

MOST-QUALIFIED-APPLICANT HIRING POLICIES OR AUTOMATIC
REASSIGNMENT FOR EMPLOYEES WITH DISABILITIES? STILL A
CONUNDRUM ALMOST THIRTY YEARS AFTER THE AMERICANS WITH
DISABILITIES ACT'S ENACTMENT

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I. INTRODUCTION

When President George H.W. Bush signed the Americans with Disabilities Act (ADA) into law, he stated: “With today’s signing of the landmark Americans for [sic] Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”¹ Despite this early optimism regarding what the ADA was going to accomplish, the Supreme Court was not particularly plaintiff-friendly when it began deciding ADA cases.² As a result of some of these pro-defendant opinions, Congress

¹President George H.W. Bush, Remarks of President George Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

²See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76 (2002) (holding that an employer is allowed to refuse to hire an individual if that individual poses a “direct threat” to self); *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197 (2002) (holding that when determining whether an individual is substantially limited in the ability to perform manual tasks, the court must look at those tasks that are central to everyday life, and commenting that there needs to be a “demanding standard” for a plaintiff to qualify as having a disability); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (holding that a body’s internal mechanisms that compensate for an individual’s physical limitations must be evaluated when determining whether that individual

passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), making the ADA more helpful for individuals with disabilities.³

Despite the passage of the ADA and the ADAAA, there are still some issues on which the courts have favored defendants. One such issue is whether the ADA requires employers to *automatically* reassign⁴ a disabled employee to a vacant position, or whether employers can rely on most-qualified-applicant hiring policies (MQAs), which, as the name suggests, are policies by which employers hire the most-qualified applicant for a vacant position, regardless of who applies for the position.⁵ Most courts have decided the ADA requires only that the disabled employee *be considered* for the vacant position, not that the disabled employee receives the position over a more-qualified applicant.⁶

Although the Supreme Court has not addressed this issue,⁷ it has addressed whether a disabled employee is entitled to reassignment to a vacant position when the sought-after position is desired by someone who has a right to it through a seniority system, rather than through an MQA.⁸ In *Barnett*, the Court determined that in most cases, requiring an employer to ignore its seniority system is not reasonable, and an employer is therefore

suffers from a disability under the Act); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999) (concluding that mitigating measures must be considered when determining whether an individual suffers from a disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (holding that mitigating measures must be taken into account when determining whether an individual suffers from a disability).

³The pro-employee changes passed by Congress are referenced in the ADAAA’s “Findings and Purposes” section, which specifies that the amendments are a result of the Supreme Court’s opinions in some of the cases referenced in note 2, *supra*. See ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553. The focus of those changes was on the definition of “disability.”

⁴Some courts use the phrase “automatic reassignment,” while others use the phrase “mandatory reassignment.” Compare *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007) with *EEOC v. United Airlines*, 693 F.3d 760, 764 (7th Cir. 2012). For purposes of this Article, the two phrases are synonymous.

⁵*Huber*, 486 F.3d at 481.

⁶See, e.g., *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1346–47 (11th Cir. 2016); *Huber*, 486 F.3d at 483–84; *United States v. Woody*, 220 F. Supp. 3d 682, 691 (E.D. Va. 2016).

⁷The Supreme Court had the opportunity to resolve this issue and had granted certiorari in the *Huber* case; however, the parties settled the matter. See *Huber v. Wal-Mart Stores, Inc.*, 552 U.S. 1136 (2008).

⁸*U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 392 (2002).

not required to reassign the individual with a disability to the position as a “reasonable accommodation” under the ADA.⁹

Post-*Barnett*, several courts decided that employers are free to adhere to MQAs, and that individuals with disabilities are not *entitled* to reassignment; if an individual with a disability desires the vacant position, he must apply for the position and compete for it with the other applicants.¹⁰ Some courts, however, have reached the opposite conclusion, requiring reassignment for an individual with a disability even if he is not the most-qualified applicant for the position.¹¹ Because of this issue’s importance, and because of the split among the federal courts,¹² the Supreme Court should clarify how *Barnett* affects MQAs.¹³ Considering both sides’ arguments and the hostility with which the Court has treated the ADA in the past,¹⁴ the Court would most likely rule that employers can utilize MQAs without violating the ADA, *provided the employers consistently follow them*.¹⁵ Until the Court addresses this question, however, lower courts will continue to issue conflicting opinions.

This Article will first identify the ADA’s relevant provisions and explain how they address the issue of MQAs.¹⁶ The Article will then address the pre-*Barnett* split regarding MQAs.¹⁷ Next, the Article will address *Barnett*, which, although not directly on point, has been relied upon

⁹ *Id.* at 403.

