.¹⁶¹ Section A of this Part argues that the ADA intended to provide disabled employees with limited preferential treatment in the form of reasonable accommodations.¹⁶² Section A also discusses how the ADA's provisions and the U.S. Equal Employment Opportunity Commission's ("EEOC") regulations curb the adverse impact reassignments have on nondisabled employees as well as the potential for noncompetitive reassignments to reduce federal disa-

¹⁵⁸ See 42 U.S.C. § 12112(b)(5)(A) (establishing the undue hardship affirmative defense); *Midland Brake*, 180 F.3d at 1170 (noting that Congress has substantially restricted the duty to reassign disabled employees); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc) (stating that existing restrictions on the reassignment clause reduce the amount of disruption connected to reassignments); EEOC Enforcement Guidance, *supra*, note 74, at *20–23 (placing unique restrictions on the reassignment clause).

¹⁵⁹ See *Castro v. Child Psychiatry Ctr.*, No. 96-6241, 1997 WL 141860, at *6 (E.D. Pa. Mar. 25, 1997) (noting that the purpose of reasonable accommodations is to prevent disabled employees from becoming unemployed); John Merline, *The Sharp Rise in Disability Claims: Are Federal Disability Benefits Becoming a General Safety Net?*, REGION FOCUS, Second/Third Quarter 2012, 24, at 24–25 (observing that an increase in the nation's unemployment rate can lead to an increase in applications for federal disability benefits); Avik Roy, *How Americans Game the \$200 Billion-a-Year 'Disability-Industrial Complex'*, FORBES.COM (Apr. 8 2013 2:27 AM), <http://www.forbes.com/sites/theapothecary/2013/04/08/how-americans-game-the-200-billion-a-year-disability-industrial-complex/>, archived at <http://perma.cc/CD2C-3JJS> (discussing a strong connection between unemployment and applying for Social Security Disability Insurance).

¹⁶⁰ See U.S. CONST. art. VI, cl. 2 (declaring that laws passed by Congress "shall be the supreme Law of the Land"); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213) (demonstrating that Congress was willing to extend disability discrimination protection through the passage of the ADA in 1990); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213) (demonstrating that Congress was willing to revisit the ADA in 2008); see also Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Coworkers*, 34 FLA. ST. U. L. REV. 313, 335–36 (2007) (proposing that Congress amend the ADA's reasonable accommodation requirement).

¹⁶¹ See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02, 405 (2002) (providing a framework for determining if an accommodation is both reasonable and not unduly burdensome); see, e.g., *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764–65 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (urging the lower court to apply the *U.S. Airways* framework and hold that noncompetitive reassignments are reasonable in the run of cases on remand).

¹⁶² See *infra* notes 165–186 and accompanying text.

bility spending.¹⁶³ Section B then offers several methods of remedying the circuit split in favor of noncompetitive reassignments.¹⁶⁴

A. Reasonable Accommodations: Fighting Discrimination Through Limited Preferential Treatment

The U.S. Courts of Appeals that do not support any preferential treatment for disabled employees seeking reassignment mistakenly reason that the ADA must be either a nondiscrimination statute or an affirmative action statute.¹⁶⁵ Properly understood, however, the ADA is a nondiscrimination statute that also grants limited preferential treatment through its reasonable accommodation requirement.¹⁶⁶ The ADA contains provisions that both prohibit

¹⁶³ See *infra* notes 187–202 and accompanying text.

¹⁶⁴ See *infra* notes 203–225 and accompanying text.

¹⁶⁵ See *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (noting that granting preferential treatment to disabled employees would “convert a nondiscrimination statute into a mandatory preference statute”); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (stating that preferential treatment for disabled employees would turn the ADA’s “nondiscrimination into discrimination”); see also *Midland Brake*, 180 F.3d at 1167 (counseling against confusing the ADA’s definition of discrimination with affirmative action). *But see U.S. Airways*, 535 U.S. at 397 (determining that “preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal”). These courts offer little reasoning to justify their holdings that the ADA is not an affirmative action statute that does not grant preferential treatment. See *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004) (concluding in two sentences that the disabled plaintiff was not entitled to preferential treatment); *Terrell*, 132 F.3d at 627 (concluding in one sentence that the ADA does not provide disabled employees with preferential treatment); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996) (holding, without prior reasoning, that an employer does not have an affirmative duty to provide a disabled employee with a reassignment). In lieu of articulating their own theory, these courts refer to what appears to be the first case to hold that the ADA is not an affirmative action statute, the U.S. Court of Appeals for the Fifth Circuit’s 1995 decision of *Daugherty v. City of El Paso*. See, e.g., *Hedrick*, 355 F.3d at 459 (citing *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)); *Sara Lee Corp.*, 237 F.3d at 354 (same); *Terrell*, 132 F.3d at 627 (same). This lack of analysis is especially problematic because the *Daugherty* court itself did little to explain why the ADA is not an affirmative action statute. See *Daugherty*, 56 F.3d at 700. The Fifth Circuit opinion only devoted two sentences to its holding that the ADA is not an affirmative action statute. See *id.* (“[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.”).

