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ADA's Reasonable Accommodation Requirement and Innocent Third Parties, The

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The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties"

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I. INTRODUCTION

Since its inception, the Americans with Disabilities Act[1] ("ADA") has proven an uneasy fit within the spectrum of existing federal anti-discrimination law. Unlike most other anti-discrimination laws, which require employers to treat their employees in the same fashion regardless of certain characteristics, the ADA proceeds from the assumption that "in order to treat some people equally, we must treat them differently."[2] Thus, employers are required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[3] The ADA's use of this "difference model"[4] has, in recent years, become one of the more controversial features of the statute.[5]

The inherently fact-specific nature of what constitutes a "reasonable" accommodation in a given case and when the hardship imposed on an employer in providing that accommodation becomes "undue" has largely prevented courts from establishing clear guidelines for litigants to follow.[6] Congress's failure to

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1. 42 U.S.C. §§ 12101-2213 (2000).

2. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment in part & dissenting in part); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 9-11 (1996).

3. 42 U.S.C. § 12112(b)(5)(A) (2000).

4. Karlan & Rutherglen, *supra* note 2, at 10.

5. *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, 1048-49 (2000) (noting the differences between the ADA and other anti-discrimination statutes and stating that "[n]egative affirmative action rhetoric has begun to creep into recent ADA decisions"); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40 (2000) ("Many of the problems emerging from judicial decisions concerning the ADA stem from the ADA's reliance on a vision of equality that is particularly controversial—the principle that differential treatment, rather than the same treatment, is necessary to create equality.").

6. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 n.5 (1st Cir. 2001) ("ADA cases come in an amazing variety of hues and shapes, and some jobs are *sui generis*, so we are reluctant to set hard and fast rules.").

more precisely define these terms has certainly not helped courts in this endeavor.[7] To some, the courts are not entirely without blame for the lack of clear standards.[8] Some, such as Justice Antonin Scalia, have charged that, as interpreted by the Supreme Court, the reasonable accommodation requirement unduly restricts the discretion of employers,[9] while others have charged that the federal courts have interpreted and applied the requirement in an overly restrictive, pro-employer fashion.[10] For critics who fall into the latter category, the tendency of courts to interpret and apply the reasonable accommodation requirement in a pro-employer fashion stems from either a failure to fully appreciate how the difference model employed by the ADA distinguishes the statute from other anti-discrimination measures[11] or a concern that the reasonable

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7. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 397 (1996) ("Congress's adoption of this vague [undue hardship] standard was a serious mistake, principally because the standard fails to define legal obligations and rights sufficiently to inform businesses and their employees with disabilities of the nature and extent of those obligations and rights."); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 339-40 (2001) ("[W]hat is striking about the ADA is the extent to which the Act leaves courts in the role of legislating so extensively in Congress's stead.").

8. US Airways, Inc. v. Barnett, 535 U.S. 391, 414 (2002) (Scalia, J., dissenting) (arguing that the majority opinion renders the ADA's reasonable accommodation provision "a standardless grab bag—leaving it to the courts to decide which workplace preferences . . . can be deemed 'reasonable'"); Barnett v. US Air, Inc., 228 F.3d 1105, 1125 (9th Cir. 2000) (Trott, J., dissenting) (complaining that the majority opinion leaves employers, employees, and the lawyers who represent them "with no guidance, none at all"), *vacated by* 535 U.S. 391 (2002).

9. *Barnett*, 535 U.S. at 418-20 (Scalia, J., dissenting) (stating that the majority opinion "incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation" even where the rule or practice does not work to exclude a disabled employee because of the employee's disability); Thomas F. O'Neil III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 360 (2001) (criticizing the approach of some courts, in part, on the grounds that their interpretations of the reasonable accommodation requirement unduly limit employer discretion).

10. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101, 108 (1999).

11. Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 15 (2002) (stating that the likely reason why courts are reluctant to require an employer to depart from a neutral policy as part of an accommodation is "because they cannot get beyond thinking about the ADA in traditional Title VII terms"); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 640 (2001) ("In adopting the Title VII practice of

accommodation requirement amounts to the provision of special rights for individuals with disabilities.[12] Regardless of the cause, as litigation under the ADA has increased, so too has controversy surrounding the reasonable accommodation requirement.[13]

While employers and individuals with disabilities have battled over the scope of an employer's obligations under the ADA, one group has frequently been caught in the middle. In numerous instances, an employer's obligation to alter its standard operating procedures has relegated other employees to mere observers as the courts make decisions that could potentially affect their future. Because the reasonable accommodation requirement requires employers to modify their regular practices, sometimes other employees may feel the effects from such alterations. Several of the possible reasonable accommodations recognized by courts have the potential to require other employees to assume unwanted, additional job duties.[14] The accommodation of reassignment to a vacant position, under which an employer may be required to place an employee with a disability in a different position altogether, has perhaps generated the most controversy. Because this accommodation could require an employer to depart from a neutral policy that would otherwise prohibit the reassignment and simultaneously deny the vacancy to another employee entitled to the position under the policy, it has presented courts with some of the most difficult accommodation questions.[15]

Thus far, a consistent approach to these types of cases has largely eluded courts. The result has been a state of affairs where some charge that courts have shown too much deference to employers,[16] while others charge that, if left unchecked, the reasonable accommodation requirement would turn the ADA into a preference statute and impose "an unreasonable imposition on the employers and coworkers of disabled employees."[17] Although a solution that would adequately balance the competing interests of all three concerned parties and

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denying a requested reassignment when it conflicts with collective bargaining agreements, a majority of courts have ignored critical differences between the ADA and Title VII.").

12. Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 143 (2000); Diller, *supra* note 5, at 46-47.

13. Befort & Donesky, *supra* note 5, at 1048.

14. Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 449 (2002) (discussing the possible extra burdens imposed on other employees by granting a disabled employee a leave of absence).

15. *Id.* at 439.

16. Anderson, *supra* note 11, at 13.

17. Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998).

address all accommodation situations would be virtually impossible, there clearly is room for improvement.

This Article suggests that the most effective and equitable method of dealing with many of the most difficult accommodation issues is to focus on the effect that providing an accommodation would have on other employees. Part II lays out the background of the reasonable accommodation requirement and discusses some of the ways that the requirement can impact other employees. Part III focuses on how courts have dealt with situations in which the rights of one individual under anti-discrimination laws have come into conflict with the interests of other employees. It discusses various situations arising under Title VII of the Civil Rights Act of 1964 in which the Supreme Court has sought to protect the interests of those whom it has referred to as "innocent third parties."[18] Part IV discusses in greater detail cases arising under the ADA that involve roughly the same dynamic, including the Supreme Court's recent decision in *US Airways, Inc. v. Barnett*,[19] which dealt with the proposed reassignment of an employee with a disability in contravention of an employer's unilaterally-imposed seniority policy. Part IV also considers the competing approaches adopted by various courts in such cases and discusses the lack of overall clarity in the area even after (and perhaps because of) *Barnett*. Part V explains why a clearer standard is needed and why the focus of that standard should be on the impact that an accommodation will have on other employees. Finally, Part VI suggests a proposed addition to the evolving law concerning the reasonable accommodation requirement that would provide that an accommodation resulting in an adverse employment action for another employee or a violation of another employee's contractual rights is not a reasonable accommodation.

II. THE REASONABLE ACCOMMODATION REQUIREMENT OF TITLE I OF THE ADA

A. Basic Background

The ADA protects qualified individuals with disabilities from discrimination. According to the statutory definition, a "qualified individual with a disability" is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[20] While the concept of reasonable accommodation helps define the ADA's protected class, it is also the source of important employer obligations. Under the ADA, it is a discriminatory practice for an employer to

18. Ford Motor Co. v. EEOC, 458 U.S. 219, 239 (1982) (quoting City of Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 723 (1978)).

19. 53 U.S. 391 (2002).

20. 42 U.S.C. § 12111(8) (2000).

fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business.[21]

The reasonable accommodation requirement is crucial to the ADA's goal of ensuring equal employment opportunities for individuals with disabilities. According to the Equal Employment Opportunity Commission ("EEOC"), the reasonable accommodation requirement "is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."[22] Thus, Congress's inclusion of the reasonable accommodation concept represented a recognition on its part that discrimination against individuals with disabilities frequently involves an unwillingness to make minor, relatively inexpensive modifications to established ways of doing business that would allow individuals with disabilities to participate in the workplace and in society as a whole.[23]

Although the ADA itself does not define the term "reasonable accommodation," it does include a non-exhaustive list of possible reasonable accommodations:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[24]

Even when an accommodation is reasonable, an employer is not required to make the accommodation if it would result in an "undue hardship." The ADA's undue hardship defense ensures that employers do not have to make accommodations that would require them to incur "significant difficulty or expense."[25] The statute includes a number of factors that should be considered in determining whether an accommodation would impose an undue hardship. Specifically, the statute provides as follows:

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21. *Id.* § 12112(b)(5)(A).
22. 29 C.F.R. app. § 1630.9 (2003).
23. Malloy, *supra* note 11, at 623.
24. 42 U.S.C. § 12111(9) (2000).
25. *Id.* § 12111(1)(A).

> In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
> (i) the nature and cost of the accommodation needed under this chapter;
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[26]

If an employer can demonstrate that a proposed accommodation, even though reasonable on its face, would impose an undue hardship on the operation of its business, the employer is not liable for failing to make the accommodation.[27]

B. The Potential Impact of a Reasonable Accommodation on "Innocent Third Parties"

The initial concern that groups representing employers seemed to have concerning the reasonable accommodation requirement was the potential costs that it might impose on employers.[28] Business groups were concerned about what they perceived to be Congress's failure to define adequately the terms "reasonable accommodation" and "undue hardship" and pushed Congress to place dollar limits on an employer's duty to make accommodations.[29] While Congress declined to define the terms more precisely, ADA supporters sought to reassure employers by pointing to studies that indicated that the cost of the average accommodation was fairly low.[30]

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26. *Id.* § 12111(10)(B).

27. *See id.* § 12112(b)(5)(A).

28. *See* Epstein, *supra* note 7, at 425-27.

29. *Id.*

30. *See generally* S. REP. NO. 101-116, at 89 (1989) (indicating that the costs to employers would be under $100 for thirty percent of employees and that accommodation for fifty-one percent of employees would require no cost at all); Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8578, 8583 (Feb. 28, 1991)

Over time, it has become clear that the greatest potential source of conflict over reasonable accommodation involves accommodations that cost employers little or nothing to make. The most controversial accommodations are not those that are expensive, but those that limit the discretion of employers or adversely impact other employees.

1. Accommodations That are Unlikely to Impact Other Employees

Some of the possible accommodations listed in the ADA can be expected to have little, if any, impact on other employees.[31] Instead, in the vast majority of cases, the impact of providing these accommodations is borne almost exclusively by the employer. Such accommodations typically involve an employer adding to or modifying the physical workplace in some way. For example, modifying a disabled employee's work station or acquiring special equipment in order to allow an employee to perform the essential functions of a job would be unlikely to have any adverse impact on other employees.[32] Although it is possible to conjure up scenarios in which the provision of these types of accommodation might somehow adversely impact other employees, by and large, the impact in such cases is only felt by the employer.

Other employees are also unlikely to be affected by some accommodations that do not involve physical changes to the workplace. For example, under the ADA, an employer might be required to provide a deaf employee with an interpreter in some instances or modify its examination procedures by giving an oral examination to a deaf applicant instead of a written examination.[33] In either situation, other employees are unlikely to be affected.

2. Job Restructuring

As envisioned by the EEOC, the accommodation of job restructuring essentially involves the "swapping" of marginal job functions between a disabled employee and non-disabled employees.[34] If a disabled employee is unable to

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(citing study concluding that more than eighty percent of accommodations cost less than $500); *see also* Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 929-30 (citing the cost concerns of employers and, among other statistics, a study concluding that only twenty-two percent of disabled workers required special accommodations and for that group fifty-one percent of the accommodations were achieved at no cost).

31. *See* Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337, 1346 (1998); Malloy, *supra* note 11, at 615-16.

32. *See* Befort & Donesky, *supra* note 5, at 1058; Long, *supra* note 31, at 1346-48.

33. *See* 42 U.S.C. § 12119(b) (2000).

34. 29 C.F.R. app. § 1630.2(o) (2003).

perform some, but not all, of the marginal functions of a particular position, the employer may be required to redistribute those functions to another position, while redistributing some functions of the other position to the disabled employee.[35] The reallocation of marginal, non-essential job functions between a disabled and a non-disabled employee will obviously have a direct effect on the non-disabled employee.[36] Perfect equality in terms of the burdens and desirability of the duties swapped is, of course, nearly impossible. Assuming that the reallocated functions of the disabled employee's position are no more onerous than the original functions of the non-disabled employee's position, the impact of the accommodation, although present, is fairly minimal.[37] However, it is also possible that, as a result of a swap with a disabled employee, a non-disabled employee may become saddled with greater responsibilities, more onerous tasks, or significantly less desirable duties.[38]

3. Part-Time or Modified Work Schedules and Extended Leave

Like the job restructuring accommodation, allowing a disabled employee to switch from a full-time position to a part-time position or otherwise modifying the employee's work schedule may also have adverse consequences for non-disabled employees. In the case of a switch from full-time to part-time employment, presumably someone will have to pick up the slack created by the switch. Unless the employer hires an additional employee, current employees will most likely inherit unwanted new job duties.[39] It is also possible that another employee may be required to transfer positions, and learn new job duties, in order to perform the duties of the disabled employee.[40] Likewise, allowing a disabled employee to alter his work schedule might necessitate a similar change in the schedule of another employee to cover the vacancy created by the absence of the disabled employee.