¹⁰ *See infra* §§ V.A and VI.A.

¹¹ *See infra* §§ V.B and VI.B. Although some courts have interpreted cases from the Seventh Circuit, the Tenth Circuit, and the D.C. Circuit as requiring automatic reassignment to a vacant position, not all courts agree that the opinions from those circuits should be interpreted in such a pro-employee manner. *See, e.g., St. Joseph’s Hosp.*, 842 F.3d at 1347 n.6 (interpreting the opinions from those courts as not being as pro-employee as the EEOC had contended).

¹² The United States District Courts have also reached different conclusions regarding this issue. *See infra* § VI.

¹³ The Court had the opportunity to do so in one case, but the case settled prior to oral argument. *See supra* note 7.

¹⁴ The Court has demonstrated its hostility toward the ADA in several opinions. *See supra* note 2. Of course, there has been turnover on the Court since those opinions were issued. Specifically, since 1999, Justices Rehnquist, Stevens, O’Connor, Souter, Scalia, and Kennedy have left the Court, while Justices Roberts, Alito, Sotomayor, Kagan, Gorsuch, and Kavanaugh have become members of it.

¹⁵ *See supra* note 6.

¹⁶ *See infra* § II.

¹⁷ *See infra* § III.

by courts when addressing whether MQAs survive under the ADA.¹⁸ After a discussion of *Barnett*, this Article will discuss opinions that have addressed MQAs post-*Barnett*.¹⁹ The Article will then argue that the pro-employer arguments are stronger than the pro-employee arguments, and that these pro-employer arguments will most likely result in a pro-employer outcome should the Court decide to answer this question.²⁰ As a result, if disability rights advocates want employees with disabilities to have more than only the right to be considered for vacant positions, that outcome will most likely have to come from Congress, and not from the courts. And with the current leanings of the House, Senate, and President, that outcome seems unlikely.

II. THE RELEVANT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

When determining whether employers can rely on MQAs without violating the ADA, courts typically start by examining the ADA's language.²¹ There are two parts of the statute that are most relevant: (1) the ADA's substantive provisions regarding the reassignment issue,²² and (2) the ADA's "Findings and Purpose" section.²³

The ADA's relevant substantive provisions are the following: (1) 42 U.S.C. § 12112(a), which states an employer may not "discriminate against a qualified individual on the basis of disability";²⁴ (2) 42 U.S.C. § 12111(8), which states a "qualified" individual is "an individual who, with or without reasonable accommodation, can perform the essential functions of the [job]";²⁵ (3) 42 U.S.C. § 12112(b)(5)(A), which defines "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the

¹⁸ See *infra* § IV.

¹⁹ See *infra* §§ V and VI.

²⁰ See *infra* § VII.

²¹ See, e.g., EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1345 (11th Cir. 2016); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1160 (10th Cir. 1999) (en banc).

²² See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12112(a), 12111(8), 12112(b)(5)(A), 12111(9)(B) (2012). These sections include the ADA's "Definitions" section, Section 12111, and the ADA's provision prohibiting discrimination against individuals with disabilities, Section 12112.

²³ *Id.* § 12101(a), (b).

²⁴ *Id.* § 12112(a).

²⁵ *Id.* § 12111(8).

employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business”;²⁶ and (4) 42 U.S.C. § 12111(9)(B), which lists “reassignment to a vacant position” as an accommodation that “may” qualify as a “reasonable accommodation.”²⁷

Employees argue the following regarding this language: (1) the ADA prohibits discrimination; (2) discrimination includes not providing reasonable accommodations to qualified individuals with disabilities; (3) “reassignment to a vacant position” is specifically listed as a reasonable accommodation; and, therefore, (4) an employee with a disability is entitled to reassignment to the vacant position so long as he is qualified.²⁸ Employers, however, argue that simply because Congress listed “reassignment to a vacant position” as something that “may” qualify as a reasonable accommodation, this does not show Congressional intent to force employers to hire minimally qualified individuals with disabilities over better-qualified individuals without them.²⁹

The ADA also includes a “Findings and Purpose” section,³⁰ which some courts have evaluated when addressing MQAs.³¹ The language upon which these courts have focused includes: (1) “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals,”³² and (2) “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous”³³ Courts have disagreed over how these statements affect the analysis of MQAs, with some courts

²⁶ *Id.* § 12112(b)(5)(A).

²⁷ *Id.* § 12111(9)(B).