¹⁶⁶ 42 U.S.C. § 12112(a) (2012) (prohibiting covered entities from discriminating against qualified individuals on the basis of disability); *id.* § 12112(b)(5)(A) (providing the reasonable accommodation requirement); see Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The “Unfair Advantage” Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 962 (2000) (arguing that “nondiscrimination requires more than passively avoiding bias”); see also Bagenstos, *supra* note 58, at 837–38 (explaining that anti-discrimination provisions and accommodation provisions both seek to remedy “a pattern of social and economic subordination that has intolerable effects on our society”). Preferential treatment is a more accurate term than affirmative action because, as many legal scholars suggest, affirmative action and reasonable accommodation are two distinct concepts that should not be confused with each other. See Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 973–81 (2004) (outlining the differences between reasonable accom-

discrimination as well as provisions that entitle disabled persons to certain workplace accommodations.¹⁶⁷

Putting aside these efforts to label the ADA, analyzing the ADA's text and legislative history demonstrates that Congress intended to provide limited preferential treatment, like noncompetitive reassignments, to disabled employees.¹⁶⁸ As the D.C. Circuit Court of Appeals reasoned, the reassignment clause must grant disabled employees more than just the privilege of competing for vacant positions because other provisions of the ADA already prohibit treating disabled employees differently than nondisabled employees.¹⁶⁹ The reassignment clause would thus be reduced to a statutory redundancy if it only required employers to treat disabled employees like nondisabled employees or applicants.¹⁷⁰ Indeed, it would be disingenuous to claim that employees

modation and affirmative action); Befort, *supra* note 29, at 469 (arguing that "affirmative action rhetoric has clouded [the reassignment] debate"); Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act*, 111 HARV. L. REV. 1560, 1574 (1998) (reasoning that comparing the ADA to affirmative action is a "misplaced" analogy).

¹⁶⁷ See 42 U.S.C. § 12112(b)(1) (stating that employers are prohibited from "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee"); *id.* § 12112(b)(5)(A) (stating that employers must provide reasonable accommodations for the physical and mental limitations of disabled employees); see also Befort & Donesky, *supra* note 52, at 1047–48 (arguing that the ADA, unlike most anti-discrimination laws, not only bans discrimination but also requires employers to make reasonable accommodations).

¹⁶⁸ See 42 U.S.C. § 12112(b)(5)(A) (providing the reasonable accommodation requirement); *id.* § 12111(9)(B) (providing the reassignment clause); H.R. REP. NO. 101-485(II), at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350 (stating that the only time an employer can avoid providing a reasonable accommodation is when the accommodation would create an undue hardship); see also *U.S. Airways*, 535 U.S. at 397 (determining that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal"); *Aka*, 156 F.3d at 1304 (noting that the text of the ADA supports granting preferential treatment to disabled employees); Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 212 (1993) (arguing that the ADA does not afford disabled employees preferential treatment, but conceding that the law does provide them with expansive reasonable accommodations).

¹⁶⁹ See *Aka*, 156 F.3d at 1304 (citing 42 U.S.C. § 12112(a)); see also Murray & Murray, *supra* note 157, at 742 (arguing that forcing disabled employees to compete for reassignments "eviscerates the accommodation and reassignment provisions of the ADA," leaving only a general prohibition against discrimination).

¹⁷⁰ See *Midland Brake*, 180 F.3d at 1164–65 (stating that if the reassignment clause only requires employers to consider disabled employees on an equal basis with nondisabled employees, then the clause adds nothing to employers' existing obligations under the ADA); *Aka*, 156 F.3d at 1304 (stating that the reassignment clause "would be redundant if permission to apply [for job vacancies] were all it meant"); see also 42 U.S.C. § 12111(9)(B) (providing the reassignment clause). This redundancy is unacceptable because a primary rule of statutory interpretation is that every word and phrase is presumed to add some meaning to the statute. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (cautioning against "reading a text in a way that makes part of it redundant" or "mere surplusage"); *Williams v. Taylor*, 529 U.S. 362, 364 (2000) (stating that the "cardinal principle" of statutory interpretation is to give meaning to every word and phrase of a statute).

who take the initiative and successfully obtain vacant positions through competitive processes have been “reassigned.”¹⁷¹

Furthermore, barring noncompetitive reassignments would dramatically alter the Act’s primary operative clause, which states that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability.”¹⁷² If disabled employees are required to compete with nondisabled employees, this provision will effectively be changed to not discriminating against the “best qualified individual, notwithstanding the disability.”¹⁷³ This rewriting of the ADA by courts that do not interpret the Act to mandate noncompetitive reassignment replaces the clear policy preferences of Congress and should therefore be rejected.¹⁷⁴

In addition to textual support, the ADA’s legislative history also encourages promoting the economic opportunities of disabled persons through preferential treatment in the reassignment process.¹⁷⁵ This legislative history states that the objective of the ADA is to “provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social main-

¹⁷¹ See *Midland Brake*, 180 F.3d at 1164 (asserting that the word “reassignment” suggests some active effort from the employer and that a narrower definition of reassignment would do “violence to the literal meaning of the word”); *Aka*, 156 F.3d at 1304 (indicating that the core word “assign” implies some active effort from the employer).

¹⁷² 42 U.S.C. § 12112(a) (2012); see *Dorsey*, *supra* note 107, at 462 (arguing that requiring disabled employees to compete for reassignments would be the equivalent of a “judicial amendment” to what Congress initially enacted).

¹⁷³ *Midland Brake*, 180 F.3d at 1167–68.

¹⁷⁴ See *Dorsey*, *supra* note 107, at 462 (arguing that this interpretation of the reassignment clause should be avoided because the courts have “a duty to enforce the ADA as Congress wrote it”). Courts are distinct from legislatures and do not have the authority to amend statutory text. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (observing that the U.S. Supreme Court is not a “super-legislature” designed “to determine the wisdom” of statutes); *Dennis v. United States*, 341 U.S. 494, 525 (Frankfurter, J., concurring) (1951) (stating that, because courts are composed of unelected individuals, they are not the best institution to make policy judgments for a democratic society); *William W. Bierce, Ltd. v. Hutchins*, 205 U.S. 340, 347 (1907) (observing that courts are not legislatures and therefore cannot create new regulations).