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35. *Id.*

36. *But see* Befort & Donesky, *supra* note 5, at 1058-59 (stating that "job restructuring . . . would have little impact upon the rights of other employees").

37. *See generally* Befort, *supra* note 14, at 448 ("[S]uch an accommodation does not necessarily result in a net increase of work duties for non-disabled employees.").

38. *See generally* Anderson, *supra* note 11, at 33 (noting that with job restructuring "other employees . . . may be required to bear the entire burden of the marginal tasks").

39. *Cf.* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996) (citing Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); 29 C.F.R. § 1630.2(p)(2)(v) (1995)) (holding that plaintiff who requested a switch to a straight daytime shift was not a qualified individual with a disability because the proposed accommodation would have resulted in other employees having to work harder or longer).

40. *See generally* Befort, *supra* note 14, at 449 (stating same in the context of granting a disabled employee an extended leave of absence).

The same potential for an adverse impact on other employees exists when an employer departs from an established leave policy in order to accommodate a disabled employee. The EEOC's position is that an employer may be required to allow a disabled employee to take unpaid leave in excess of the twelve weeks mandated by the Family and Medical Leave Act ("FMLA").[41] It is also possible that granting an employee leave beyond that specified in an employer's leave policy could, in some circumstances, be a reasonable accommodation.[42] As is the case with modifying an employee's work schedule, such extended leave could require other employees to temporarily assume some of the job duties of the absent employee.[43]

4. Reassignment to a Vacant Position

Reassignment to a vacant position differs from the other possible accommodations listed in the ADA in several respects. Most obviously, it is the only accommodation listed in the statute that envisions accommodating a disabled employee by removing the employee from her present position. The other accommodations listed in the statute seek to enable the disabled employee to continue performing the essential functions of her existing position. By its nature, the accommodation of reassignment to a vacant position seeks to accommodate a disabled employee by removing the employee from a position involving essential functions that the employee cannot perform, even with a reasonable accommodation, and placing that employee in an altogether new position.[44] In this sense, the accommodation is more sweeping than the others listed in the statute. Because the accommodation of reassignment to a vacant position alters the status quo of the workplace in a way that the other possible accommodations do not, it has the greatest potential to impinge upon an employer's business discretion. Not surprisingly, it is also the accommodation that has the greatest potential to adversely impact other employees.[45]

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41. 29 U.S.C. §§ 2601-2654 (2000); 29 C.F.R. § 825.702(a) (2003).

42. *See* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (citing Ralph v. Lucent Techs., Inc., 135 F.3d 166, 171-72 (1st Cir. 1998)).

43. Befort, *supra* note 14, at 448-49. Similarly, the EEOC has suggested that an employer violates the ADA when, as part of a reduction in force, it bases its decision as to which employees to discharge on past productivity and, consequently, discharges a disabled employee who needed leave and a modified work schedule as a reasonable accommodation because that employee was less productive than other employees. *See* EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC COMPL. MAN. § 902 No. 915.002 n.55 (Oct. 17, 2002), *available at* http://www.eeoc.gov/docs/accommodation.html [hereinafter *Enforcement Guidance*].

44. Befort, *supra* note 14, at 448.

45. *See id.* (stating that reassignment to a vacant position and leave of absence

According to the legislative history, the purpose of reassignment is twofold: "a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker."[46] Aside from the fact that reassignment places the focus on a completely different job than the one that the disabled employee currently occupies, the accommodation of reassignment to a vacant position also takes a different approach with what it requires of employers. As Justice Scalia observed in *US Airways, Inc. v. Barnett*, all of the other accommodations listed in the ADA require an employer "to modify or remove (within reason) policies and practices that burden a disabled person '*because of [his] disability.*'"[47] The other accommodations listed in the statute may require the removal of barriers if it is the employee's actual *disability* that prevents the employee from overcoming the barriers.[48] For example, the barrier that prevents an employee with back problems from performing the essential function of standing at an assembly line for an extended period of time is the requirement of standing.[49] Under appropriate circumstances, an employer could be required to modify the employee's work schedule to allow for more breaks or modify the physical workplace if that would help eliminate the barrier. Regardless, with all of the other accommodations listed in the statute, the policies or practices of an employer that are subject to modification are those that fall more heavily upon a disabled employee *because of the disability* of the employee.[50]

In contrast, with the accommodation of reassignment to a vacant position, the employer may be required to modify an existing policy or practice that is in no way related to the disabled employee's disability. For example, an employer may have a legitimate, non-discriminatory policy against transfer where the transfer would result in a demotion, such as in the case of prohibiting salaried employees from transferring to a vacant hourly position.[51] If a disabled employee wished to transfer to the hourly position as an accommodation, the employee's *disability* would pose no obstacle (assuming the employee was capable of performing the essential functions of the vacant position). The only

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"impose[] greater burdens on employers and co-workers than do the other types of accommodation recognized by the ADA").

46. H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345; *see also* S. REP. NO. 101-116, at 6 (1989).

47. US Airways, Inc. v. Barnett, 535 U.S. 391, 413 (2002) (Scalia, J., dissenting) (quoting 42 U.S.C. § 12112(a) (2000)) (emphasis added).

48. *Id.* (Scalia, J., dissenting).

49. *See id.* (Scalia, J., dissenting).

50. *Id.* (Scalia, J., dissenting).

51. *Cf.* Duckett v. Dunlop Tire Corp., 120 F.3d 1222 (11th Cir. 1997) (involving such a policy). The difference between *Duckett* and the hypothetical is that in *Duckett* such a transfer would have violated both the employer's policy and the relevant provision of a collective bargaining agreement. *Id.* at 1225.

barrier preventing the employee from assuming the position is the employer's neutral policy. Thus, in order to reassign the disabled employee to the vacant position, the employer would be required to modify a workplace policy or practice that is in no way a barrier to the position because of the employee's disability.[52]

Perhaps recognizing the potential effects of reassignment on employers, the EEOC has sought to limit the scope of this accommodation. First, reassignment as an accommodation is only available to employees, not applicants.[53] Second, as both the statute and the EEOC suggest, the employee must actually be qualified for the vacant position.[54] Third, "an employer is not required to promote an individual with a disability as an accommodation."[55] Finally, reassignment is an accommodation of last resort, to be used only "when accommodation within the individual's current position would pose an undue hardship."[56]

The reassignment accommodation clearly impacts employers in ways that the other accommodations listed in the statute do not. However, reassignment may also have potentially dramatic results for other employees. If a position is "vacant" in the sense that no one is currently performing the duties of the position, reassignment of a disabled employee means that other employees who may want the position may not be able to obtain it. Moreover, as later discussed in greater detail, it may also mean that another employee who would otherwise be entitled to the position under an employer's existing policy could be denied the position in order to accommodate a disabled employee.[57] In some instances, an employer facing a decision as to whether to depart from such a policy may find itself in a Catch 22. While an employee handbook containing the various policies of an employer generally does not create enforceable employment contract rights on the part of other employees, it is certainly not unheard of for an employee handbook to amount to an implied employment contract.[58] Thus, if an employer has not been careful to disclaim the existence of a contract when drafting its employee handbook, it may violate the contractual rights of another employee when it departs from a stated policy in order to reassign a disabled employee.

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52. *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting).

53. 29 C.F.R. app. § 1630.2(o) (2003).

54. *Id.*; 42 U.S.C. § 12112(b)(5)(A) (2000) (defining discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").

55. 29 C.F.R. app. § 1630.2(o) (2003).

56. *Id.*

57. *See infra* notes 97-203 and accompanying text.

58. *See* EEOC v. Sara Lee Corp., 237 F.3d 349, 355 (4th Cir. 2001) (noting that "in South Carolina, [a] claim of breach of implied contract based on employer policies is available") (citing Small v. Springs Indus., Inc., 357 S.E.2d 452 (S.C. 1987)).

C. The ADA's Attempt to Protect "Innocent Third Parties"

1. The Direct Threat Defense

Of the several measures within the ADA's statutory language that seek to protect the interests of other individuals, the direct threat defense is perhaps the most obvious. Under the ADA, an employer is permitted to insist upon a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.[59] Thus, the ADA's anti-discrimination mandate gives way at the point that an individual poses a "significant risk" to the health and safety of others, including coworkers.[60]

2. The Undue Hardship Defense

As previously discussed, even if an accommodation is reasonable in the general sense, an employer is not required to provide the accommodation if it would result in an undue hardship on the operation of the business.[61] To some extent, the undue hardship defense does take into account the effect of an accommodation on other employees.[62] Among the factors to consider in making the undue hardship determination is the impact of an accommodation on the operation of the facility.[63] The EEOC has explained that this impact may include "[t]he impact on the ability of other employees to perform their duties."[64] Ultimately, however, the focus of the undue hardship defense is on "the operation of the business" of the employer. Although several courts have suggested that the fact that an accommodation might result in decreased employee morale might be sufficient under the ADA or the Rehabilitation Act to establish the existence of an undue hardship, the focus of these decisions has been on how decreased employee morale would ultimately affect the employer.[65]

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59. 42 U.S.C. § 12113(a)-(b) (2000).

60. *Id.* § 12111(3).

61. *See supra* notes 25-27 and accompanying text.

62. *See* Long, *supra* note 31, at 1349-50 (stating that in addition to being a limit on the effect that an accommodation may have on an employer, the undue hardship defense can be seen "as a means of preventing unfairness among similarly-situated employees").

63. 42 U.S.C. § 12111(10)(B)(ii) (2000).

64. 29 C.F.R. § 1630.2(p)(2)(v) (2003).

65. *See* Barth v. Gelb, 2 F.3d 1180, 1189-90 (D.C. Cir. 1993); Holt v. Olmsted Township Bd. of Trs., 43 F. Supp. 2d 812, 824 (N.D. Ohio 1998) (relying on Sixth Circuit case law and suggesting that it is conceivable that employee morale problems could become so acute that they would constitute an undue hardship). *See generally* Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1022-35 (1997) (discussing decreased coworker morale as a

In sum, the purpose of examining the factors listed is geared toward the effect of an accommodation on an employer's business, either from a cost or efficiency standpoint or from an administrative standpoint.[66]

3. Other Measures

Several other general rules have developed through administrative regulation or case law that work to protect other employees from any adverse consequences that might flow from a proposed accommodation. One of the rules regarding the job restructuring accommodation works to protect other employees from assuming some of the more burdensome tasks of the disabled employee's position. Because an employee with a disability is "qualified" only if the employee is capable of performing the essential functions of a position, an employer is not required to reassign the essential functions of a particular position as part of a job restructuring.[67] Although this rule might be seen as an attempt to limit an employer's burden under the reasonable accommodation requirement, the rule also has the effect of limiting the impact of job restructuring on other employees. According to the EEOC's regulations, one reason why a function may be deemed "essential" is because the reason the position exists is to perform that function.[68] Another reason why a function may be essential is the fact that the function is time-consuming or highly specialized.[69] Therefore, if an employer were required to reallocate such a function to a non-disabled employee in order to accommodate a disabled employee, the result could potentially be a significant increase in duties for the non-disabled employee. Finally, the legislative history concerning the reassignment accommodation makes it clear that an employer is not required to "bump" another employee out of a position in order to create a vacancy for a disabled employee.[70]

III. INNOCENT THIRD PARTY PROBLEMS IN EMPLOYMENT DISCRIMINATION LAW

There are several instances in which the conflict between employers and employees who seek the protection of anti-discrimination law has resulted in other employees getting caught in the crossfire. In each of these instances, the

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basis for the undue hardship defense).

66. *See* 42 U.S.C. § 12111(10)(A) (2000).

67. *See* 29 C.F.R. app. § 1630.2(o) (2003).

68. *Id.* § 1630.2(n)(2)(i).

69. *Id.* §§ 1630.2(n)(2)(iii), 1630.2(n)(3)(iii).

70. *See Enforcement Guidance, supra* note 43, at n.82; H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345.

federal courts have been reluctant at best to allow these third parties to suffer material harm.

A. Title VII and Affirmative Action

Despite some conceptual dissimilarities, the ADA's reasonable accommodation requirement has, perhaps regrettably, drawn frequent comparisons to affirmative action programs.[71] Obviously, the controversial nature of affirmative action raises some concerns about how such programs affect other individuals. The Supreme Court has allowed the use of voluntary affirmative action programs in private employment under Title VII if they meet certain criteria.[72] First, the plan must be designed to eliminate manifest imbalance in traditionally segregated job categories. In addition, the plan must not unnecessarily trammel the interests of other employees and must not create an absolute bar to other employees. Finally, the plan must be a temporary measure, not designed to maintain balance, but to eliminate a manifest imbalance.[73]

The framework devised by the Court expressly takes into account the interests of employees in the majority group. For example, in *Johnson v. Transportation Agency*, the Court found that the employer's promotion policy that took into account an applicant's sex was a permissible affirmative action policy, in part because it did not unnecessarily trammel the interests of male employees nor serve as a bar to male employees.[74] The plan did not set aside positions for female applicants; instead, sex was only one factor in the promotion decision.[75] Furthermore, female applicants were not excluded from direct comparison with male applicants; instead, the plan required all women to compete for the positions in question.[76]

B. Seniority Systems

Recognizing the important role that seniority systems play in labor-management relations, Congress has made clear in both Title VII and the ADEA that employers are generally free to abide by the terms of a bona fide seniority system.[77] In keeping with that rule, the Supreme Court has been reluctant to

71. *See* Befort, *supra* note 14, at 441.
72. United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979).
73. *See* Johnson v. Transp. Agency, 480 U.S. 616, 628-30 (1987).
74. *Id.* at 638.
75. *See id.*
76. *See id.*
77. *See* 29 U.S.C. § 623(f)(2)(A) (2000); 42 U.S.C. § 2000e-2(h) (2000).

allow the interests of employees under such systems to be adversely affected by the struggle between an employer and another employee.