²⁸ *See* *United States v. Woody*, 220 F. Supp. 3d 682, 687 (E.D. Va. 2016) (citing §§ 12101(b), 12112(a), 12112(b)(5)(A), 12111(9)(A), (B)). Typically, however, reassignment is viewed as an “accommodation of last resort,” which is considered only after it is clear that no other accommodation would allow the employee to stay in his then-current position. *See, e.g., id.*

²⁹ *See, e.g., EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1345 (11th Cir. 2016).

³⁰ 42 U.S.C. § 12101(a)–(b).

³¹ *See, e.g., Woody*, 220 F. Supp. 3d at 688–89; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168 (10th Cir. 1999) (en banc).

³² 42 U.S.C. § 12101(a)(7).

³³ *Id.* § 12101(a)(8).

concluding they support the use of MQAs, and others concluding these statements favor automatic reassignment for individuals with disabilities.³⁴

If the Court decides to resolve this issue, it will first analyze the previously-identified substantive provisions of the ADA as well as its “Findings and Purpose” section.³⁵ Before this Article addresses the merits of the arguments regarding the ADA’s language,³⁶ however, it will address the pre-*Barnett* split regarding automatic reassignment and MQAs.

III. THE PRE-*BARNETT* SPLIT REGARDING AUTOMATIC REASSIGNMENT

Before *Barnett*, courts were inconsistent with how to resolve cases involving MQAs.³⁷ Some courts decided the ADA required employers only to *consider* a disabled applicant for a vacant position, while others believed the ADA required more: entitlement to the position, provided the employee was minimally qualified.³⁸ This Article will now discuss some of these cases and how the courts reached their differing conclusions.³⁹

³⁴ Compare *Smith*, 180 F.3d at 1168 (deciding that the “Findings and Purpose” section of the ADA supports automatic reassignment) with *Woody*, 220 F. Supp. 3d at 688–89 (deciding that the “Findings and Purpose” section of the ADA does not support automatic reassignment, but rather favors an employer’s ability to rely on an MQA).

³⁵ The Court will review the statutory language first because when interpreting a statute, the statutory language is the starting point. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (observing that when interpreting a statute, the Court must start with the statutory language). Also, with respect to the ADA’s “Findings and Purpose” section, the Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484–88 (1999), relied on this language when deciding whether the disability determination should be made with or without respect to mitigating measures.

³⁶ See *infra* § VII.A.

³⁷ Compare *Smith*, 180 F.3d at 1164–65 (ruling in a pro-employee manner on this issue) with *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (ruling in a pro-employer manner on this issue). As will be discussed later in this Article, in 2012, the Seventh Circuit decided *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012), in which it rejected its previous pro-employer position on this issue, which it had articulated in *Humiston-Keeling*, 227 F.3d at 1029, and later in *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002) (addressing this issue under the Rehabilitation Act).

³⁸ See *infra* § III.

³⁹ Not each case specifically addressed MQAs; however, the cases that did not specifically address MQAs have been relied upon and analyzed by several courts when those courts were deciding cases involving MQAs. See, e.g., *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

A. *Courts that adopted a pro-employer interpretation of the automatic reassignment issue prior to Barnett*

Before *Barnett*,⁴⁰ the Seventh Circuit was one court that ruled the ADA did not require employers to reassign less-qualified, disabled employees to positions when more-qualified, non-disabled individuals also applied for them.⁴¹ In *Humiston-Keeling*, the EEOC alleged the defendant's failure to automatically reassign a disabled employee to a vacant position violated the ADA.⁴² The court rejected that idea, finding that such a holding would constitute "affirmative action with a vengeance," which was something the ADA did not endorse.⁴³

The plaintiff⁴⁴ in *Humiston-Keeling* suffered an injury that prevented her from performing her job.⁴⁵ Her employer tried to accommodate her by assigning her to a light-duty job at a construction site.⁴⁶ When the construction project ended, so did the plaintiff's job.⁴⁷ After the plaintiff unsuccessfully applied for other "in-house" positions, she was terminated.⁴⁸ The court had to address whether the ADA required the company to reassign her to a vacant "in-house" position even though she was not the most-qualified applicant.⁴⁹ Relevant to this issue was the existence of a "bona fide policy, consistently implemented . . . giving a vacant job to the best applicant rather than to the first qualified one."⁵⁰ Also relevant was the fact that the employer did *not* consider the plaintiff's disability during the hiring process; there was no evidence of discriminatory animus.⁵¹

⁴⁰ As will be discussed later in this Article, in 2012, the Seventh Circuit decided *United Airlines, Inc.*, 693 F.3d at 761, in which it rejected its previous pro-employer position on this issue, which it had articulated in *Humiston-Keeling*, 227 F.3d at 1029, and later in *Mays*, 301 F.3d at 872. See *infra* § V.B.