¹⁷⁵ H.R. REP. NO. 101-485(II), at 22, 68, reprinted in 1990 U.S.C.C.A.N. 303, 304, 350; see *Midland Brake*, 180 F.3d at 1169 (concluding that competitive reassignments are unsupported by either the ADA’s statutory language or its legislative history and is instead just “judicial gloss”); *Aka*, 156 F.3d at 1304 (using the ADA’s legislative history to reason that the Act provides preferential treatment to disabled employees through reasonable accommodations). Although the legislative history indicates that employers are not required to “prefer” disabled *applicants* over non-disabled *applicants*, the legislative history also indicates that reasonable accommodations for disabled *employees* are required. *Aka*, 156 F.3d at 1304 (citing H.R. REP. NO. 101-485(II), at 56, 63, 1990 U.S.C.C.A.N. 303, 338, 345). Employers are not, however, required to modify the essential functions of the employee’s position. See H.R. REP. NO. 101-485(II), at 64, 1990 U.S.C.C.A.N. 303, 346 (stating that the ADA does not require employers to make any changes to job descriptions or policies if doing so would dramatically alter the essential functions of the jobs).

stream of American life.”¹⁷⁶ To accomplish this goal, according to the legislative history, the ADA requires employers to do more to accommodate disabled employees than Title VII requires employers to do to accommodate the religious beliefs of employees.¹⁷⁷ Unlike accommodations for religious beliefs, reasonable accommodations for disabled employees must be provided if they would not cause undue hardship for the employer.¹⁷⁸

Additionally, if Congress was concerned with the adverse consequences of noncompetitive reassignments, broader restrictions could have been established for the reassignment clause.¹⁷⁹ For example, the legislative history states that “reassignment need only be to a vacant position” and “‘bumping’ another employee out of a position to create a vacancy is not required.”¹⁸⁰ By protecting current employees from being “bumped” to create new vacancies, Congress clearly considered and applied protections to nondisabled workers from reassignments.¹⁸¹ Had Congress also wanted to ensure that nondisabled workers were not affected in the filling of new vacancies through the non-competitive reassignment of disabled workers, it could have similarly stated that employers are not required to pass over more qualified candidates in either the legislative history or the statute itself.¹⁸² Because Congress failed to

¹⁷⁶ H.R. REP. NO. 101-485(II), at 22, 1990 U.S.C.C.A.N. 303, 304. This objective is similar to the goals listed in the ADA itself. See 42 U.S.C. § 12101(a)(7) (2012); *supra* note 11 and accompanying text (listing the ADA’s goals).

¹⁷⁷ See H.R. REP. NO. 101-485(II), at 68, 1990 U.S.C.C.A.N. 303, 350.

¹⁷⁸ See *id.* (stating that, although Title VII only requires employers to make religious accommodations if they impose minimal cost, the ADA requires employers to make disability accommodations unless they would impose “significant difficulty or expense”); see also *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1049 (7th Cir. 1996) (noting that the ADA’s reasonable accommodation requirement is not identical to the requirements of Title VII of the Civil Rights Act of 1964).

¹⁷⁹ See *Davis v. Passman*, 442 U.S. 228, 241 (1979) (stating that Congress has the ability to determine who may enforce statutory rights and in what manner they may be enforced); see also *Midland Brake*, 180 F.3d at 1170 (providing a summary of the statutory limitations placed on the reassignment clause and indicating that any additional limitations “must come from Congress”).

¹⁸⁰ H.R. REP. NO. 101-485(II), at 63, 1990 U.S.C.C.A.N. 303, 345; see *White v. York Int’l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (indicating that the ADA does not require employers to reassign disabled employees to positions that are already occupied by other employees); *Eckles*, 94 F.3d at 1047 (noting that because reassignments must be to *vacant* positions, Congress could not have intended for nondisabled employees to lose their jobs to accommodate disabled employees).

¹⁸¹ See H.R. REP. NO. 101-485(II), at 63, *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

¹⁸² Compare 42 U.S.C. § 12112(b)(5)(A) (2012) (requiring employers to provide reasonable accommodations to disabled employees), and *id.* § 12111(9)(B) (requiring employers to, at times, provide reassignments to vacant positions), with Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(j) (2012) (asserting that employers are not required to provide any form of preferential treatment to an individual due to the individual’s race, color, religion, sex, or national origin).

include this reciprocal language, it presumably intended the ADA to provide noncompetitive reassignments.¹⁸³

Furthermore, when the Rehabilitation Act—the ADA's predecessor—was enacted in 1973, it did not require employers to consider reassignments.¹⁸⁴ Although Congress used the Rehabilitation Act as a framework for the ADA, it made the deliberate decision to depart from that legislation by adding the reassignment clause.¹⁸⁵ This departure strongly suggests that Congress intended for the ADA to function differently than the Rehabilitation Act because every word of a statute is presumed to have some meaning.¹⁸⁶

Although the ADA's text and the legislative history justify noncompetitive reassignments, these reassignments do admittedly have some negative impact on nondisabled employees.¹⁸⁷ Nonetheless, existing statutory limitations help mitigate the adverse impact of noncompetitive reassignments.¹⁸⁸ First, like all reasonable accommodations, an employer does not have to provide a reassignment if it would create an undue hardship.¹⁸⁹ A reassignment that adversely affected many nondisabled employees would likely qualify as

¹⁸³ See *Aka*, 156 F.3d at 1304 (pointing out that if Congress had intended for disabled employees to be treated like nondisabled job applicants, it would have been unnecessary for the legislative history to explain that “bumping” a nondisabled employee from his or her position to produce a vacancy is not required by the Act); Dorsey, *supra* note 107, at 464 (arguing that if reassignments are not mandatory, Congress would have had no reason to explain that employers are not required to “bump” nondisabled employees to create vacancies).