In *Ford Motor Co. v. EEOC*,[78] the Supreme Court held that an employer charged with Title VII discrimination in hiring can toll the accrual of back pay liability by unconditionally offering the claimant the job that the claimant sought, and the job offer need not be supplemented by an offer of retroactive seniority.[79] Central to the Court's reasoning was its concern over the rights of what it termed "innocent third parties."[80] In the period between an employer's refusal to hire and the new offer to hire, other employees will have accrued seniority. The Court reasoned that if an employer may cap backpay liability only by forcing incumbent employees to yield seniority to a person who has not proved, and may never prove, unlawful discrimination, these innocent third parties might bear a heavy burden, including the potential for being laid off during a reduction in force as a result of losing previously accrued seniority.[81]

Like the ADA, Title VII may sometimes require an employer to modify existing policies or practices in order to accommodate a particular employee. Under Title VII, an employer is required "to reasonably accommodate an employee's or prospective employee's religious observance or practice" unless the accommodation would result in an undue hardship on the conduct of the employer's business.[82] In defining the scope of the requirement, the Supreme Court in *Trans World Airlines, Inc. v. Hardison*[83] looked to the effect that making an accommodation would have on both the employer and other employees. Although *Hardison* is usually cited for the proposition that an undue hardship exists under Title VII where an employer is forced to "bear more than a *de minimis* cost" in order to accommodate the plaintiff's religious beliefs,[84] the Court's reasoning also relies heavily on the impact that providing an accommodation would have on other employees. In order to accommodate the employee in *Hardison*, the employer would have had to deny the shift and job preference of some employees, as well as deprive them of their seniority rights under a collective bargaining agreement.[85] The Court was unwilling to conclude that Title VII's reasonable accommodation requirement required such an unequal outcome.[86] Other courts have since extended this concern over the effects an

78. 458 U.S. 219 (1982).

79. *Id.* at 234.

80. *Id.* at 239 (citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 723 (1978)).

81. *See id.* at 239-40.

82. 42 U.S.C. § 2000e(j) (2000).

83. 432 U.S. 63 (1977).

84. *Id.* at 84 (emphasis added).

85. *See id.* at 80.

86. *Id.* at 81.

accommodation may have on third parties to situations outside of the collective bargaining context.[87]

IV. INNOCENT THIRD PARTY PROBLEMS UNDER THE ADA

A. Accommodations That Would Result in Other Employees Having to Work Longer and Harder

As discussed previously, the accommodations of job restructuring, modified work schedules, and extended leave have the potential to put at odds the interests of disabled employees and non-disabled employees.[88] In several cases, courts have concluded that a proposed job restructuring or a proposed modification of a disabled employee's work schedule that would result in other employees having to work longer or harder is not a reasonable accommodation.[89] For example, in *Turco v. Hoechst Celanese Corp.*, a chemical operator suggested that a reasonable accommodation would have been to switch him from a rotating shift to a straight daytime shift.[90] The difficulty with the proposal was that the employer had no such shifts for chemical operators; instead, all operator positions were on rotating shifts.[91] The Fifth Circuit Court of Appeals concluded that the employee was not a qualified individual with a disability for purposes of

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87. *See* Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001) (stating that requiring other employees to assume a disproportionate workload or to travel involuntarily with plaintiff in order to accommodate plaintiff's religious beliefs constitutes an undue hardship).

88. *See supra* notes 34-43 and accompanying text.

89. *See* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Lodderhose v. Viacom Cable, Inc., No. C9604282 SI, 1998 WL 57025, at *8 (N.D. Cal. Jan. 27, 1998); Frix v. Fla. Tile Indus., Inc., 970 F. Supp. 1027, 1036 (N.D. Ga. 1997); Andress v. Nat'l Pizza Co. Int'l, 984 F. Supp. 475, 489 (S.D. Miss. 1997); Rhoads v. Atchison-Holt Elec. Coop., No. 96-6057-CV-W-6, 1997 WL 839482, at *6 (W.D. Mo. Nov. 20, 1997). *See generally* Morrissey v. Gen. Mills, No. 01-3696, 2002 WL 1339850, at *1 (8th Cir. June 20, 2002) (stating that such an accommodation imposes an undue hardship); Basith v. Cook County, 241 F.3d 919, 930 (7th Cir. 2001) (rejecting plaintiff's proposed accommodation because it "would result in a restructuring of both his job and the jobs of other employees"); Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1052 (E.D. Wis. 1996) (stating that such an accommodation imposes an undue hardship); DiPompo v. West Point Military Acad., 770 F. Supp. 887, 894 (S.D.N.Y. 1991) (rejecting, in a Rehabilitation Act case, plaintiff's proposed accommodation of reallocating job duties because, in part, plaintiff was requesting to be excused from a duty "considered sufficiently burdensome that it is used as a disciplinary measure" and to have that duty reallocated to other employees).

90. *Turco*, 101 F.3d at 1094.

91. *Id.*

the ADA because he could not perform the essential functions of the position with a reasonable accommodation. The court based its decision, in part, on the fact that moving the plaintiff to a straight day shift would place a heavier burden on the rest of the operators in the plant.[92] According to the court, "an accommodation that would result in other employees having to work harder or longer is not required under the ADA."[93] Thus, the focus of the court's analysis in this respect was on the effect the accommodation might have on other employees. Importantly, there was no suggestion in this portion of *Turco* that the plaintiff's proposed accommodation was unreasonable based upon its effect on the employer or because it would have imposed an undue hardship on the employer. Instead, the court upheld the lower court's summary judgment for the employer based on its conclusion that the plaintiff was not a qualified individual with a disability, i.e., that he was not capable of performing the job's essential functions *with a reasonable accommodation.*[94]

B. Reassignment to a Vacant Position in Violation of a Legitimate, Non-Discriminatory Policy

As discussed previously, reassignment to a vacant position is the accommodation that is most likely to impact both employers and other

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92. *Id.*

93. *Id.* (citing *Milton*, 53 F.3d at 1125).

94. *Id.* at 1093-94. In support of its conclusion in this respect, the Fifth Circuit Court of Appeals cited an EEOC regulation discussing when a proposed accommodation might impose an undue hardship. *Id.* at 1094 (citing 29 C.F.R. § 1630.2(p)(2)(v) (1996)). Thus, the implication might be that the court considered the plaintiff's proposed accommodation to impose an undue hardship. However, as mentioned, the court was clear that it was assessing the reasonableness of the proposed accommodation as opposed to the hardship on the employer that it might impose. *See supra.* In addition, the court cited *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995), a decision from the Tenth Circuit Court of Appeals, for support of its stated position. *Milton* appears to be the original source for the notion that an accommodation that would result in other employees having to work harder or longer is not required under the ADA. *Milton* also cited the above-referenced regulation regarding the undue hardship analysis. However, it characterized the regulation as suggesting that the "impact to other employees on their ability to do their duties is a relevant factor in determining *the reasonableness* of an accommodation." *Milton*, 53 F.3d at 1124-25 (emphasis added). Moreover, the *Milton* court specifically based its decision in the case on its belief that none of the plaintiff's proposed accommodations were reasonable. *Id.* at 1124. As such, it is fair to say that the *Milton* line of cases are premised upon the notion that consideration of the effect that an accommodation might have on other employees is not exclusively in the domain of the undue hardship analysis, but that the reasonableness of a proposed accommodation may be determined in part by the effect that the accommodation would have on other employees.

employees.[95] Prior to the Supreme Court's decision in *US Airways, Inc. v. Barnett*, numerous courts had concluded that an employer was not required to ignore a legitimate, non-discriminatory transfer policy in order to reassign a disabled employee.[96] Despite this general rule, courts split on the question of whether an employer could be required to depart from certain types of neutral employment policies in order to comply with the ADA's reasonable accommodation requirement. These cases almost invariably involved situations where the departure might ultimately have an adverse impact on another employee.

1. Light-Duty Assignments and Part-Time Employee Policies

The use of employer policies regarding light-duty assignments has generated substantial litigation under the ADA. Employers may set aside a certain number of light-duty assignments for several reasons, including a desire to limit workers' compensation liability related to on-the-job injuries,[97] the feeling of "a special obligation arising out of the employment relationship" to create positions for employees who have been injured on the job,[98] and as a means of easing an injured employee back to work.[99] According to the EEOC, it may be a reasonable accommodation for an employer to reassign a disabled employee to a light-duty position, provided that such a position is vacant.[100] However, as with other reassignments, an employer is not required to create such a position or to convert a temporary light-duty position into a full-time position.[101]

Not surprisingly, employers frequently establish policies to help define employees' eligibility for light-duty positions and to define the nature of the positions themselves. In situations where the reassignment of a disabled

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95. *See supra* notes 44-45 and accompanying text.

96. *See* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998). Some courts had not been as precise as the Seventh Circuit Court of Appeals in explaining exactly which types of rules employers are not required to ignore. However, the thrust of the decisions of several other circuit courts of appeals is in keeping with the Seventh Circuit's view. *See* EEOC v. Sara Lee Corp., 237 F.3d 349, 353-54 (4th Cir. 2001); Burns v. Coca-Cola Enter., Inc., 222 F.3d 247, 257-58 (6th Cir. 2000); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997).

97. Sharpe v. Henderson, No. CV-00-71-ST, 2001 WL 34039485, at *10 (D. Or. Oct. 19, 2001).

98. Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 696 (7th Cir. 1998).

99. Middleton v. Ball-Foster Glass Container Co., 139 F. Supp. 2d 782, 798 (N.D. Tex. 2001), *aff'd*, No. 01-10329, 2002 WL 243242 (5th Cir. Jan. 16, 2002).

100. EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the ADA*, 8 FEP MAN. § 9.4, at IX-5 (1992).

101. *Id.*; 29 C.F.R. app. § 1630.9 (2003).

employee to a light-duty position would violate such a policy, there is the potential that a departure would impact not only the employer, but other employees. If, for example, an employer set aside a limited number of temporary light-duty positions and it made an exception to its existing policy concerning eligibility for such positions in order to accommodate a disabled employee, it could reduce the number of available positions set aside for eligible, non-disabled employees.[102]

In *Middleton v. Ball-Foster Glass Container Co.*, a federal district court in Texas concluded that it was not a reasonable accommodation for an employer to reassign the plaintiff to light-duty because the reassignment would have conflicted with the employer's light-duty policy or practice.[103] Under the policy, only those employees with temporary work restrictions were eligible for light-duty assignments.[104] The purpose of the policy was to ease temporarily injured employees back to full-time work.[105] However, the plaintiff's physical impairment permanently prevented him from returning to his old job.[106] Thus, because the plaintiff's requested assignment to a light-duty position conflicted both with the employer's policy and the underlying reasons for that policy, the court concluded that reassignment was not a reasonable accommodation.[107]

In *Sharpe v. Henderson*,[108] a federal district court in Oregon concluded that reassignment to a limited-duty[109] position was not a reasonable accommodation because it would have conflicted with the employer's neutral policy regarding such assignments.[110] Under the policy, employees with compensable workers' compensation claims were eligible for limited-duty assignments, but employees whose workers' compensation claims were denied were not eligible for the positions.[111] The court reasoned that although an employer has an obligation to reassign a disabled employee to a position he can perform, it is only required to do so when the position is available under the employer's existing policies.[112] Thus, because the employee was not eligible for workers' compensation benefits, the proposed accommodation was not reasonable.[113]

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102. Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 680 (7th Cir. 1998).

103. *Middleton*, 139 F. Supp. 2d at 798.

104. *Id.* at 787.

105. *Id.* at 798.

106. *Id.*

107. *Id.* at 797-98.

108. No. CV-00-71-ST, 2001 WL 34039485 (D. Or. Oct. 19, 2001).

109. There was a distinction between *light*-duty assignments and *limited*-duty assignments under the employer's policy. *See id.* at *12.

110. *Id.* at *13.

111. *Id.*

112. *Id.*

113. *Id.*

Given the increased use of part-time employees in recent years, it is natural that employers have developed separate policies related to such employees. These policies may extend to light-duty assignments. In *Pulcino v. Federal Express Corp.*,[114] the Washington Supreme Court dealt with such a policy in a case involving the state's disability discrimination statute. Although Washington's statute is not identical to the ADA, it does contain the same duty of reasonable accommodation and the court had previously concluded that this duty could include reassignment to a vacant position.[115] The employer asserted that it was not required to reassign a disabled employee to a light-duty position because only full-time employees were eligible for such positions under the employer's policy.[116] The court took a far less deferential approach to the existence of the employer's neutral policy than many federal courts, stating that an employer "should not be able to hide behind a policy of not providing light duty for part-time employees when such a policy is unreasonable."[117] The court suggested that in "an era where some employers rely heavily on a part-time workforce, such a policy may be subject to question," and concluded that the reasonableness of the employer's policy was a jury question.[118]

In contrast, the Fifth Circuit Court of Appeals upheld an employer's preference for full-time employees over part-time employees in reassignment matters in *Daugherty v. City of El Paso*.[119] Under the city's charter, the city's civil service system gave full-time employees priority over part-time employees in filling vacant positions.[120] There were several full-time positions available, but the city was unwilling to depart from the policy contained in the charter for fear of receiving complaints (and possible lawsuits) from full-time employees if the plaintiff, a part-time employee, were reassigned to the position.[121] The court sided with city, stating that it did not read the ADA as requiring "affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."[122]

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114. 9 P.3d 787 (Wash. 2000).