⁴¹ See *Humiston-Keeling*, 227 F.3d at 1029.

⁴² *Id.* at 1026–27.

⁴³ *Id.* at 1028–29.

⁴⁴ Although the EEOC was the named plaintiff in this action, this Article's references to the plaintiff will refer to the terminated employee.

⁴⁵ *Humiston-Keeling*, 227 F.3d at 1026.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1026–27.

⁴⁹ *Id.* at 1027.

⁵⁰ *Id.*

⁵¹ *Id.*

The EEOC argued that the ADA required “that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show ‘undue hardship[.]’”⁵² The court, however, believed the EEOC’s position forced employers to give “bonus points” to individuals with disabilities, something the court was not willing to accept.⁵³ In rejecting the EEOC’s argument that not requiring an employer to reassign a qualified employee to a vacant position would render the ADA’s reassignment language meaningless, the court stated:

Without the reassignment provision in the statute, an employer might plausibly claim that “reasonable accommodation” refers to efforts to enable a disabled worker to do the job for which he was hired or for which he is applying, rather than to offer him another job. The reassignment provision makes clear that the employer must also *consider* the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, *and if the reassignment is feasible and does not require the employer to turn away a superior applicant*, the reassignment is mandatory. That is not the same thing as requiring the employer to give him the 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.⁵⁴

The court then addressed pro-employee cases from the D.C. and Tenth Circuits.⁵⁵ The court dismissed the D.C. Circuit’s opinion in *Aka* because *Aka* did not address the “situation in which a nondisabled person is the superior applicant for the job to which the disabled person seeks reassignment and the employer has a consistent policy of preferring the best candidate for a vacancy rather than merely hiring the first qualified person to apply.”⁵⁶ According to the court, *Aka* “merely rejects an ‘interpretation of the reassignment provision as mandating nothing more than that the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1027–28. (emphasis added).

⁵⁵ *Id.* at 1028 (citing *Aka v. Wash. Hosp. Center*, 156 F.3d 1284, 1303–05 (D.C. Cir. 1998); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–68 (10th Cir. 1999) (en banc)).

⁵⁶ *Humiston-Keeling*, 227 F.3d at 1028.

employer allow the disabled employee to submit his application along with all of the other candidates.”⁵⁷ The court then noted that this “is not the same thing as holding that the employer must pass over the superior applicant who . . . might himself or herself be disabled or belong to some other protected class.”⁵⁸

Next, the court addressed the Tenth Circuit cases and acknowledged that, unlike the D.C. Circuit, the Tenth Circuit did address the specific issue the Seventh Circuit was facing in *Humiston-Keeling*.⁵⁹ The court simply relied on Seventh Circuit precedent and disagreed with the Tenth Circuit.⁶⁰ The court believed the Tenth Circuit turned the ADA into a “mandatory preference statute,” which was inconsistent with the ADA.⁶¹ The court noted the following: “A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.”⁶² The court emphasized the ADA was *not* an affirmative action statute or a mandatory preference statute.⁶³

But there 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. That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to

⁵⁷ *Id.* (citing *Aka*, 156 F.3d at 1305).

⁵⁸ *Id.*

⁵⁹ *Id.* The two cases from the Tenth Circuit were *Smith*, 180 F.3d at 1164–68, and *Davoll v. Webb*, 194 F.3d 1116, 1131–32 (10th Cir. 1999).

⁶⁰ *Humiston-Keeling*, 227 F.3d at 1028–29. The cases from the Seventh Circuit that the *Humiston-Keeling* court cited were the following: *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998); *Malabarba v. Chicago Tribune, Co.*, 149 F.3d 690, 699–700 (7th Cir. 1998); and *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997).

⁶¹ *Humiston-Keeling*, 227 F.3d at 1028.

⁶² *Id.*

⁶³ *Id.*

rectify a situation (such as lack of wheelchair access) that is of his own doing.⁶⁴

The court concluded that “the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it’s the employer’s consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant.”⁶⁵ Thus, prior to *Barnett*, the Seventh Circuit was one court that utilized this pro-employer approach when addressing this issue.

The Fifth Circuit has also strongly suggested the ADA does not require an employer to automatically reassign an individual with a disability to a vacant position.⁶⁶ In *Daugherty*, the court addressed whether an employer was required to reassign a bus driver who could no longer perform his job.⁶⁷ The court acknowledged that the ADA lists “reassignment to a vacant position” as a possible reasonable accommodation⁶⁸ and that job openings were controlled by the city charter, which gave part-time employees such as the plaintiff lower priority than full-time employees looking for other jobs.⁶⁹ The city’s unwillingness to ignore the charter, along with the plaintiff’s lack of effort toward finding another job, resulted in the plaintiff losing his job.⁷⁰

Ultimately, because the city treated the plaintiff as it would have treated any part-time employee, the court ruled in the city’s favor.⁷¹ The court rejected the plaintiff’s claim because he “did not show that he was treated

⁶⁴*Id.* at 1028–29.