¹⁸⁴ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–796 (2012)); see *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) (indicating that employers only have to consider reassignment if they normally maintain a policy of reassigning employees). The Rehabilitation Act was amended in 1992 to include a reassignment requirement. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, §§ 503 & 505, 106 Stat. 4344, 4424, 4428 (codified at 29 U.S.C. §§ 791(g), 794(d) (2012)).

¹⁸⁵ Compare 29 U.S.C. §§ 701–794 (1976) (lacking a reassignment clause), with 42 U.S.C. § 12111(9)(B) (providing the ADA's reassignment clause). See also Befort & Donesky, *supra* note 52, at 1058 (discussing the ADA's departure from the Rehabilitation Act).

¹⁸⁶ See *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (asserting that courts must “give effect, if possible, to every clause and word of a statute”); *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115, (1879) (declaring that every aspect of a statute must be construed in a way that gives each part of the statute meaning).

¹⁸⁷ Befort, *supra* note 13, at 946 (discussing noncompetitive reassignments and the resulting negative consequences for nondisabled employees); Alex B. Long, *The ADA's Reasonable Accommodation Requirement and “Innocent Third Parties,”* 68 MO. L. REV. 863, 884 (2003) (arguing that the reassignment clause creates a “substantial” conflict between disabled and nondisabled employees); see also *Aka*, 156 F.3d at 1314–15 (Silberman, J., dissenting) (arguing against noncompetitive reassignments because accommodations should not have a negative direct impact on nondisabled employees).

¹⁸⁸ See 42 U.S.C. § 12112(b)(5)(A) (2012) (establishing the undue hardship affirmative defense); *id.* § 12111(10) (defining undue hardship); *Aka*, 156 F.3d at 1305 (discussing the limitations the ADA places on reasonable accommodations).

¹⁸⁹ 42 U.S.C. § 12112(b)(5)(A) (establishing the undue hardship affirmative defense); see *supra* notes 66–68 and accompanying text (discussing the undue hardship exception to the ADA's reasonable accommodation requirement).

an undue hardship because it would involve “significant difficulty or expense.”¹⁹⁰ Employers also have no reassignment obligation when disabled employees are unqualified for vacant positions.¹⁹¹ A disabled employee must meet the minimum qualifications of the vacant position and also be able to perform the essential functions of the vacant position either with or without reasonable accommodation.¹⁹²

The EEOC regulations governing the ADA further limit the reassignment clause’s negative impact on nondisabled employees.¹⁹³ Most importantly, the regulations state that reassignment is the reasonable accommodation of “last resort.”¹⁹⁴ This means that a reassignment will only affect nondisabled employees when no other accommodations would allow a disabled employee to continue to perform his or her essential job functions.¹⁹⁵ Like the ADA’s legislative history, the EEOC enforcement guidance also indicates that employers are not required to remove nondisabled employees from positions to create vacancies for disabled employees seeking reassignment.¹⁹⁶ In short, because reassignments are subject to more limitations than any other type of reasonable accommodation, employers will use reassignments infrequently and the overall impact on nondisabled employees will be diminished.¹⁹⁷

¹⁹⁰ See 42 U.S.C. § 12111(10) (defining undue hardship).

¹⁹¹ *Id.* § 12112(b)(5)(A) (stating that an employer only needs to provide reasonable accommodations to an “otherwise *qualified* individual with a disability”) (emphasis added); see *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1019 (8th Cir. 2000) (discussing the ADA’s “otherwise qualified individual with a disability” prerequisite).

¹⁹² See *Befort*, *supra* note 29, at 451. The EEOC enforcement guidance states that employers have no obligation to train disabled employees so that they may become qualified for vacant positions. EEOC Enforcement Guidance, *supra* note 74, at *20.

¹⁹³ 29 C.F.R. § 1630.2(o) (2014); APPENDIX, *supra* note 74; EEOC Enforcement Guidance, *supra* note 74, *20–23; *Befort*, *supra* note 29, at 450–51 (discussing the restrictions placed on reassignments by the EEOC); see also *supra* notes 74–79 and accompanying text (same).

¹⁹⁴ EEOC Enforcement Guidance, *supra* note 74, at *20; see *Cravens*, 214 F.3d at 1019 (noting that “reassignment is an accommodation of last resort”); *Aka*, 156 F.3d at 1301 (noting that both Congress and the EEOC viewed reassignment as “an option to be considered only after other efforts at accommodation have failed”); H.R. REP. NO. 101-485(II), at 63, *reprinted in* 1990 U.S.C.C.A.N. 303, 345 (stating that a reassignment should only be considered after the employer makes efforts to accommodate the disabled worker in the position he or she was hired to fill); APPENDIX, *supra* note 74 (stating that “reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship”).

¹⁹⁵ See EEOC Enforcement Guidance, *supra* note 74, at *20; *Cravens*, 214 F.3d at 1019; *Aka*, 156 F.3d at 1301.

¹⁹⁶ EEOC Enforcement Guidance, *supra* note 74, at *21; see also *See* H.R. REP. NO. 101-485(II), at 63, 1990 U.S.C.C.A.N. 303, 345.