115. *Id.* at 794-95 (citing MacSuga v. County of Spokane, 983 P.2d 1167 (Wash. Ct. App. 1999)).

116. *Id.* at 795.

117. *Id.* at 796.

118. *Id.*

119. 56 F.3d 695, 699 (5th Cir. 1995).

120. *Id.*

121. *Id.*

122. *Id.* at 700.

2. Best-Qualified Individual Cases

According to the EEOC, to satisfy the reasonable accommodation requirement in a reassignment case, a disabled employee must be given the vacant position if he or she is qualified; it is not sufficient that the employee simply be allowed to apply for the position and compete against other applicants or current employees.[123] At least two federal appellate courts have agreed, suggesting that the reasonable accommodation requirement would amount to an empty promise if an employer could satisfy the requirement by simply allowing the disabled employee to compete for the vacant position.[124] As the Tenth Circuit Court of Appeals stated in *Smith v. Midland Brake, Inc.*, the statute does not say "*consideration* of a reassignment to a vacant position."[125] Thus, the word "'reassignment' must mean something more than the mere opportunity to apply for a job with the rest of the world."[126]

In response, Judge Richard Posner of the Seventh Circuit Court of Appeals referred to the EEOC's policy as "affirmative action with a vengeance."[127] Writing for the court in *EEOC v. Humiston-Keeling, Inc.*, Judge Posner savaged the EEOC's contention that the reassignment accommodation requires an employer to "give [a disabled employee] the [vacant] job even if another worker would be twice as good at it, provided only that this could be done without undue hardship to the employer."[128] While acknowledging that anti-discrimination laws, and the ADA in particular, may impose costs on employers, Judge Posner argued that:

> [T]here is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group.[129]

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123. *See Enforcement Guidance*, *supra* note 43, at n.90.

124. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166-67 (10th Cir. 1999); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304-05 (D.C. Cir. 1998).

125. *Midland Brake*, 180 F.3d at 1164 (emphasis added).

126. *Id.*

127. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000).

128. *Id.* at 1028.

129. *Id.* at 1028-29. Tweaking the facts of *Humiston-Keeling* to illustrate his point, Judge Posner suggested that, under the EEOC's view, an employer would be required to reassign a twenty-nine year-old white male with severe tennis elbow to a vacant position over a sixty-two year-old black woman with no disability despite the fact that the woman was "not only the better applicant but also a member of one of the minority groups that the laws administered by the EEOC are supposed to be protecting." *Id.* at 1027. Judge

These types of cases clearly pit the interests of employers at odds with the interests of disabled employees; however, the conflict that arises between a disabled employee and other employees is at least as substantial. An employer is not required to reassign a disabled employee to a vacant position if the employee is not qualified for the position.[130] Thus, even if the employer is not able to fill the vacancy with the most qualified employee, it still ends up with a qualified individual in the position. The conflict between a disabled employee and a better qualified employee is analogous. As reassignment is the accommodation of last resort, if a disabled employee is denied the vacancy, the employee will be out of a job and, because of his or her disability, may have difficulty obtaining a new job.[131] If a better qualified employee is denied the vacancy, presumably he or she will still have a job, just not the job desired. However, the impact on the better qualified employee could be more than de minimis. For whatever reason, the employee desired to move into the new position, so presumably the employee considered the vacant position to be an improvement over the employee's current position. Moreover, the vacant position may objectively be an improvement over the current position even though it is not technically a promotion.

3. Collective Bargaining Agreement Cases

One of the earliest sources of conflict over the reasonable accommodation requirement involved the rights provided to other employees by a collective bargaining agreement.[132] The general rule that soon emerged was that an employer is not required to violate the seniority provisions of a collective bargaining agreement in order to accommodate a disabled employee through reassignment to a vacant position; such an accommodation would be unreasonable per se.[133] Importantly, despite the fact that violating the provisions of a collective bargaining agreement potentially subjects *an employer* to legal action, most courts have tended to focus on the effects on *other employees* of reassigning a disabled employee in violation of a collective bargaining

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Posner continued, "Thus on the Commission's view there is a hierarchy of protections for groups deemed entitled to protection against discrimination, with the disabled being placed ahead of the members of racial minorities." *Id.*

130. *See supra* note 54 and accompanying text.

131. *See* Anderson, *supra* note 11, at 42.

132. *See* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995).

133. This is true under both the ADA and the "linguistically similar Rehabilitation Act." US Airways, Inc. v. Barnett, 535 U.S. 391, 392-93 (2002); *see* Vikram David Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 GREEN BAG 2D 361, 361-62 (2002) (stating that even before *Barnett*, "everyone had already agreed that seniority in the context of [collective bargaining agreements] is largely beyond the scope of the ADA").

agreement.[134] Thus, the general rule is that an accommodation that requires an employer to violate another employee's contractual rights is not reasonable.[135]

Despite this general rule, one federal appellate court has expressed a willingness to inquire into the specific facts of a case to determine whether an accommodation that would violate the terms of a collective bargaining agreement might nonetheless be reasonable. In *Aka v. Washington Hospital Center*,[136] the D.C. Circuit Court of Appeals initially rejected the position that the terms of a collective bargaining agreement served as a per se bar to an accommodation that conflicted with those terms.[137] The court noted that the ADA's legislative history specifically stated that while the existence of a collective bargaining agreement may be considered a factor in determining the reasonableness of a proposed accommodation, the terms of the agreement "would not be determinative on the issue."[138] For example, the court suggested in dicta that a reassignment requiring a non-disabled employee who was entitled to a vacant position under the collective bargaining agreement to simply wait an extra day to receive an identical assignment might be reasonable, despite the fact that it would conflict with the literal terms of the agreement.[139] Thus, the court was unwilling to make blanket assumptions about whether a proposed accommodation could trump the terms of a collective bargaining agreement or vice versa, and instead adopted an approach that looked to the degree of impact on the non-disabled employee.[140] The decision was later withdrawn and the court did not address the issue when the case was reheard en banc.[141]

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134. *See* Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998) (stating that reassignment in violation of a collective bargaining agreement would violate the rights of other employees subject to the collective bargaining agreement); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996) (stating that reassignment in such cases "poses a conflict not so much between the rights of the disabled individual and his employer and union, but between the rights of the disabled individual and those of his co-workers"); Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989) (stating in the context of the Rehabilitation Act, "To give plaintiff such a new position would violate the collective bargaining rights of other employees . . . .").

135. *See, e.g.*, *Benson*, 62 F.3d at 1114.

136. 116 F.3d 876 (D.C. Cir. 1997), *aff'd en banc on other grounds*, 156 F.3d 1284 (D.C. Cir. 1998).

137. *Id.* at 896.

138. *Id.* at 895 (quoting S. REP. NO. 101-116, at 32 (1989)).

139. *Id.* at 896.

140. *See id.*

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

4. Unilaterally-Imposed Seniority Systems and *US Airways, Inc. v. Barnett*

US Airways, Inc. v. Barnett presented the Supreme Court with its first opportunity to speak to the ADA's reasonable accommodation requirement in the work setting. Robert Barnett was a US Airways employee who injured his back while working in a cargo-handling position.[142] Although no collective bargaining agreement covered Barnett's situation, US Airways had a seniority system that, according to the trial court, had been in place for decades and governed "over 14,000 US Air Agents."[143] Barnett invoked his seniority rights and transferred to a less physically demanding position in the mailroom.[144] Under the seniority system, which was unilaterally imposed by US Airways, the mailroom position periodically became open to seniority-based employee bidding.[145] Two years after injuring his back, Barnett learned that at least two more-senior employees intended to bid for the mailroom job.[146] In response, Barnett requested that US Airways make an exception to its seniority rule and permit him to remain in the mailroom.[147] After considering the matter, US Airways declined to make an exception to its rule and Barnett lost his job.[148]

The issue on certiorari was whether the ADA "requires an employer to reassign a disabled employee to a position as a reasonable accommodation even though another employee is entitled to hold the position under the employer's bona fide and established seniority system."[149] The Fourth Circuit Court of Appeals had previously concluded that an employer was not required to take such action,[150] while the Ninth Circuit Court of Appeals, in *Barnett*, had held that the existence of a seniority policy was only one factor in the reasonableness determination.[151] Barnett argued that US Airways should be forced to defend the case on undue hardship grounds, not on the basis that the proposed accommodation was unreasonable.[152] Relying on the EEOC's regulations, Barnett argued that a "reasonable accommodation" was an "effective" one, i.e., one that "*enable[s]* a qualified individual with a disability to perform the

142. US Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002).
143. *Id.*
144. *Id.* at 391.
145. *Id.* at 394, 404.
146. *Id.* at 394.
147. *Id.*
148. *Id.*
149. *Id.* at 395-96.
150. EEOC v. Sara Lee Corp., 237 F.3d 349, 350 (4th Cir. 2001).
151. Barnett v. US Air, Inc., 228 F.3d 1105, 1125 (9th Cir. 2000), *vacated by* 535 U.S. 391 (2002).
152. *Id.* at 1110-11.

essential functions of [a] position."[153] Barnett argued that, particularly in the context of reassignment to a vacant position, such an interpretation was required. Under the statute, the burden of demonstrating the reasonableness of an accommodation is on the plaintiff, while the burden of establishing the imposition of an undue hardship is on the employer.[154] According to Barnett, by defending the suit on the basis of a "seniority rule violation," US Airways was, in effect, arguing that the reassignment amounted to the imposition of an undue hardship.[155] Accordingly, if Barnett were required to demonstrate that reassignment was a reasonable accommodation in spite of the violation of the seniority rule, he would be forced to prove a negative, "an absence of hardship," while US Airways was in the superior position to prove the existence of such a hardship.[156] Thus, Barnett argued, he should only have to establish that his proposed accommodation was effective.

The Court rejected Barnett's burden of proof argument, stating that "in ordinary English the word 'reasonable' does not mean 'effective,'" nor did the statute suggest such an interpretation.[157] Importantly, the Court suggested that an accommodation could be unreasonable based on its impact, "not on business operations, but on fellow employees."[158] An accommodation that was simply "effective" could lead to "dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent."[159] Instead of choosing to interpret the word "reasonable" as meaning "effective," the Court interpreted the term to mean something along the lines of "feasible for the employer" or "plausible."[160] In a somewhat circular fashion, the Court suggested that the plaintiff's burden in establishing the existence of a reasonable accommodation is to "show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[161] According to the Court, "Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."[162]

In applying this standard, the Court took a fact-specific approach to determining what the relevant "run of cases" would be. For the Court, the proper

153. *Barnett*, 535 U.S. at 399 (citing 29 C.F.R. § 1630(o)(ii) (2001)).
154. *Id.* at 400.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 400-01.
160. *Id.* at 401-02; *see also id.* at 423 (Souter, J., dissenting).
161. *Id.* at 402.
162. *Id.*

question was whether reassignment to a vacant position (an accommodation which would be reasonable "in the run of cases") is not a reasonable accommodation when it would violate a seniority policy.[163] According to the Court, the violation of such a policy would "ordinarily" make reassignment an unreasonable accommodation.[164] In reaching its conclusion, the majority focused on the benefits that flow to employers and other employees from seniority systems, but with an emphasis on the benefits to other employees. Such systems "creat[e] and fulfill[] employee expectations of fair, uniform treatment"; they provide "job security and an opportunity for steady and predictable advancement based on objective standards"; they help establish an order as to who will be laid off during a reduction in force; they "include an element of due process, limiting unfairness in personnel decisions"; and they "encourage employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years."[165] Most important, in the Court's determination, was that requiring an employer to show more than the existence of a seniority system "might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend."[166] Although the Court focused primarily on the benefits to employees that flow from seniority systems, the Court also recognized that such systems play an important role in management-employee relations more generally. Seniority systems enable management to apply "more uniform, impersonal" seniority rules instead of "complex case-specific 'accommodation' decision[s],"[167] thereby eliminating some of the burden imposed by the ADA on employers. Once such systems are established, violations of or variances from them may produce difficulties for employee-management relations.[168] "Discretionary" accommodation decisions made by employers "would involve a matter of the greatest importance to employees, namely, layoffs."[169] By limiting their discretion in such matters through the implementation of seniority systems, employers have created "expectations of consistent, uniform treatment" that must be maintained if the benefits of seniority systems are to be realized.[170] If a reasonable accommodation could trump seniority systems in "the run of cases," the benefits of such systems would be lost.

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163. *Id.* at 403.
164. *Id.*
165. *Id.* at 404 (internal quotations omitted) (internal citations omitted).
166. *Id.*
167. *Id.*
168. *Id.* at 403-05.
169. *Id.* at 405.
170. *Id.* at 404.