⁶⁵*Id.* at 1029. As will be discussed in Section IV.B, *infra*, the Seventh Circuit no longer follows this pro-employer interpretation of the ADA. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012).

⁶⁶*Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995). Although this case did not involve an MQA, several courts have decided that the case supports an employer’s use of an MQA. See, e.g., *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 (11th Cir. 2016). The Fifth Circuit, however, will soon decide this exact issue. See *EEOC v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495, 504–05 (N.D. Tex. 2016), *motion to alter or amend judgment denied*, No. 15-3104, 2017 WL 930923, at *1 (N.D. Tex. Mar. 9, 2017), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017). See *infra* § VI.A.

⁶⁷56 F.3d at 696.

⁶⁸*Id.* (quoting 42 U.S.C. § 12111(9) (2012)).

⁶⁹*Id.* at 699.

⁷⁰*Id.*

⁷¹*Id.* at 700.

differently from any other part-time employee whose job was eliminated.”⁷² The court concluded that “[t]here was no proof that the city treated him worse than it treated any other displaced employee.”⁷³ The court observed the following:

Stated another way, we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.⁷⁴

Even though this case did not specifically involve an MQA, several courts have interpreted *Daugherty* as allowing employers to rely on MQAs when deciding whether to reassign a disabled employee when a more-qualified, non-disabled individual applies for the same position.⁷⁵ Of course, not all courts have reached this pro-employer conclusion, and this Article will next address pre-*Barnett* opinions that, unlike *Humiston-Keeling* and *Daugherty*, reached pro-employee outcomes.

B. Courts that adopted a pro-employee interpretation of the automatic reassignment issue prior to Barnett

One court that reached a pro-employee result (and one that is often cited for the proposition that the ADA requires reassignment of an individual with a disability)⁷⁶ is the Tenth Circuit.⁷⁷ Although most courts interpret *Smith* as requiring reassignment so long as the disabled employee is qualified for the at-issue position,⁷⁸ as will be discussed later, there is some language in *Smith* that supports the position that reassignment is not *always*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *supra* note 66. See also *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996) (relying on *Daugherty* and stating that the employer “did not have an affirmative duty to provide [the plaintiff] with a job for which she was qualified,” but rather, “only had an obligation to treat her in the same manner that it treated other similarly qualified candidates”).

⁷⁶ See, e.g., *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 765 (7th Cir. 2012).

⁷⁷ *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc).

⁷⁸ See, e.g., *United Airlines*, 693 F.3d at 765.

required, even if the disabled employee is minimally qualified for the position.⁷⁹

In *Smith*, the plaintiff developed several health conditions that affected his ability to work in his then-current position.⁸⁰ Eventually, he was unable to work in his department; he was fired; and he then sued his former employer.⁸¹ After losing at summary judgment and after losing initially at the Tenth Circuit, the plaintiff was granted a rehearing by the Tenth Circuit.⁸²

The majority addressed the reassignment issue in response to Judge Kelly's separate opinion.⁸³ Specifically, Judge Kelly argued that the reassignment "duty" is nothing more than an obligation to *consider*, without discrimination, the disabled employee for a new position.⁸⁴ The court rejected this idea by first looking at the ADA's language, which lists as a possible reasonable accommodation "reassignment to a vacant position," not simply "*consideration of* a reassignment to a vacant position."⁸⁵ The court also cited the D.C. Circuit's opinion in *Aka* for the proposition that the reassignment provision means more than simply allowing the employee to apply for the position.⁸⁶ Regarding the ADA's language, the court stated: "The ADA's reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures,"⁸⁷ and interpreting the ADA as requiring only that the employee be considered for the position

⁷⁹ 180 F.3d at 1176. Specifically, the court acknowledged that there could be some situations in which an employer's policies would trump the duty to reassign under the ADA. *Id.* The court did not, however, expand on this topic, stating, "[w]e neither attempt here to itemize all such policies that may exist nor comment upon such policies which may be so fundamental to the way an employer does business that it would be unreasonable to set aside." *Id.* Although this court did not believe that an MQA was such a policy as to justify not reassigning an employee with a disability, other courts could (and have), in fact, done so. *See infra* §§ V.A and VI.A.