¹⁹⁷ See *Cravens*, 214 F.3d at 1019–20 (providing a brief overview of the various limitations on the reassignment clause); *Midland Brake*, 180 F.3d at 1170–78 (discussing, in detail, the numerous limitations on reassignments); APPENDIX, *supra* note 74 (discussing several restrictions that apply to the reassignment clause); EEOC Enforcement Guidance, *supra* note 74, at *20–23 (explaining the unique restrictions on the reassignment clause).

Furthermore, noncompetitive reassignments have the potential to indirectly benefit nondisabled employees by reducing government spending.¹⁹⁸ In 2002, the federal government spent \$229 billion dollars on benefits for disabled Americans.¹⁹⁹ Only six years later, that number jumped to \$357 billion dollars, which represented twelve percent of the entire federal budget.²⁰⁰ Disabled persons are more likely to apply for federal disability benefits if they are unemployed.²⁰¹ Every successful reassignment of a disabled employee ensures

¹⁹⁸ Roy, *supra* note 159 (discussing a strong connection between unemployment and applying for Social Security Disability Insurance); Estella J. Schoen, Note, *Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems*, 82 MINN. L. REV. 1391, 1394–95 (1998) (noting that Congress enacted the ADA to increase employment among disabled persons). Apart from indirect financial benefits, noncompetitive reassignments may provide other hidden benefits to nondisabled employees. See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 841–42 (explaining that many accommodations, such as wheel chair ramps or elevators, benefit both disabled persons and nondisabled persons). As the accommodation of last resort, reassignments can sometimes be necessary to prevent nondisabled employees from losing the opportunity to work with productive disabled employees. See *id.*, at 853 (discussing relational benefits, which are the “benefits of having a particular individual, with her particular skills and talents, in the workplace”).

¹⁹⁹ Gina Livermore et al., *Health Care Costs Are a Key Driver of Growth in Federal and State Assistance to Working-Age People with Disabilities*, 30 HEALTH AFFAIRS 1664, 1666 (2011); DAVID STAPLETON & GINA LIVERMORE, CTR. FOR STUDYING DISABILITY POLICY, ISSUE BRIEF NO. 11-03, COSTS, CUTS, AND CONSEQUENCES: CHARTING A NEW COURSE FOR WORKING-AGE PEOPLE WITH DISABILITIES 2 (2011), available at http://www.researchondisability.org/docs/default-document-library/working-agepeople_ib.pdf?sfvrsn=2, archived at <http://perma.cc/AF86-7HPT>. As of 2003, these monies were allocated to over two hundred programs and more than twenty federal agencies. David A. Weisbach, *Toward a New Approach to Disability Law*, 1 U. CHI. LEGAL F. 47, 49 (2009).

²⁰⁰ Livermore et al., *supra* note 199, at 1665; STAPLETON & LIVERMORE, *supra* note 199, at 1, 2. This jump represented a 56.3% increase in spending. STAPLETON & LIVERMORE, *supra* note 199, at 2. Additionally, in 2008, states spent seventy-one billion dollars on joint federal-state programs for disabled Americans. *Id.* at 1. As of 2013, approximately fourteen million Americans received a disability check from the government each month. Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, NPR: PLANET MONEY, <http://apps.npr.org/unfit-for-work/#fn1>, archived at <http://perma.cc/LAN2-6FQU> (last visited Oct. 15, 2014).

²⁰¹ See Merline, *supra* note 159, at 25 (discussing how the 2008 economic recession led to a sharp rise in disability benefits applicants); Joffe-Walt, *supra* note 200 (explaining that the “vast majority” of Americans receiving federal disability benefits are unemployed). In 2011, the economic recession caused an additional 3,000 Americans to apply for disability benefits each month. See Merline, *supra* note 159, at 25. Disabled persons are also at a disproportionate risk of being unemployed. See Economic News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Table A-6: Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted (Oct. 3, 2014), available at <http://www.bls.gov/news.release/empsit.t06.htm>, archived at <http://perma.cc/AG6F-2KGU> (stating that for September 2014, the unemployment rate for nondisabled persons over the age of fifteen was 5.5% and the unemployment rate for disabled persons over the age of fifteen was 12.3%); Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 340 (2000) (citing a Harris survey indicating that in 1998 only 29% of disabled working age persons were employed, whereas 79% of nondisabled working age persons were employed). Despite these findings, disabled employees may be some of the hardest workers. See *Americans with Disabilities May Be the Best Workers No One’s Hiring*, SALON (Aug. 7, 2013, 9:20 PM), http://www.salon.com/2013/08/07/americans_with_

that there is one less person who is out of work and therefore one less person seeking to collect these taxpayer-funded benefits.²⁰²

B. Implementing Noncompetitive Reassignments: Solving the Problem Through Congressional Amendment or U.S. Airways v. Barnett

Although the existing EEOC enforcement guidance supports noncompetitive reassignments of disabled persons, it has been ineffective at protecting disabled employees.²⁰³ As the circuit split over the reassignment clause and best-qualified reassignment policies illustrates, federal courts frequently do not defer to the EEOC's enforcement guidance concerning reassignments of disabled employees.²⁰⁴ Therefore, in light of the ineffectiveness of the EEOC enforcement guidance, alternative methods of implementing noncompetitive reassignments should be explored.²⁰⁵ The most promising alternatives

disabilities may be the best workers who cant get jobs newscred/, archived at <http://perma.cc/V86E-UFU4> (reporting that, since 2007, Walgreens has hired a large number of disabled workers because they are more efficient and loyal than nondisabled workers). See generally NAT'L GOVERNORS ASS'N, A BETTER BOTTOM LINE: EMPLOYING PEOPLE WITH DISABILITIES (2013), available at https://governor.delaware.gov/docs/NGA_2013_Better_Bottom_Line.pdf, archived at <http://perma.cc/9MZ3-W2KT> (providing governors with a framework to help local businesses utilize the largely untapped potential of the disabled work force).