In support of its assessment of the importance of seniority systems, the majority also pointed to the Court's past recognition of "the importance of seniority to employee-management relations" in the context of a requested accommodation for religious practices in *Trans World Airlines, Inc. v. Hardison*.[171] The majority characterized the Court's prior holding as establishing that "an employer need not adapt to an employee's special worship schedule as a 'reasonable accommodation' where doing so would conflict with the seniority rights of other employees."[172] In conclusion, the *Barnett* majority stated that it could "find nothing in the statute that suggests Congress intended to undermine seniority systems in this way."[173]

The majority did provide at least two victories for disabled employees. First, the majority stated that a disabled employee "nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system . . . , the requested 'accommodation' is 'reasonable' on the particular facts."[174] Such "special circumstances" might include where the employer, "having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations . . . to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference."[175] Or perhaps the plaintiff could show "that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter."[176] Ultimately, however, the plaintiff must show why a seniority system, which carries a presumption of reasonableness, should not be a bar to concluding that the plaintiff's request for reassignment in violation of the policy is unreasonable.[177]

Second, the Court rejected US Airways' argument that the ADA does not require employers to provide "preferential" treatment for disabled employees by requiring employers to depart from neutral rules.[178] Indeed, the Court explicitly recognized that the reasonable accommodation requirement requires employers to treat disabled employees differently, "i.e., preferentially."[179] Although the Court's ultimate holding is that it is generally unreasonable to require an employer to depart from a seniority policy, "the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the

171. *Id.* (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)).
172. *Id.* at 403.
173. *Id.* at 405.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 405-06.
178. *Id.* at 397.
179. *Id.*

accommodation beyond the Act's potential reach."[180] Thus, the Court seems to reject the rule advanced by several lower courts that an employer is not required to ignore legitimate, non-discriminatory intra-company transfer policies.

The majority opinion prompted two separate concurrences and two separate dissents. Justice O'Connor's concurring opinion and Justice Souter's dissent in particular seem to view Barnett's accommodation rights as sufficient to trump the other employees' expectations of consistent, uniform treatment. Although she signed on to the majority opinion, Justice O'Connor made clear that she did not fully agree with the majority's approach and joined the majority, in part, only to prevent a stalemate.[181] Justice O'Connor viewed the conflict in *Barnett* as primarily being between Barnett and the more-senior employees. For Justice O'Connor, the key question in such cases is whether the position in question is truly "vacant." Under Justice O'Connor's rationale, "a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement."[182] Where a legally enforceable seniority rule exists, the person with the contractual right to the position becomes the "possessor" and the position cannot be considered "vacant."[183] Where the seniority system in question is unenforceable, the employee expecting assignment to a position "would not have any type of contractual right to the position," and the position, therefore, would be "vacant."[184]

Justice O'Connor concluded by suggesting that the loophole created by the majority, which allows a disabled employee to show that "special circumstances" exist that make reassignment reasonable, "will often lead to the same outcome" as the test Justice O'Connor proposed.[185] If the seniority policy is unenforceable, and if employers have retained the right to change the system, thus possibly permitting frequent exceptions to the policy, then employees will have reduced "expectations that the system will be followed."[186] Therefore, a disabled employee "may be able to show circumstances that make the accommodation 'reasonable in the particular case.'"[187]

Justice Souter's chief complaint with the majority approach was that it gave such weight to the importance of seniority rules that it almost insulated them from the reasonable accommodation requirement. In his dissent, Justice Souter focused on the effects that Barnett's request for reassignment would have on the competing interests of all three concerned parties. Although acknowledging the

180. *Id.*
181. *See id.* at 408 (O'Connor, J., concurring).
182. *Id.* at 409 (O'Connor, J., concurring).
183. *Id.* (O'Connor, J., concurring).
184. *Id.* (O'Connor, J., concurring).
185. *Id.* at 411 (O'Connor, J., concurring).
186. *Id.* (O'Connor, J., concurring).
187. *Id.* (O'Connor, J., concurring) (quoting majority opinion).

"value and importance of seniority systems," Justice Souter found it hard to believe that US Airways' system was "any match for Barnett's ADA requests."[188] Looking at the interests of US Airways, Justice Souter suggested that if Barnett's request would have resulted in something "more than minimal disruption to US Airways's operations," such as creating "unmanageable ripple effects," the request might not have been reasonable.[189] However, no such evidence existed.[190] As far as Barnett's interests were concerned, the ADA obviously gave him a right to a reasonable accommodation. According to Justice Souter, Barnett's interests were made stronger by the fact that he had already held the job in question for two years.[191] Thus, according to Justice Souter, "perhaps unlike ADA claimants who request accommodation through reassignment, Barnett was seeking not a change but a continuation of the status quo."[192]

Turning to the interests of the other non-disabled employees and those similarly situated, Justice Souter suggested that the effect of granting Barnett his proposed accommodation would have been minimal and that the interests of the other employees paled in comparison to Barnett's. As far as the effects on other employees, Justice Souter noted that "no one would have lost a job on [Barnett's account]" and there had been no showing that Barnett "would have overstepped an inordinate number of seniority levels by remaining where he was."[193] Other employees had no contractual right to any position under US Airways' unilaterally-imposed seniority system. US Airways' reservation of its right to "change any and all" of the policies contained within its handbook effectively prevented employees from asserting a contractual right to the position in question.[194] Thus, US Airways "took pains to ensure that its seniority rules raised no great expectations."[195]

In addition to the interests of the affected parties, Justice Souter also looked at the ADA's reasonable accommodation requirement in relation to other federal anti-discrimination law. To Justice Souter, nothing in the statutory language or legislative history suggested that an employer's seniority system could somehow

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188. *Id.* at 420, 423 (Souter, J., dissenting).

189. *Id.* at 423-24 (Souter, J., dissenting).

190. *Id.* at 423 (Souter, J., dissenting).

191. *Id.* (Souter, J., dissenting).

192. *Id.* (Souter, J., dissenting).

193. *Id.* (Souter, J., dissenting).

194. *Id.* (Souter, J., dissenting) (quoting US Airways' Agent Personnel Policy Guide). Justice Souter continued, "[I]t is safe to say that the contract law of a number of jurisdictions would treat this disclaimer as fatal to any claim an employee might make to enforce the seniority policy over an employer's contrary decision." *Id.* at 423-24 (Souter, J., dissenting).

195. *Id.* at 423 (Souter, J., dissenting).

be insulated from the reasonable accommodation requirement.[196] In contrast, Justice Souter pointed out that both Title VII and the ADEA contain "explicit protection for seniority" in the form of provisions allowing employers to provide different benefits pursuant to a bona fide seniority system and to abide by the terms of a bona fide seniority system.[197] "Because Congress modeled several of the ADA's provisions on Title VII," Justice Souter suggested, "its failure to replicate Title VII's exemption for seniority systems" provided "more than a hint that seniority rules do not inevitably carry the day."[198] After weighing the competing interests, Justice Souter concluded that Barnett's requested accommodation was reasonable and that US Airways should be forced to demonstrate that it would work an undue hardship before refusing to grant the request.

Justice Scalia dissented on different grounds. The problem with the majority's approach, according to Justice Scalia, is that it renders the ADA's reasonable accommodation provision "a standardless grab bag—leaving it to the courts to decide which workplace preferences . . . can be deemed 'reasonable.'"[199] The approach advocated by Justice Scalia would eliminate any need to resort to a weighing of competing interests in the context of a situation like in *Barnett* because, in effect, the statutory language has already accomplished this process. Justice Scalia's reasoning is roughly as follows: the ADA makes it illegal to discriminate against a qualified individual with a disability *because of the disability* of the individual.[200] Discrimination under the statute includes "not making reasonable accommodations *to the known physical or mental limitations* of an otherwise qualified individual with a disability."[201] "Read together," Justice Scalia argued, "these provisions order employers to modify or remove (within reason) policies and practices that burden a disabled person 'because of [his] disability.'"[202] Because US Airways' seniority rule did not bear more heavily on Barnett than other employees because of his disability, US Airways was under no obligation to deviate from the rule.[203]

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196. *Id.* at 421-22 (Souter, J., dissenting).

197. *Id.* at 420 (Souter, J., dissenting).

198. *Id.* at 420-21 (Souter, J., dissenting).

199. *Id.* at 414 (Scalia, J., dissenting).

200. *Id.* at 413 (Scalia, J., dissenting).

201. *Id.* at 412-13 (Scalia, J., dissenting).

202. *Id.* at 413 (Scalia, J., dissenting).

203. *Id.* (Scalia, J., dissenting). There is at least some support in the legislative history for Justice Scalia's approach. *See* H.R. REP. NO. 101-485(II), at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 348 ("The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job *because of a physical or mental impairment.*") (emphasis added).

C. Is the Reasonable Accommodation Requirement a "Standardless Grab Bag"?

While *Barnett* presented the Supreme Court with an opportunity to provide some clarity not just on reassignment issues but on the reasonable accommodation requirement as a whole, ultimately the decision may have simply muddied already muddy waters. The clearest standard that could have emerged from the case was Justice Scalia's, which would require employers to remove only disability-related obstacles. Unfortunately, this approach would also greatly reduce the reach of the reassignment accommodation—the last resort available to fulfill Congress's goal of integrating individuals with disabilities into the workplace.

In terms of providing predictability for future litigants, the rule adopted by many courts that an employer is not required to ignore a legitimate, non-discriminatory policy on intra-company transfers would have provided perhaps the next best alternative. However, stated as broadly as it was, the rule was arguably over-inclusive in light of the fact that the ADA was designed to alter the ability of employers to rely on blanket approaches to workplace matters and also because the ADA specifically lists the modification of policies as a possible reasonable accommodation.[204] As other courts have noted, the fact-intensive nature of the ADA makes the creation of bright-line rules problematic.[205]

Similarly, the Court could have announced a broader rule that went beyond seniority policies and held that the same presumption of reasonableness that applies to seniority systems applies to all neutral intra-company transfer policies. In an effort to preserve some measure of harmony with existing federal anti-discrimination law, the Court could have concluded that, given the wide latitude that Congress and the courts have historically granted employers in establishing such policies, it would be unreasonable in the run of cases to require an employer to depart from a policy that is so fundamental to the exercise of employer discretion.[206] Although the Court stopped short of announcing such a rule, the Court's reasoning regarding the expectations created by seniority policies could easily transfer to other types of neutral policies.[207] However, by focusing as heavily as it did on the special status that seniority systems occupy in employment law and labor-management relations, it is doubtful that the Court

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204. *Barnett*, 535 U.S. at 397-98.

205. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 n.5 (1st Cir. 2001); *see also* Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992) (stating that "[r]easonableness is not a constant").

206. *Cf.* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998) (noting the range of intra-company transfer policies that have been upheld by courts in other contexts).

207. *See* Anderson, *supra* note 11, at 35-36.

intended this reading of the decision. Moreover, the same problem of over-inclusiveness that arguably plagued the bright-line rule regarding validating neutral employer policies would apply to a rule establishing the presumptive validity of such policies.[208]

Alternatively, the Court could have taken a more policy-specific approach. It could have concluded that seniority policies fall within a certain undefined class of important employer policies that are so fundamental to the way an employer does business that it would be unreasonable to require an employer to set them aside. Indeed, this seems to be the approach the Tenth Circuit Court of Appeals adopted in *Smith v. Midland Brake, Inc.* where the court stated that "[a]n employer need not violate . . . important fundamental policies underlying legitimate business interests."[209] According to the Tenth Circuit Court of Appeals, there are policies that are so "important" and "fundamental to the way an employer does business that it would be unreasonable" for an employer to set them aside "in order to accomplish reassignment of a disabled employee."[210] Thus, determining whether a proposed deviation from a policy was a reasonable accommodation in a given case would depend on whether the policy fell within an unspecified category of "important" policies that are "fundamental" to the way an employer does business.

If "importance" were to become the standard, however, courts would have to engage in a difficult process of categorization and line drawing that could potentially be over or under-inclusive in terms of protecting an employer's interests. Such an approach could, and arguably already did, lead to conflicting standards.[211] It might be a fairly easy matter to conclude that, because decisions as to which employee is most likely to be of benefit to an employer go to the heart of employer discretion, allowing an employer to fill positions with the most qualified individuals available is sufficiently important and fundamental to *any* employer's business that it would be unreasonable to require an employer to depart from it.[212] But would the same logic truly apply to a seniority policy? By enforcing such policies, employers are not attempting to choose the best-

208. *See id.* at 18.

209. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999).

210. *Id.* at 1176.

211. *Compare id.* (citing favorably cases holding that an employer is not required to reassign a disabled employee where the transfer would violate a legitimate, non-discriminatory policy of the employer) *with id.* at 1169 ("[R]equiring the reassigned employee to be the best qualified employee for the vacant job[] is judicial gloss unwarranted by the statutory language or its legislative history."). *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2002) (stating that the *Midland Brake* decision was not distinguishable, but regardless, an employer is not required to ignore a policy of giving a vacancy to the best qualified individual).