⁸⁰ 180 F.3d at 1160.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1164.

⁸⁴ *Id.* at 1180–85. In his separate opinion, Judge Kelly indicated he did not believe the ADA entitled a disabled employee to an automatic reassignment when there were other, more-qualified applicants for that position. *Id.* at 1180 (Kelly, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 1164 (citing 42 U.S.C. § 12111(9) (2012)).

⁸⁶ *Id.* (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998)).

⁸⁷ *Id.* at 1165.

would result in statutory redundancy.⁸⁸ The court then cited several opinions that it believed stood for the proposition that in some instances, employers *are* required to reassign a disabled employee.⁸⁹

The court next looked to the EEOC's Interpretive Guidance.⁹⁰ Although the Interpretive Guidance used the word "considered" in the context of reassignment, the court concluded that the use of that word did not mean that employers are required only to "consider" employees for reassignment; rather, the court concluded that it meant reassignment must be "considered" after other possible accommodation options have been exhausted.⁹¹ The court also looked at the EEOC's 1999 pronouncement: "reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended."⁹²

Believing that requiring an employer only to consider the disabled employee for the position would be a "hollow promise," the court concluded that Congress did not intend that result.⁹³ Wrapping up this part of its opinion, the court stated:

We conclude that reassignment of an employee to a vacant position in a company is one of the range of reasonable accommodations which must be considered and, *if appropriate*, offered if the employee is unable to perform his or her existing job. Thus, even though [the plaintiff] was admittedly unable to perform the essential functions of his existing job in the light assembly department, that

⁸⁸ *Id.*

⁸⁹ *Id.* (citing *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996)); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996); *Ransom v. State of Ariz. Bd. of Regents*, 983 F. Supp. 895, 902–03 (D. Ariz. 1997); and *Cmty. Hosp. v. Fail*, 969 P.2d 667, 677–78 (Colo. 1998).

⁹⁰ *Smith*, 180 F.3d at 1165–67. The court also noted that automatic reassignment would have been required under the Rehabilitation Act, and because the ADA grants as much protection as the Rehabilitation Act does, reassignment was required under the ADA as well. *Id.* at 1165 n.4.

⁹¹ *Id.* at 1166.

⁹² *Id.* at 1166–67 (quoting EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (1999), 1999 WL 33305876, at *23).

⁹³ *Id.* at 1167.

admission by itself does not preclude his ADA claim for an accommodation of reassignment.⁹⁴

The court then continued to explain its decision.⁹⁵ The court again referenced the ADA's language and concluded that mentioning "reassignment to a vacant position" as a possible reasonable accommodation indicated Congress's intent for employers to be required to provide this accommodation.⁹⁶ The court also noted that a pro-employer interpretation would provide employers with the defense that the employer need not reassign the employee "if it can find a better qualified employee to take the place of the otherwise qualified individual with a disability."⁹⁷ This, of course, would make it easier for employers to avoid having to retain employees with a disability.

The court then addressed the ADA's "Findings and Purpose" section and legislative history.⁹⁸ Regarding the ADA's Findings and Purpose, the ADA's purpose, in part, was to foster economic independence for

⁹⁴*Id.* (emphasis added). Although this statement seems to be very pro-employee, the use of the phrase "if appropriate" qualifies the pro-employee interpretation. Also, the court in *Smith* noted that there could be some situations in which reassigning a disabled employee might interfere with legitimate, well-established expectations (such as seniority), where it could be unreasonable to allow for automatic reassignment. *Id.* at 1175–76. That statement, of course, raises the question of whether an MQA would carry as much weight as a seniority system. At least one court has decided that seniority systems and MQAs are so similar, that they should be treated the same way. Specifically, in *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002), the Seventh Circuit allowed the employer to follow its MQA without violating the Rehabilitation Act. It analogized the MQA at issue in that case to the seniority system at issue in *Barnett*. *See id.* The court stated that *Barnett* "holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system." *Id.* It then concluded: "[i]f for 'more senior' we read 'better qualified,' for 'seniority system' we read 'the employer's normal method of filling vacancies,' and for 'superseniority' we read 'a break,' *U.S. Airways* becomes our case." *Id.* Of course, since *Mays*, the Seventh Circuit has reversed itself on this issue. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012). Also, in his dissenting opinion in *Barnett*, Justice Scalia expressed his belief that MQAs should be treated the same way as seniority systems. 535 U.S. at 416 (Scalia, J., dissenting) ("[Reassignment] does not envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability – for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications.").

⁹⁵*Smith*, 180 F.3d at 1167.

⁹⁶*Id.* at 1167–68.