²⁰² See Merline, *supra* note 159, at 25; see also Befort, *supra* note 29, at 469 (observing that because reassignment is the accommodation of last resort, a disabled employee who is denied a reassignment will be out of a job). Although reassignments may be able to help taxpayers indirectly, employers may also benefit financially from reassignments. See HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THERE ARE SIGNIFICANT COSTS TO REPLACING EMPLOYEES 1 (2012), available at <http://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>, archived at <http://perma.cc/3S66-5YGS> (estimating that it costs employers approximately one fifth of a departing employee's salary to train a replacement employee).

²⁰³ See *Huber v. Wal-Mart Stores, Inc. (Huber II)*, 486 F.3d 480, 483–84 (8th Cir. 2007) (making no mention of the EEOC's enforcement guidance and holding that the ADA requires noncompetitive reassignments); *Hedrick*, 355 F.3d at 459 (making no mention of the EEOC's enforcement guidance and holding that the ADA never provides preferential treatment). The EEOC enforcement guidance is not controlling authority and thus not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). See Wern, *supra* note 74, at 1535 n.9 (stating that the EEOC's enforcement guidance is entitled to only a small amount of deference); see also *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 n.3 (10th Cir. 1997) (stating that the EEOC interpretative guidance, which was attached as an appendix to the formal regulations, does not carry the force of law). Therefore, the enforcement guidance should only be followed to the extent that it is persuasive. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (stating that although interpretative rulings may not be controlling authority they do “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

²⁰⁴ See *Huber II*, 486 F.3d at 483; *Hedrick*, 355 F.3d at 459; *Sara Lee*, 237 F.3d at 355; *Terrell*, 132 F.3d at 627; *Wernick*, 91 F.3d at 384–85; *Daugherty*, 56 F.3d at 700.

²⁰⁵ See *Huber II*, 486 F.3d at 483; *Hedrick*, 355 F.3d at 459; *Sara Lee*, 237 F.3d at 355; *Terrell*, 132 F.3d at 627; *Wernick*, 91 F.3d at 384–85; *Daugherty*, 56 F.3d at 700.

are a congressional amendment or working within the current *U.S. Airways v. Barnett* framework.²⁰⁶

Congressional action is the best method of implementing noncompetitive reassignments for disabled persons because it is both definitive and feasible.²⁰⁷ If Congress were to remove the ambiguity surrounding the reassignment clause, the circuit split would be resolved.²⁰⁸ Moreover, the ADA's legislative history indicates that Congress never intended to place tight restrictions on the reassignment clause.²⁰⁹ Therefore, Congress should amend the reassignment clause to more accurately reflect its intent.²¹⁰ Additionally,

²⁰⁶ See *U.S. Airways*, 535 U.S. at 401–02, 405; see also *infra* notes 207–225 and accompanying text (discussing either adopting a congressional amendment or operating within the *U.S. Airways v. Barnett* framework). One prominent example of a congressional amendment to an anti-discrimination statute is the Lily Ledbetter Fair Pay Act of 2009, which amended Title VII to allow an employee who has suffered discrimination in compensation to sue his or her employer within 180 days of receiving the last discriminatory paycheck. Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (2009) (amending 42 U.S.C. § 2000e-5(e) (2012)). See generally Charles A. Sullivan, *Raising the Dead?: The Lily Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 554 (2010) (recounting Ledbetter's unsuccessful sex discrimination claim and the resulting congressional amendment).

²⁰⁷ See U.S. CONST. art. VI, cl. 2 (declaring that laws passed by Congress “shall be the supreme Law of the Land”); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (2012)) (demonstrating that Congress was willing to extend disability discrimination protection through the passage of the ADA in 1990); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213) (demonstrating that Congress was willing to revisit the ADA in 2008); see also Porter, *supra* note 160, at 335–36 (2007) (proposing that Congress amend the ADA's reasonable accommodation requirement).

²⁰⁸ Compare *Huber II*, 486 F.3d at 483 (holding that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation), with *United Airlines*, 693 F.3d at 764–65 (holding that disabled employees are entitled to noncompetitive reassignments as a reasonable accommodation), *Midland Brake*, 180 F.3d at 1166–67 (same), and *Aka*, 156 F.3d at 1304–05 (same).

²⁰⁹ See H.R. REP. NO. 101-485(II), at 63, *reprinted in* 1990 U.S.C.C.A.N. 303, 345. The legislative history only places two restrictions on the reassignment clause. *Id.* First, a reassignment should only be made after “[efforts] . . . to accommodate [the] employee in the position that he or she was hired to fill.” *Id.* Second, the reassignment clause does not require employers to remove nondisabled employees from positions to create vacancies for disabled employees. *Id.*