212. *See* O'Neil & Reiss, *supra* note 9, at 365 (referring to an employer's "fundamental right to select the most qualified individual for a vacant position").

qualified individual from a pool of qualified individuals in order to maximize profit. They are simply using the easiest means available to fill vacancies in an effort to *avoid* having to choose between qualified individuals.[213] As one moves further along the spectrum of employer decision-making, making classifications based on an abstract notion of which policies are "important" and "fundamental" becomes more difficult. Is a policy against reassigning an employee to a new position when the reassignment would result in a demotion important enough to generally make it immune from the reasonable accommodation requirement?[214] A policy of making reassignments available only to full-time, as opposed to part-time, employees?[215] A policy that extends a preference in reassignments to full-time employees over part-time employees?[216] A policy of only reassigning employees who have been injured on the job to light-duty assignments?[217] A policy of only reassigning employees who are *temporarily* unable to perform their current positions?[218] A policy of requiring that all employees desiring a transfer must follow certain application procedures?[219] If each of these policies is sufficiently important and fundamental to the way employers do business to generally excuse an employer's refusal to depart from it, then why are neutral leave of absence rules or fixed work schedule policies—policies that courts generally agree an employer may be required to depart from in order to accommodate a disabled individual—any less important?[220] At some point, an approach that required such blanket characterizations as to whether certain policies are sufficiently important or fundamental to the way an employer does business would be likely to produce results even more varied than currently exist.

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213. *See generally* EEOC v. Sara Lee Corp., 237 F.3d 349, 354 (4th Cir. 2001) (stating that a seniority policy "is a neutral and non-arbitrary method of resolving sensitive questions in the workplace").

214. *See supra* notes 51-52 and accompanying text.

215. *See supra* notes 114-18 and accompanying text.

216. *See supra* notes 119-22 and accompanying text.

217. *See supra* notes 103-07 and accompanying text.

218. *See supra* notes 101-06 and accompanying text.

219. *Compare* Shapiro v. Township of Lakewood, 292 F.3d 356, 357-58 (3d Cir. 2002) (departing from a policy that requires all employees to respond to a posting of vacant positions may be a reasonable accommodation) *with* Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 258 (6th Cir. 2000) (holding it would not be a reasonable accommodation to require an employer to ignore such a policy).

220. *Cf.* Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 36-37 (1st Cir. 2000) (rejecting employer's argument that it should not have to modify an employee's work schedule because "it would eliminate employers' control over the workplace and ability to maintain any standards" on the grounds that the ADA imposes on an employer a duty "to modify some work rules, facilities, terms, or conditions to enable a disabled person to work, and if [the employer's] position were given credence, it would defeat almost any reasonable accommodation").

Thus, the Supreme Court's instinct in *Barnett* to focus on the impact of the proposed accommodation on other employees was sound. However, its implementation of that instinct is somewhat problematic. If the focus of the opinion is read to be on other employees' "expectations of consistent, uniform treatment," then the Court provided little guidance to lower courts in cases not involving seniority rules. All rules are designed to establish expectations of consistent, uniform treatment and let employees understand the rules of the game.[221] Thus, the Court's reasoning would seem to apply with equal force to virtually every neutral policy in the workplace, including transfer policies, leave of absence policies, and fixed work schedule policies.[222] If the *expectation of consistent, uniform treatment* on the part of other employees is the standard, rather than the actual *tangible effects* on other employees of providing the accommodation, then it is difficult to see any logical stopping point to the Court's holding.

This perhaps explains the Court's repeated emphasis on the important place that seniority policies occupy, not just in labor-management relations, but in anti-discrimination law more generally. By focusing so heavily on the importance of seniority policies, the Court effectively limited the precedential value of its decision. In doing so, however, it did employers and employees few favors in terms of providing predictability. The Seventh Circuit Court of Appeals, which had previously held that an employer is not required to depart from a "best-qualified" policy, has since stated that *Barnett* actually supports its previously-announced rule.[223] In contrast, when the Tenth Circuit Court of Appeals decided, prior to *Barnett*, that the reasonable accommodation requirement could require an employer to reassign a less-qualified disabled employee to a vacant position, the court specifically stated that an employer would not be required to ignore a well-entrenched seniority policy in order to comply with the reasonable accommodation, largely predicting the outcome in *Barnett*.[224] Thus, *Barnett*'s focus on the expectations of other employees prevents courts from applying their previously announced rule that an employer is not required to ignore a legitimate, non-discriminatory intra-company transfer policy,[225] but offers limited guidance for lower courts to follow now that the Court has deprived them of their bright-line rule. While Justice Scalia's description of the reasonable accommodation requirement as a "standardless grab bag" may be somewhat harsh, after *Barnett* it may not be entirely off the mark.

Of potentially greater utility is the Court's observation in *Barnett* that an accommodation could be unreasonable based on its actual tangible impact on

221. *See* EEOC v. Sara Lee Corp., 237 F.3d 349, 354-55 (4th Cir. 2001).

222. *See* Anderson, *supra* note 11, at 39.

223. Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002).

224. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999).

225. Anderson, *supra* note 11, at 34.

other employees. The Court's observation concerning some of the more dramatic effects for other employees that providing an accommodation might cause (dismissals, relocations, or modification of employee benefits) places the accommodation analysis on more solid ground. By focusing on the tangible effects that an accommodation would have on other employees, rather than the effects of the accommodation on the "expectations of consistent, uniform treatment" of other employees, future courts could restore some semblance of order to the ADA's "standardless grab bag."

V. THE NEED FOR A CLEARER LINE

Reasonable accommodation is a concept that simultaneously cries out for and makes difficult the creation of bright-line rules. This is particularly true in the case of accommodation by reassignment to a vacant position. Commentators have criticized Congress for failing to define more precisely the scope of the reasonable accommodation requirement.[226] Indeed, some have speculated that the reason why the Supreme Court and other federal courts have been so strict in their interpretation of the ADA's definition of disability is because they have sought to create a high threshold for qualifying as disabled in order to avoid having to deal with the amorphous reasonable accommodation requirement.[227] Given the highly fact-specific nature of ADA cases, it would be virtually impossible to devise a bright-line rule to cover the types of conflicts addressed in this Article that would not be either over or under-inclusive. Instead, the best one can hope to accomplish is to reduce some of the existing uncertainty.

Cases in which the interests of disabled and non-disabled employees come into conflict, however, present a situation in which something approximating a bright-line rule is both possible and highly desirable. Congress clearly contemplated that employers and other potential defendants would bear the costs of allowing individuals with disabilities to participate in the mainstream of society,[228] and it would be impossible to expect that other employees would not be burdened somewhat by the actions of their employers. The extent to which Congress intended for other employees to bear this burden is, however, subject to debate. The few references to the impact of an accommodation on other employees that appear in the legislative history are inconclusive.[229] As

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226. Issacharoff & Nelson, *supra* note 7, at 339-40.

227. *Id.* at 320-01.

228. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 350-51 (2001).

229. *See generally* O'Neil & Reiss, *supra* note 9, at 359 ("[T]here is nothing in the legislative history that suggests that Congress intended non-disabled employees to shoulder the burdens of the ADA at the expense of their own careers."). The only reference to reassignment as an accommodation that has been cited by courts is

mentioned, however, the text of the ADA itself contains several provisions that work to minimize the burdens on other employees that an accommodation might cause.[230] As a matter of common sense, it is difficult to believe that Congress, in the absence of any clear legislative history to the contrary, intended to remedy the problems facing individuals with disabilities by requiring that employers take action that would cause other employees to suffer a materially adverse impact.

Thus far, much of the scholarship addressing the reasonable accommodation requirement in the context of employment reflects the implicit assumption that the non-contractual interests of employees who may be adversely affected by an accommodation are of secondary importance to the interests of a disabled employee.[231] Given the long history of discrimination against individuals with disabilities and Congress's expressed goal of bringing individuals with disabilities into the mainstream of society, such a view is certainly understandable. Ultimately, however, there are equities involved on both sides

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susceptible to different interpretations. *See* H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("The Committee also wishes to make clear the reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required."); S. REP. NO. 101-116, at 32 (1989) (same). *Compare* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1168-69 (10th Cir. 1999) (using legislative history regarding the bumping of other employees to support the conclusion that it is a reasonable accommodation to reassign a less-qualified employee to a vacant position over a better-qualified employee) *with id.* at 1181-82 (Kelly, J., concurring in part & dissenting in part) (using the same legislative history to support the opposite conclusion). As mentioned, the legislative history concerning seniority policies contained within collective bargaining agreements provides that the existence of such a policy "may be considered as a factor in determining whether" an accommodation is reasonable, although the agreement would not be determinative. H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345. Several of the statements made during congressional debate are of a more general nature, but reference a concern that the ADA could be interpreted as requiring employers to give preferences to individuals with disabilities. *See* 136 CONG. REC. H2,438 (daily ed. May 17, 1990) (statement of Rep. Edwards) ("[N]or does it require employers to give preference to persons with disabilities."); *id.* at H2,439 (statement of Rep. Edwards) ("Under the ADA, persons with disabilities will have the same rights and remedies as minorities and women, no more and no less.").

230. *See supra* notes 59-70 and accompanying text.

231. *See* Anderson, *supra* note 11, at 33 (stating that the ADA "reflects an intent to upset 'expectations,'" including those of other employees, "to the extent that they limit the employability of individuals with disabilities"); *id.* (stating that with regard to the accommodation of job restructuring that other employees "may be required to bear the entire burden of the marginal tasks" once belonging to a disabled employee's position); Befort & Donesky, *supra* note 5, at 1089 (stating that "the scale[s] generally should tip in favor of the disabled employee" when an employer must choose between reassigning a less-qualified disabled employee and a better-qualified, non-disabled employee to a vacant position).

of the conflict. The view that the non-contractual interests of other employees are of secondary importance to the interests of an employee with a disability is flawed for practical as well as equitable reasons. First, if, as Congress and the EEOC have stated, the purpose of the reasonable accommodation requirement is to allow for equal employment opportunity,[232] the interests of disabled employees and non-disabled employees should be of equal importance.

Second, minimizing the impact of an accommodation on other employees is ultimately self-defeating for disability rights advocates. Several authors have charged that courts are reluctant to give full effect to the ADA because they view the statute as creating "special rights" for individuals with disabilities or because they are resistant to the notion that sometimes equality of opportunity may require unequal treatment.[233] There can be no question that the ADA requires "preferential" treatment in the sense that it may require different treatment of disabled and non-disabled employees. However, it does not necessarily follow that "preferential" treatment of individuals with disabilities should amount to detrimental treatment of non-disabled employees. There is perhaps no better way to ensure that courts remain reluctant to fully effectuate the ADA's broad remedial goals than to adopt such a reading of the statute. Those who seek to ensure equality of opportunity for individuals with disabilities need to be willing to acknowledge that requiring employers to make certain accommodations in the workplace may, in some instances, impose real burdens on employers and other employees.[234] It is not enough to suggest that these burdens are minimal simply because other employees have no contractual rights to maintain the status quo of their work environment or to a particular job in the workplace. Indeed, it is somewhat unsettling to read Justice Souter's suggestion in *Barnett* that the impact on two more-senior employees of reassigning Robert Barnett to a vacant position would be fairly minimal, in part because neither would have lost a job as a result of the reassignment. As discussed in greater detail below, the courts have been willing to recognize that numerous employment actions falling short of termination are significant enough to constitute an alteration of the terms and conditions of employment under anti-discrimination law.[235]

Finally, such an approach keeps with the approach of courts in employment discrimination law more generally. As discussed previously, courts in the ADA context have expressly taken into consideration the impact on other employees

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232. 42 U.S.C. § 12101(a)(9) (2000); 29 C.F.R. app. § 1630.9 (2003).

233. *See* Anderson, *supra* note 11, at 143; Diller, *supra* note 5, at 40.

234. *See generally* Hayward v. Mass. Water Res. Auth., No. CA 98-0953-F, 2001 Mass. Super. LEXIS 231, at *18 (Mass. Super. Ct. May 15, 2001) (refusing to find an employers' duty to reassign disabled employees to vacant positions under Massachusetts anti-discrimination statute because it would open "a Pandora's box of difficult issues regarding the interpretation and application of this obligation by employers").

235. *See infra* notes 273-76 and accompanying text.

that modifying an existing policy or practice might have, and have protected the interests of these individuals when they would be adversely affected by a modification.[236] In the Title VII context, the federal courts have taken care to protect not only the contractual rights of other employees who may get caught in the middle of a dispute between an employer and another employee, but also their non-contractual interests.[237] Courts have been highly reluctant to allow one employee's pursuit of his or her statutory rights to unduly impact another employee's interests in moving into a new position[238] or continuing to work under roughly the same conditions.[239]

Admittedly, the Title VII cases are distinguishable, as is the approach Title VII itself takes with respect to discrimination. For example, Congress specifically rejected the de minimis standard of undue hardship established in Title VII cases involving accommodations for religious practices articulated in *Trans World Airlines, Inc. v. Hardison*.[240] Yet, the Court's pronouncement in *Hardison* that an accommodation that forces an employer to bear more than a de minimis cost imposes an undue hardship was made in reference to the actual monetary costs that would have flowed from TWA having to pay premium wages to another employee in order to accommodate Hardison.[241] When the Court concluded that TWA was not required to "deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others,"[242] the Court seemed to be concluding that such an accommodation was not *reasonable*[243]—an analysis separate from the undue hardship analysis. Another more important distinction between the Title VII and ADA cases is that Title VII proceeds from a premise that employers must treat all employees in the same fashion, without regard to certain characteristics. In contrast, the ADA *requires* employers to treat

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236. *See supra* notes 89-94 and accompanying text.

237. *See supra* notes 74-87 and accompanying text.

238. *See* Johnson v. Transp. Agency, 480 U.S. 616, 628-30 (1987).

239. *See* Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001), *cert. denied*, 534 U.S. 952 (2001).

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

241. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

242. *Id.* at 81.