⁹⁷*Id.* at 1167.

⁹⁸*Id.* at 1168.

individuals with disabilities, which the court found automatic reassignment would accomplish.⁹⁹ Regarding legislative history, the court concluded that Congress did not intend for current employees with disabilities to have to be treated identically to other applicants.¹⁰⁰ The court noted that requiring the disabled employee to be the most-qualified applicant “is judicial gloss unwarranted by the statutory language or its legislative history.”¹⁰¹

The court then identified safeguards that ensure automatic reassignment is not problematic for employers.¹⁰² The first was that the reassignment must be to a vacant position for which the employee was qualified.¹⁰³ The court also expressed that if there were either contractual rights or seniority rights to the position, the position would not be “vacant” and thus not a position to which the disabled employee would be entitled.¹⁰⁴ As will be addressed in more detail later, this was the issue the Supreme Court faced in *Barnett*.¹⁰⁵ The other safeguards the court acknowledged were the following: (1) the position does not need to be a promotion; (2) the employer can select the position offered to the employee; and (3) an employer is not required to provide an accommodation that creates an undue hardship.¹⁰⁶

The court next addressed the scope of the duty to reassign;¹⁰⁷ it was at this point the court made some statements that were not particularly pro-employee. The most relevant of these statements was that “[a]n employer need not violate other important fundamental policies underlying legitimate business interests.”¹⁰⁸ While focusing its discussion on collective bargaining

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1169. The court also noted that “[i]f no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer.” *Id.*

¹⁰² *Id.* at 1170.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 535 U.S. 391, 399 (2002). *See infra* § IV.

¹⁰⁶ *Smith*, 180 F.3d at 1170. The court ended this part of its discussion with a statement that the court should defer to the EEOC’s position on this issue, which required automatic reassignment for a qualified individual with a disability. *Id.* *See* EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (1999), 1999 WL 33305876, at *23.

¹⁰⁷ *Smith*, 180 F.3d at 1175.

¹⁰⁸ *Id.*

agreements and seniority systems, the court also cited to cases that stood for the proposition that employers need not violate “legitimate, nondiscriminatory” policies.¹⁰⁹ The court acknowledged that collective bargaining agreements and seniority systems are not the only policies that might trump the duty to reassign, but the court did not “itemize all such policies that may exist nor comment upon such policies which may be so fundamental to the way an employer does business that it would be unreasonable to set aside.”¹¹⁰ With this language, other courts could conclude, unlike the Tenth Circuit, that MQAs *are* legitimate, nondiscriminatory policies that would trump the duty to reassign. Thus, although most courts look at *Smith* as being very pro-employee, it did leave room for the possibility that other courts could allow employers to utilize MQAs without incurring ADA liability.¹¹¹

Another court to take a pro-employee approach was the D.C. Circuit., which it did in *Aka*.¹¹² Some courts addressing MQAs distinguish *Aka*, arguing that it does not support automatic reassignment for a disabled employee.¹¹³ Nonetheless, many courts have referenced it as being one that generally supports automatic reassignment.¹¹⁴ In *Aka*, a hospital orderly was

¹⁰⁹*Id.* at 1176 (citing *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998)).

¹¹⁰*Id.* The court did, however, note that an employer would be required to violate a “no transfer” policy if confronted with an employee who seeks reassignment as a reasonable accommodation. *Id.*

¹¹¹The case was ultimately remanded to the district court. *Id.* at 1180. The opinion concurring in part and dissenting in part focused its reasoning on the belief that the ADA was not intended to be a mandatory preference statute, and that employers should be able to select the most-qualified applicants for a position so long as the employer does not discriminate against the individual with a disability. *Id.* at 1180–85 (Kelly, J., concurring in part and dissenting in part).

¹¹²156 F.3d 1284, 1305 (D.C. Cir. 1998). This is another case in which the court did not directly address an MQA, but the opinion has been cited many times in cases involving those policies. *See, e.g.*, *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 765 (7th Cir. 2012).

¹¹³*See, e.g.*, *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016) (expressing that *Aka* does not stand for the broad proposition for which the EEOC had cited it). Also, the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 n.2 (8th Cir. 2007), minimized *Aka*’s relevance, stating that the case “does not hold the ADA requires an employer to place a disabled employee in a position while passing over more qualified applicants.” The *Huber* court continued: “[r]ather, *Aka* only rejects an ‘interpretation of the reassignment provision as mandating nothing more than that the employer allow the disabled employee to submit his application along with other candidates.’” *Id.* (quoting *Aka*, 156 F.3d at 1305).