²¹⁰ See *id.* The ADA Amendments Act of 2008 is a further indication that Congress is willing to amend the ADA when necessary. See Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. §§ 12101–12213). Nonetheless, Congress could be unwilling to revisit the reassignment clause because it appears that the circuit split may be shrinking, rather than growing. See *United Airlines*, 693 F.3d 764–65 (joining the other U.S. Courts of Appeals that interpret the ADA to require noncompetitive reassignments). Congress may not view the reassignment clause as a major concern because only the U.S. Court of Appeals for the Eighth Circuit explicitly holds that disabled employees are not entitled to noncompetitive reassignments. *Huber II*, 486 F.3d at 483. Furthermore, in the current political climate, it is difficult for any major federal legislation to get through Congress. See Tom Cohen, *U.S. Government Shuts Down as Congress Can't Agree on Spending Bill*, CNN POLITICS (Oct. 1, 2013, 12:43 AM), <http://www.cnn.com/2013/09/30/politics/shutdown-showdown/>, archived at <http://perma.cc/6TPL-AUT6> (discussing the 2013 federal government shutdown that resulted from Congress's inability to agree on a spending bill); see also Dylan Matthews, *Why Congress*

the task of restructuring the reassignment clause belongs to Congress, because it is ultimately a policy judgment.²¹¹

The EEOC enforcement guidance interpreting the reassignment clause is a potential starting point for a congressional amendment.²¹² These guidelines state that “[r]eassignment means that the employee gets the vacant position if s/he is qualified for it” and that reassignment does not merely allow the disabled employee to compete for a vacant position.²¹³ This language should be incorporated directly into the text of the ADA to strengthen disabled employees’ existing reassignment right.²¹⁴ Furthermore, this process of incorporating provisions of the enforcement guidance into the ADA could also be used to ensure that the interests of nondisabled employees are not forgotten.²¹⁵

If a congressional amendment is not forthcoming, it will be incumbent on courts to implement noncompetitive reassignments.²¹⁶ Courts should apply

Can't Seem to Get Anything Done, WASH. POST (Jan. 26, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/26/why-congress-cant-seem-to-get-anything-done/>, archived at <http://perma.cc/3XJB-GCZ9> (observing that it is difficult to make changes in Congress because there are too many individual actors who can effectively veto legislation by withholding support).

²¹¹ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (stating that the country’s elected leaders, not the U.S. Supreme Court, are entrusted with making policy judgments); *Griswold*, 381 U.S. at 482 (stating that the U.S. Supreme Court does not “sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”).

²¹² See EEOC Enforcement Guidance, *supra* note 74, at *20–23. Congress should rely on the EEOC’s enforcement guidance because the EEOC, as the agency charged with implementing and interpreting the ADA, has the most expertise. See Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 33 (2008) (indicating that one of the primary reasons administrative agencies were established was a desire for “greater expertise and focus” than legislatures possessed); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1132 (2000) (observing that administrative agencies were created, in part, because of a perceived need for apolitical expertise).

²¹³ EEOC Enforcement Guidance, *supra* note 74, at *23.

²¹⁴ See *id.* Incorporation is necessary because the enforcement guidance, which does not carry the force of law, can be circumvented. Compare *id.* (asserting that reassignments do not merely grant disabled employees the opportunity to compete for vacant positions), with *Huber II*, 486 F.3d at 483 (holding that disabled employees are not entitled to noncompetitive reassignments as a reasonable accommodation).

²¹⁵ See EEOC Enforcement Guidance, *supra* note 74, at *20–23. One provision that could be incorporated to safeguard the interests of nondisabled employees states that: “Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.” *Id.* at 20; see also H.R. REP. NO. 101-485(II), at 63, reprinted in 1990 U.S.C.A.N. 303, 345 (stating that a reassignment should only be considered after the employer makes efforts to accommodate the disabled worker in the position he or she was hired to fill); APPENDIX, *supra* note 74 (stating that “reassignment should be considered only when accommodation within the individual’s current position would pose an undue hardship”).

²¹⁶ See *United Airlines*, 693 F.3d at 764–65 (laying the groundwork, at a minimum, for noncompetitive reassignments); *Midland Brake*, 180 F.3d at 1166 (currently implementing noncom-

the framework established in *U.S. Airways* to arrive at the conclusion that noncompetitive reassignments are reasonable under most circumstances.²¹⁷ Currently, there is near-universal agreement that disabled employees are not entitled to reassignments that violate an employer's "legitimate non-discriminatory policy," such as a seniority system.²¹⁸ An accommodation that violates a legitimate non-discriminatory policy is likely unreasonable under *U.S. Airways* because it would not be "reasonable on its face" or "in the run of cases."²¹⁹ Because the U.S. Supreme Court appears to have determined that a seniority system is a legitimate non-discriminatory policy, the Court held that the reassignment of a disabled person in violation of a seniority system is generally unreasonable.²²⁰

petitive reassignments); *Aka*, 156 F.3d at 1304 (same). Because the *Huber II* court relied upon a ruling which has since been overruled, it is in a better position to revisit the reassignment clause and rule in favor of noncompetitive reassignments. See *Huber II*, 486 F.3d at 483–84; *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). Admittedly, a U.S. Supreme Court decision could definitively end the circuit split and avoid the process of incremental change through the lower courts. See *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (asserting that U.S. Supreme Court precedent must be followed by lower court judges even if they disagree with the precedent). Moreover, the Court could further clarify the scope of its holding in *U.S. Airways* and the framework that lower courts should apply when analyzing a reassignment case. Compare *Huber II*, 486 F.3d at 483–84 (relying on *U.S. Airways* to hold that disabled employees must compete with nondisabled employees for vacant positions), with *United Airlines*, 693 F.3d at 761 (relying on *U.S. Airways* to support noncompetitive reassignments). As the denial of certiorari in *United Airlines* indicates, however, it is unlikely that the Court will resolve the circuit split in the near future. See *EEOC v. United Airlines, Inc.*, 133 S. Ct. 2734 (2013) (denying certiorari).