243. *See id.* ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far."); *see also* US Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) (characterizing *Hardison* as holding that "an employer need not adapt to an employee's special worship schedule as a '*reasonable accommodation*' where doing so would conflict with the seniority rights of other employees") (emphasis added).

individuals with disabilities differently.[244] Yet, the Title VII decisions, taken as a whole, do reflect serious equitable concerns on the part of the courts with respect to differential treatment that results in material harm to other employees.[245]

VI. SOLUTIONS

Constructing a bright-line rule in cases that pit the interests of employers, disabled employees, and non-disabled employees at odds is a difficult task. Any rule should take into account not only the interests of the affected parties, but the policy reasons underlying the reasonable accommodation requirement, the broad goals of the ADA, and the need to create harmony with other areas of law. The rule that best achieves these goals would hold that a proposed accommodation is not reasonable when it would violate the contractual rights of another employee or otherwise result in an adverse employment action (as that term is defined through case law) for a non-disabled employee. Thus, the focus would be on the actual effects or likely effects that providing an accommodation would have on other employees. If an accommodation does not result in an adverse employment action in a particular case, the undue hardship defense and the other rules that have developed concerning the reasonable accommodation requirement should be sufficient to resolve most questions as to whether an employer must provide the accommodation.

A. Current Proposals

To date, at least two commentators have suggested approaches to dealing with cases in which an accommodation request causes conflicts between the interests of an employer, a disabled employee, and a non-disabled employee. Professor Stephen F. Befort has argued that the reasonableness of an

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244. Karlan & Rutherglen, *supra* note 2, at 10-11.

245. There is one possible exception to this general rule, but it is easily distinguishable. Both Title VII and the ADEA authorize courts to order various forms of equitable relief for victims of discrimination, including reinstatement to the individual's former position. 42 U.S.C. § 2000e-5(g) (2000); 29 U.S.C. § 626(b) (2000). Despite the fact that, under existing case law, a victim of discrimination is presumptively entitled to reinstatement, *see* Franks v. Bowman Transp. Corp., 424 U.S. 747, 780 n.41 (1976), the federal courts are particularly wary of authorizing this form of relief where other employees would be materially impacted. *See* Walters v. City of Atlanta, 803 F.2d 1135, 1149 (11th Cir. 1986); Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 121 (4th Cir. 1983); Elizabeth Newsom, *The Price of Eradicating Discrimination: Should a Title VII Plaintiff Displace an Incumbent Employee?*, 59 GEO.WASH. L. REV. 1395, 1403 (1991). Importantly, reinstatement is only available where an employer has already been found to have made an adverse employment decision on the basis of a protected class.

accommodation depends on the type of request involved.[246] According to Befort, it is generally a reasonable accommodation for an employer to reassign a disabled employee to a vacant position even though that employee may not be the best qualified individual.[247] This result, Befort argues, is justified because a contrary result would curtail the ADA's purpose of enabling individuals with disabilities to remain in "the economic and social mainstream of American life."[248] According to Befort, this goal would be frustrated by a contrary rule because if the non-disabled employee is better qualified, he or she remains employed and is still "a strong candidate for a future transfer or promotion."[249] In contrast, because reassignment to a vacant position is the accommodation of last resort, the disabled employee would be out of a job.[250] However, Befort argues that where an accommodation request would require an employer to violate other neutral transfer and assignment policies that serve a legitimate business purpose, such as a seniority policy or a "no demotion" policy,[251] the requested accommodation is generally unreasonable.[252] The difference in results, Befort explains, is justified because in the latter situations, such a rule preserves the discretion of employers to adopt valid, neutral polices and protects the "legitimate expectations" of other employees that the policies will be followed.[253] According to Befort, "An employer's consistent application of such policies promotes fairness and predictability, as well as creating genuine incentives for the workforce as a whole."[254]

One problem with this suggested approach is that it contains a certain amount of internal inconsistency. If it is generally unreasonable to force an employer to depart from a seniority or "no demotion" policy, in part because such policies create "genuine incentives" for employees and because departures from such policies upset the "legitimate expectations" of these employees, it is difficult to see why the same reasoning would not apply to a "best-qualified" policy.[255] In either scenario, the disabled employee would still be out of a job if the employer refused to make an exception to its policy, so there is no real distinction in terms of the consequences to the disabled employee. In addition, a "best-

246. Befort, *supra* note 14, at 469; Befort & Donesky, *supra* note 5, at 1089.

247. Befort, *supra* note 14, at 469; Befort & Donesky, *supra* note 5, at 1088-89.

248. Befort & Donesky, *supra* note 5, at 1088-89 (quoting S. REP. NO. 101-116, at 20 (1989)).

249. *Id.* at 1089; *see also* Befort, *supra* note 14, at 470 ("The non-disabled worker remains employed in his or her current position, and the chance to move into a more desirable position is deferred rather than lost.").

250. Befort & Donesky, *supra* note 5, at 1089.

251. *See supra* note 51 and accompanying text.

252. Befort & Donesky, *supra* note 5, at 1091-93.

253. *Id.* at 1092.

254. *Id.*

255. *See* Anderson, *supra* note 11, at 39.

qualified" policy would seem to create the same type of incentives for employees as would a seniority policy. Moreover, although a variance from a "no demotion" policy might upset the predictability that results from the consistent application of polices, the same would be true of a departure from virtually any employer policy, including leave policies or fixed-work schedule policies.[256] Yet, in the case of a "no demotion" policy, it is far less likely there would be any kind of adverse impact on other employees who expected the policy to be enforced than in the case of a departure from a "best-qualified" policy.[257] Indeed, aside from general concerns over fairness that other employees might have, it is difficult to see why other employees would have any particularly strong objections to such a variance unless the disabled employee's demotion would otherwise disrupt the workplace.

In addition, Befort's justification for his proposed outcome in the case of a better-qualified, non-disabled employee presupposes (1) that another vacancy or promotion opportunity will in fact arise during the employee's tenure, and (2) that the employee will be the best-qualified individual for that position and that he or she actually would desire that position. Neither contingency is certain, or even likely, to occur. Finally, while Befort's point about undermining the ability of employers to legitimately exercise their discretion in personnel matters is a strong one, it seems to apply with *more* force to a "best-qualified" policy, where an employer is directly deciding which employee is the best fit for a position, than to a seniority policy, where an employer is abdicating any discretion as to which employee is most likely to maximize profit.

Professor Cheryl L. Anderson has suggested with regard to reassignment requests that clash with neutral employer policies that the Supreme Court's decision in *Barnett* be limited to the specific situation of seniority policies.[258] Regarding other neutral policies, a reassignment request should be reasonable "if the accommodation requires that the employer modify only a self-imposed policy regarding transfers and the employee is otherwise qualified for the position."[259] Thus, employers would be forced to defend their neutral intra-company transfer policies on undue hardship grounds, rather than on the issue of whether the proposed accommodation is reasonable.[260] For example, if an employer could show that denying a vacancy to a better-qualified, non-disabled employee "would have lasting effect [on the employer], this should be sufficient to show undue hardship."[261] Like Befort, Anderson justifies her proposed rule, in part, on the

256. *Id.*

257. *See infra* note 294 and accompanying text.

258. Anderson, *supra* note 11, at 43.

259. *Id.* at 42.

260. *Id.* Befort also argues that the undue hardship defense can provide employers with an "adequate escape valve" in such cases. Befort & Donesky, *supra* note 5, at 1090.

261. Anderson, *supra* note 11, at 42.

grounds that the harm suffered by a highly qualified, non-disabled employee who is denied a transfer is not as great as the harm to a disabled employee if he or she is denied the position.[262]

Anderson's proposal is limited to accommodation cases involving requested variances from neutral policies and focuses particularly on reassignments. As such, it does not fully address the numerous other situations in which an accommodation might adversely impact other employees. However, the primary flaw in the proposal is that it does not adequately take into account the interests of other employees. Anderson's proposal seems to proceed from the assumption that only the denial of another employee's contractual rights is sufficient to render an accommodation unreasonable.[263] The frustration of non-contractual expectations, therefore, is only sufficient to trump a disabled employee's interest in an accommodation during the undue hardship analysis. Such a view is problematic for the reasons discussed previously[264] and for other reasons discussed below.[265]

The undue hardship defense focuses on the effect of an accommodation on an employer.[266] Although the defense does take into account the effect of an accommodation on other employees, it does so only to the extent that providing the accommodation would ultimately result in "*significant* difficulty or expense" for the *employer*.[267] Thus, the focus of the undue hardship analysis is ultimately on the effect of an accommodation on the employer's business. Yet, Anderson takes a highly expansive view of what is meant by undue hardship. Under Anderson's view, the standard can be met by showing that denying a transfer to a better-qualified employee will have a "lasting effect" on the employer's business. It is questionable whether this view is in keeping with the statutory language or the EEOC's regulations. Departing from the "best-qualified" policy would be unlikely to impose any administrative burden, nor would it affect the ability of other employees to perform their jobs, thus the accommodation would not be "difficult" to implement. Regarding the cost of making the accommodation, to borrow an example from Judge Posner, even if an employer were required to pass over a non-disabled employee who would be "twice as good" at the position as a disabled employee,[268] the accommodation would not

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262. *Id.*

263. *See generally id.* at 33 ("If the problem is that expectations may be upset, then the entire accommodation mandate is vulnerable to attack. The ADA reflects an intent to upset 'expectations' to the extent that they limit the employability of individuals with disabilities.").

264. *See supra* notes 231-35 and accompanying text

265. *See infra* notes 265-69 and accompanying text.

266. *See supra* notes 61-66 and accompanying text.

267. 42 U.S.C. § 12111(10)(A) (2000) (emphasis added).

268. EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027-28 (7th Cir. 2000).

impose a significant cost because the employer would still be getting an individual who was qualified for the position. The only "cost" would be the inability to increase profits to the fullest extent possible, so it is difficult to see how providing this accommodation would be significantly expensive or difficult to implement.[269] The likely reality is that under Anderson's lenient interpretation of the undue hardship requirement, the non-contractual interests of other employees will rarely be sufficient to trump the ADA's reasonable accommodation requirement.[270]

B. The Adverse Employment Action Alternative

In order to best balance the competing interests at stake, courts should adopt the rule that a proposed accommodation is not reasonable when it would violate the contractual rights of another employee or otherwise result in an adverse employment action (as that term is defined through case law) for another employee. Although this rule would not remove all of the uncertainty in the area, it would represent a substantial step toward greater clarity. If an accommodation does not result in such an adverse employment action for another employee, the undue hardship defense and the other rules that have developed concerning the reasonable accommodation requirement should be sufficient to resolve most questions as to whether an employer must provide the accommodation. One benefit of the rule is that it would not be restricted to certain types of proposed accommodations (such as reassignment to a vacant position), but would instead cover virtually every situation in which the interests of a disabled employee may come into conflict with the interests of other employees. The rule would cover those types of accommodation requests that could potentially implicate the interests of other employees but leave unchanged the developing law surrounding other types of accommodations.

Existing federal employment discrimination law helps to illustrate the rationale of such an approach. Under Title VII and the ADEA, it is illegal to discriminate against an individual with respect to the individual's "compensation, terms, conditions, or privileges of employment."[271] In order to establish a prima facie case, a plaintiff must establish that he or she suffered an adverse

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269. *Cf.* Befort & Donesky, *supra* note 5, at 1090 ("[I]n circumstances in which the better-qualified employee's skills are *vital* to the successful performance of the essential functions of the position in question, an employer may be able to demonstrate that not filling the vacancy with this employee would amount to an undue hardship.") (emphasis added).

270. Moreover, it would seem to have the effect of making it much easier for employers to defend against other types of accommodation claims.

271. 42 U.S.C. § 2000e-2(a)(1) (2000); 29 U.S.C. § 623(a)(1) (2000).

employment action.[272] Obviously, ultimate employment actions, such as a failure to hire or a discharge, qualify as adverse employment actions, but generally federal courts have not limited the category of adverse employment actions to such measures. Courts have found the existence of adverse employment actions in cases involving a failure to promote;[273] a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits or significantly diminished material responsibilities;[274] involuntary transfer with significantly different responsibilities, working conditions, pay, prestige, or opportunities for advancement or salary increases;[275] and the refusal to transfer to a position with significantly different responsibilities, pay, or prestige.[276]

Thus, the federal courts have recognized that actionable harm may exist for employer actions that fall short of a refusal to hire or discharge. In keeping with the principles of equal opportunity embodied within the ADA and the federal courts' overall concern for innocent third parties, this same standard should apply in reasonable accommodation cases in which the provision of an accommodation has adverse consequences for other employees: where the provision of an accommodation would result in adverse employment action for another employee, the accommodation is unreasonable.

There are numerous advantages to this rule over the current state of affairs. First, it is in keeping with the ADA's stated goal of providing equality of opportunity for individuals with disabilities and the numerous statements

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272. Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994).

273. Treglia v. Town of Manlius, 313 F.3d 713, 720 (2d Cir. 2002) (citing Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999)).

274. *Flaherty*, 31 F.3d at 456 (internal quotations omitted).

275. Patrolmen's Benevolent Ass'n v. City of New York, 310 F.3d 43, 51-52 (2d Cir. 2002); McCabe v. Sharrett, 12 F.3d 1558, 1564 (11th Cir. 1994). *But see* Forkkio v. Powell, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) (holding that reassignment that deprived employee of prestige was not an adverse employment action).

276. *See* Trujillo v. N.M. Dep't of Corr., No. 98-2143, 1999 WL 194151, at *4 (10th Cir. Apr. 8, 1999) (unpublished table opinion) (concluding that a jury issue existed as to whether the refusal to transfer to a position that would have been the objective equivalent of a promotion was an adverse employment action); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (concluding that the refusal to transfer an employee could constitute adverse employment action where, under the facts, the transfer was "doubtless as important as a promotion"); Bouman v. Block, 940 F.2d 1211, 1229 (9th Cir. 1991) (holding that failure to transfer employee constituted an "adverse employment action"). While each of these examples involves changes in salary, benefits, or duties, courts have found the existence of adverse employment actions "in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary and support services." Collins v. Illinois, 830 F.3d 692, 703 (7th Cir. 1987) (citing Trout v. Hidalgo, 517 F. Supp. 873, 890 n.67 (D.D.C. 1981); Harris v. Richard Mfg. Co., 511 F. Supp. 1193, 1203 (W.D. Tenn. 1981)).

contained in the legislative history that the ADA is not designed to give individuals with disabilities greater rights than their non-disabled counterparts.[277] Such a rule would help limit concerns that the ADA is a "preference" statute that confers special rights upon individuals with disabilities.[278]

Second, the rule has some support in *Barnett* itself. *Barnett* clearly recognized that an accommodation "could prove unreasonable because of its impact, not on business operations, but on fellow employees."[279] The Court's non-exhaustive list of possible consequences for other employees from an accommodation that might render the accommodation unreasonable ("dismissals, relocations, or modifications of employee benefits") simply includes specific types of recognized adverse employment actions.[280] Third, the rule would provide at least something approximating a bright-line for courts to follow, while at the same time allowing for an individualized inquiry into the facts of each case. The portion of the rule concerning a violation of the contractual rights of other employees is as clear a rule as possible. While the federal circuits vary somewhat in their descriptions of what constitutes an adverse employment action, there is a general understanding as to the meaning of the term that would be sufficient to guide courts and the relevant parties.

Despite the number of situations in which courts have found the existence of adverse employment actions, to rise to the level of an adverse action, the harm to the employee must be more than de minimis.[281] Courts frequently describe an adverse employment action as an action that results in a "significant change in employment status."[282] The workplace is filled with petty indignities, and by requiring some type of material harm, the courts have prevented claims based

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277. 42 U.S.C. § 12101(a)(9) (2000); 136 CONG. REC. H2,444 (daily ed. May 17, 1990) (statement of Rep. Matsui) ("This bill will make the playing field a little more even for those with disabilities to compete in the workplace and in the marketplace."); 136 CONG. REC. H2,438 (daily ed. May 17, 1990) (statement of Rep. Edwards) ("[N]or does it require employers to give preference to persons with disabilities."); *id.* at H2,439 (statement of Rep. Edwards) ("Under the ADA, persons with disabilities will have the same rights and remedies as minorities and women, no more and no less."); 135 CONG. REC. S16,102 (daily ed. Nov. 17, 1989) (statement of Sen. Durenberger) ("[I]ndividuals with disabilities can and should be given the opportunity to compete on an equal footing with their nondisabled counterparts."). *See generally* 29 C.F.R. app. § 1630 (2003) ("[The ADA] does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.").

278. *See supra* note 233 and accompanying text.

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

280. *See supra* notes 274-75 and accompanying text.

281. *See* Flaherty v. Gas Research Inst., 31 F.3d 451, 456 (7th Cir. 1994) (stating that an employer's actions must result in some "materially significant disadvantage" for the plaintiff) (quoting Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883, 885 (7th Cir. 1989)).

282. Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998).

upon a simple bruised ego.[283] For example, while there are a number of cases that have recognized claims based upon involuntary transfers, there are perhaps an even greater number of decisions that have held that "purely lateral" involuntary transfers—those that do not involve significantly different responsibilities, working conditions, pay, prestige, or opportunities for advancement or salary increases—do not constitute adverse employment actions.[284] Likewise, employer actions that result in a "mere inconvenience" do not rise to the level of adverse employment actions.[285] In sum, as interpreted by the federal courts, "not everything that makes an employee unhappy is an actionable adverse action,"[286] and "[m]ere idiosyncracies of personal preference are not sufficient to state an injury."[287] Instead, the action must be "of such quality or quantity that a reasonable employee would find the conditions of her employment altered for the worse."[288]

The determination of whether an accommodation would result in an adverse employment action would obviously depend on the facts of each case. However, given the already fact-dependent nature of the reasonable accommodation requirement, the rule would impose no greater burden on courts than already exists. At the same time, inquiring into the specific facts of each case would enable courts to prevent inequities on both sides. The reasonable accommodation requirement is an essential aspect of the ADA, and an overly-restrictive interpretation of the requirement would frustrate Congress's goals of furthering integration and providing equal employment opportunity. Thus, a disabled

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283. *See, e.g.*, *Flaherty*, 31 F.3d at 457.

284. *See* Burger v. Cent. Apartment Mgmt., Inc., 168 F.3d 875, 879 (5th Cir. 1999) (holding that refusing an employee's request for a purely lateral transfer does not qualify as an adverse employment action); *Sanchez*, 164 F.3d at 532 (holding that an involuntary lateral transfer, without more, does not constitute an "adverse employment action" where the transfer merely increased the employee's commute and did not alter her salary, benefits, or elementary school teaching responsibilities, and the transfer was prompted by decreasing student enrollment); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) ("[A] *purely* lateral transfer [is not] . . . [an] adverse employment action.") (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)); Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997) (holding that allegedly retaliatory transfer was not adverse because it "did not entail a change in position, title, salary, or any other aspect of [plaintiff's] employment[] [h]owever unpalatable the prospect [of the transfer] may have been to him"); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 886-87 (6th Cir. 1996) (holding that a nurse's transfer was not adverse because it did not entail a loss of pay, duties, or prestige).

285. Oest v. Ill. Dep't of Corr., 240 F.3d 605, 612 (7th Cir. 2001) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)).

286. *Id.* at 613 (internal quotations omitted) (quoting Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996)).

287. Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999).

288. Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997).

employee should not be denied an accommodation because another employee suffers a bruised ego or a minor inconvenience. At the same time, the same employee should not be allowed to insist that a colleague endure employer action that amounts to a materially significant disadvantage.

Fourth, such an approach recognizes the federal courts' concerns about innocent third parties. As discussed previously, courts have been cautious about requiring other employees to bear significant burdens when they become caught in the conflict between an employer and another employee.[289] If the ADA is to be in harmony with existing federal employment discrimination law, courts should take roughly the same approach.

Finally, the proposed rule has the advantage of covering most of the controversial accommodation issues. For example, while the emerging rule among some federal courts that an accommodation is not required under the ADA if it would result in other employees having to work harder or longer might arguably be a subspecies of the proposed rule, the "harder or longer" rule is hardly precise. The proposed rule would refer judges and lawyers back to the wealth of employment discrimination case law addressing adverse employment actions. Thus, a disabled employee's request to take an extended leave of absence would not be unreasonable, even if it resulted in another employee having to worker harder or longer, as long as the effect on the other employee was only temporary or of relatively short duration.[290] Similarly, the fact that a job restructuring resulted in the non-disabled employee having to perform relatively few or minor added duties would not render an accommodation unreasonable.[291] Instead, the increased burden on the non-disabled would have to be material.

Moreover, the "harder or longer" rule does not address what is perhaps the most controversial of the ADA's possible accommodations—reassignment to a vacant position. The proposed rule would apply to a reassignment in violation of a "best-qualified" policy in certain cases. Under the rule, the mere fact that another employee considered the vacant position to be more desirable would not, in and of itself, establish that the reassignment of the disabled employee is unreasonable. Rather, in keeping with federal employment discrimination law precedent, only where the vacancy was objectively a more desirable position or would be the functional equivalent of a promotion would the accommodation become unreasonable.[292]

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289. *See supra* notes 74-87 and accompanying text.

290. *Cf. Brown*, 199 F.3d at 457 (finding no adverse employment action where employee was temporarily assigned to a less desirable position).

291. *Cf.* Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999) (finding no adverse employment action where the duties of a produce clerk were expanded to include mopping the floor and cleaning the chrome in the produce department).

292. *See* Trujillo v. N.M. Dep't of Corr., No. 98-2143, 1999 WL 194151, at *5 (10th Cir. Apr. 8, 1999) (unpublished table opinion) (holding that the failure to transfer plaintiff to a position that would not have involved a change in salary, benefits, or job

The proposed rule could be applied with relative ease to most reassignment cases. In the case of a light-duty assignment policy, the determination of whether a requested departure from such a policy would constitute an adverse employment action would depend on whether the departure would prevent another employee who is entitled to the position from obtaining it. Because employers create such assignments in order to keep employees in the workplace, an employee who was denied such a position would be likely to suffer an adverse employment action in the event of a departure from such a policy.

In the case of an accommodation that would violate the contractual rights of another employee, the materiality of the harm would be irrelevant. It is simply not reasonable to require an employer to breach a contract or force another employee to waive his bargained-for rights in order to accommodate another employee.[293] In sum, the proposed rule would add an element of clarity to existing law and would do a better job of balancing the equities than the ad hoc approach to reassignment issues that currently varies from circuit to circuit.

In the numerous other situations where the primary conflict is between the interests of employers and the interests of disabled employees, the proposed rule would simply not be implicated. However, once one addresses the impact of an accommodation on other employees, many of the more difficult accommodation issues become far more simple. For example, in the case of a proposed departure from an employer's "no demotion" policy, a departure would be unlikely to impact other employees in any material sense—the disabled employee's gain would likely not be a non-disabled employee's loss. Thus, the primary conflict is between the employer's interest in furthering the goals underlying the policy and the disabled employee's accommodation rights.[294] Such cases are best dealt with by resorting to other provisions of the ADA, including the undue hardship defense.

Although a discussion as to why an accommodation might be unreasonable based on the effects on an employer is beyond the scope of this Article, a court could resolve many disputes over a requested variance from a neutral policy

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classification could still constitute an adverse employment action because the transfer would nonetheless have been the objective equivalent of a promotion based on the increase in prestige and supervisory responsibilities); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998) (finding "no case . . . in which a court explicitly relied on the subjective preferences of a plaintiff to hold that that plaintiff had suffered an adverse employment action").

293. *See generally* US Airways, Inc. v. Barnett, 535 U.S. 391, 421 (2002) (Souter, J., dissenting) ("I doubt that any interpretive clue in legislative history could trump settled law specifically making collective-bargaining agreements enforceable.").

294. *See generally* Anderson, *supra* note 11, at 13 ("Even when a court recognizes that the ADA requires a more fact-based inquiry into the policy, there is still a tendency to defer to the employer's business purposes without scrutinizing the actual impact the accommodation would have on those purposes.").

based on the Supreme Court's clarification in *Barnett* that an accommodation must be reasonable "in the run of cases" and the somewhat fact-specific approach the Court took in resolving that issue in the case. One reason an employer might have a "no demotion" policy is because the employer believes an over-qualified employee is more likely to become bored and be less productive.[295] Thus, it would not be reasonable "in the run of cases" for an employer to reassign the director of marketing to an unskilled labor position in contravention of a "no demotion" policy. In other instances, an accommodation that would result in a demotion would not necessarily implicate the employer's concerns; thus, there would be at least a genuine issue of material fact as to the reasonableness of the proposed accommodation.

In other situations, the undue hardship defense would be an adequate device to protect the interests of employers. For example, it is potentially quite disruptive to an employer's business to reassign a supervisor to an hourly position in which the former supervisor would work alongside those he or she once supervised.[296] Depending upon the specific facts, the resulting tension in the workplace might lead to increased turnover or otherwise affect productivity. Because such an accommodation might prove significantly disruptive or costly, it could impose an undue hardship.[297]

VII. CONCLUSION

By its nature, the term "reasonable accommodation" is frustratingly imprecise. The fact-specific nature of ADA claims makes the formulation of bright-line rules particularly problematic, and the difference model employed by the ADA, aside from being controversial, brings with it a unique set of challenges. However, if the valid interests of disabled employees and their

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295. *See generally* Jordan v. City of New London, No. 99-9188, 2000 WL 1210820, at *1 (2d Cir. Aug. 23, 2000) (noting that a manual accompanying the Wonderlic Personnel Test and Scholastic Level Exam contains this conclusion); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1290 (9th Cir. 2000) ("[A]n employer may choose not to hire an employee because he is overqualified for a position without violating ADEA."); Woody v. St. Clair County Comm'n, 885 F.2d 1557, 1562-63 (11th Cir. 1989) (concluding that employer's belief that an over-qualified professional applicant for a secretarial position would be more likely to become bored and quit was a legitimate non-discriminatory reason for its employment decision).

296. *See Can I Turn Down an Applicant Because She Is "Overqualified"?*, 13-7 MASS. EMP. L. LETTER, Dec. 2002, *available at* LEXIS, Legal News Library, M. Lee Smith Publications File.

297. *See generally* 29 C.F.R. app. § 1630.2(p) (2003); *see also* 42 U.S.C. § 12111(10)(B) (2000) (listing among other factors in the undue hardship determination "the impact . . . of such accommodation upon the operation of the facility").

employers and coworkers are to be adequately protected, courts must unfortunately engage in some line-drawing.

As this Article has suggested, line-drawing on the basis of the existence or importance of a neutral employer policy is problematic. However, by looking to the impact that providing an accommodation would have on other employees, courts can draw lines that would produce more efficient and equitable resolutions of many accommodation claims.