²¹⁷ See *United Airlines*, 693 F.3d, at 761 (holding that, in light of *U.S. Airways*, "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer").

²¹⁸ See, e.g., *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000) (holding that accommodating disabled employees does not require employers to infringe upon nondisabled employees' rights under a collective bargaining agreement or other non-discriminatory policies); *Cravens*, 214 F.3d at 1020 (noting that in most cases an employer does not need to reassign disabled employees if the reassignments would contravene a legitimate, non-discriminatory policy established by the employer); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 678 (7th Cir. 1998) (indicating that employers are not required to reassign disabled employees if the reassignment would breach a legitimate, nondiscriminatory policy established by the employer). Although the courts have universally refused to condone violating the nondiscriminatory policies of an employer, the U.S. Supreme Court has warned that a bright line rule prohibiting the violation of these policies as a reasonable accommodation is unwarranted. See *U.S. Airways*, 535 U.S. at 406 (asserting that it could be possible for the plaintiff to provide evidence justifying a departure from the rules of an established seniority system).

²¹⁹ See *U.S. Airways*, 535 U.S. at 403; see also EEOC Enforcement Guidance, *supra* note 74, at *3 (explaining that an accommodation is "reasonable on its face" or "in the run of cases" if it is "'feasible' or 'plausible'").

²²⁰ See *U.S. Airways*, 535 U.S. at 403; see also EEOC Enforcement Guidance, *supra* note 74, at *23 (explaining that it will generally be unreasonable to reassign a disabled employee if doing so would violate the rules of a seniority system).

To avoid a similar fate, therefore, lower federal courts should hold that best-qualified reassignment policies are not similar to seniority systems and therefore do not qualify as legitimate non-discriminatory policies.²²¹ The courts could reason that best-qualified reassignment policies are too subjective to be considered legitimate non-discriminatory policies.²²² Unlike seniority systems, which are highly transparent and objective, the flexibility of best-qualified reassignment policies makes it relatively easy to discriminate against disabled employees.²²³ It would be difficult for courts to determine if a best-qualified reassignment policy was truly non-discriminatory.²²⁴ In sum, if best-qualified reassignment policies do not contain objective criteria, courts have more freedom to hold that reassigning disabled employees in violation of an existing best-qualified reassignment policy is reasonable.²²⁵

CONCLUSION

The ADA requires employers to provide disabled employees with reasonable accommodations, including reassignments. By holding that the ADA does not grant disabled employees any limited preferential treatment, howev-

²²¹ See *United Airlines*, 693 F.3d at 764 (recognizing that a best-qualified reassignment policy is not the equivalent of a seniority policy).

²²² See Befort, *supra* note 13, at 981 (arguing that most seniority systems are administered objectively and create legally enforceable claims to vacant positions where most assignment policies do not create legally enforceable claims to vacant positions). Employees frequently come to rely on the outcomes of seniority systems when planning their careers because objective criteria, such as length of service, produce predictable outcomes. See *U.S. Airways*, 535 U.S. at 404 (acknowledging that seniority systems create an expectation of equal treatment); *Midland Brake* 180 F.3d at 1176 (observing that well-established seniority systems can give senior employees legitimate expectations). Best-qualified reassignment policies, however, do not create expectations in employees because determining who is best-qualified is an inherently unpredictable task involving subjective judgments. See Brief of Appellee Pam Huber at 15, *Huber II*, 486 F.3d 480 (No. 06-2238), 2006 WL 5126387, at *15 (arguing that employees do not rely upon an employer's "subjective determination of qualification" in the same way they rely upon the "arithmetic certainties of seniority").

²²³ See *Perfetti v. First Nat'l Bank of Chi.*, 950 F.2d 449, 457 (7th Cir. 1991) (recognizing "the ease with which employers may use subjective factors to camouflage discrimination") (internal quotations omitted); 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, 2098-99 (2003) (observing that although it is relatively easy to compare the length of employment of different applicants, it is more difficult to compare the overall qualifications of different applicants).

²²⁴ *Aka*, 156 F.3d at 1298 (stating that "courts traditionally treat explanations that rely heavily on subjective considerations with caution" because "an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination").

²²⁵ See *id.* Admittedly, however, implementing noncompetitive reassignments through the *U.S. Airways* framework would be less than ideal because it requires each U.S. Circuit Court of Appeals to take action, which may be unlikely in some circuits. See *Huber II*, 486 F.3d at 483; *Hedrick*, 355 F.3d at 459; *Sara Lee Corp.*, 237 F.3d at 355; *Terrell*, 132 F.3d at 627; *Wernick*, 91 F.3d at 384-85; *Daugherty*, 56 F.3d at 700.

er, a majority of the U.S. Courts of Appeals have made it difficult for disabled employees to rely upon the ADA's reasonable accommodation requirement. Forcing disabled employees to compete with nondisabled employees for vacant positions renders the Act's reassignment clause meaningless. The ADA's text, legislative history, and the EEOC enforcement guidance implementing the ADA all indicate that disabled employees are entitled to automatic reassignments instead of the mere opportunity to compete for reassignments.

The best solution would be to amend the language of the ADA itself. This option is both feasible and would provide a definitive end to the circuit split. In the meantime, however, lower courts should apply the *U.S. Airways* framework to hold that best-qualified reassignment policies, unlike seniority systems, are not legitimate nondiscriminatory policies. Through either of these solutions, noncompetitive reassignments will help many disabled Americans keep their jobs and put the ADA back to work.

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