¹¹⁴*See, e.g.*, *United Airlines*, 693 F.3d at 765.

diagnosed with heart problems.¹¹⁵ Despite being cleared to work, he was unable to work as an orderly.¹¹⁶ He asked to be reassigned to other positions, but he was required to apply to all positions he desired.¹¹⁷ He was unable to find another position, and he ultimately sued under the ADEA and the ADA.¹¹⁸ At summary judgment, the district court ruled in favor of the employer and decided that the reassignment obligation under the ADA had to “give way” to the at-issue collective bargaining agreement (CBA) if the reassignment conflicted with other employees’ rights.¹¹⁹ The case eventually reached the D.C. Circuit for *en banc* review.¹²⁰

After addressing the plaintiff’s other claim, the court addressed his reasonable accommodation claim.¹²¹ Looking at the definition of “discrimination,” and also noting that “reassignment to a vacant position” was listed as a reasonable accommodation, the court set forth the plaintiff’s position that these provisions required reassignment.¹²² As noted earlier, the district court rejected this idea: “the ADA can never require an employer to violate such collectively bargained rights, and that therefore [the plaintiff] had no right to reassignment.”¹²³

Although the D.C. Circuit spent significant time addressing the interplay between the CBA and the ADA, the court ultimately remanded the case to determine whether there was a conflict between the two.¹²⁴ Specifically, the court instructed the district court to determine “how broad [the defendant’s]

¹¹⁵ 156 F.3d at 1286.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1287.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1288.

¹²¹ *Id.* at 1300. The court first addressed the plaintiff’s disparate treatment claim, which involved an analysis of the *Hicks* burden-shifting paradigm. *See* *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509–11 (1993).

¹²² *Aka*, 156 F.3d at 1300.

¹²³ *Id.* Before addressing whether the ADA requires automatic reassignment, the court first had to address whether the plaintiff was a qualified individual with a disability. *Id.* at 1300–01. The employer argued that because the plaintiff was unable to perform his job as an orderly with or without an accommodation, he was not entitled to the ADA’s protection. *Id.* The court rejected this argument, following the EEOC’s position and the ADA’s legislative history that require only that the employee be qualified for his current position *or* for the position to which he seeks reassignment. *Id.*

¹²⁴ *Id.* at 1305–06.

reassignment powers under [the CBA] are, and whether reassigning [the plaintiff] would have been permissible under [it], properly interpreted.”¹²⁵

The court addressed the issue of automatic reassignment when it addressed the dissent’s assertion that the ADA entitled the plaintiff only “to be treated like any other applicant for that position.”¹²⁶ When the court did so, it expressed its position that the ADA required a disabled employee to be given the desired position if he was qualified:

To begin with the statutory text, the word “reassign” must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been “reassigned”; the core word “assign” implies some active effort on the part of the employer. Indeed the ADA’s reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits discrimination “against a qualified individual with a disability because of the disability of such individual in regard to job application procedures.”¹²⁷

The court then acknowledged that although the ADA’s legislative history warns against hiring preferences, the court believed this caveat applied only to new applicants, not to current employees with disabilities seeking reassignment.¹²⁸ According to the court, had Congress wanted current employees seeking reassignment to be treated the same as all job applicants, Congress would not have stated that the ADA did not require “bumping” an employee to create a vacancy.¹²⁹ The court also noted that several courts had concluded that the “reassignment obligation means something more than treating a disabled employee like any other job applicant.”¹³⁰

¹²⁵ *Id.* at 1303.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1304.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* (citing *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496–99 (7th Cir. 1996); *Mengine v. Runyon*, 114 F.3d 415, 418 (3d Cir. 1997); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114–15 (8th Cir. 1995)). However, the D.C. Circuit also cited to cases seemingly supporting an

The court then acknowledged the safeguards the ADA provides for employers: (1) an employer is not required to reassign an employee to a position for which he is not qualified; (2) an employer does not have to reassign an employee if doing so would pose an undue hardship; (3) an employer need not bump an existing employee from his position to accommodate the disabled employee; and (4) the employer can choose which accommodation to provide.¹³¹ Interestingly, the court also noted that “[a]n employer is not required to reassign a disabled employee in circumstances ‘when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.’”¹³² Additionally, and certainly importantly, the majority acknowledged that it was *declining* “to decide the precise contours of an employer’s reassignment obligations.”¹³³ This statement is one reason some pro-employer courts have dismissed *Aka* and have minimized its relevance.¹³⁴ Despite not answering that question, *Aka* did state that interpreting “the reassignment provision as mandating nothing more than that the employer allow the disabled employee to submit his application along with all of the other candidates . . . would render that provision a nullity.”¹³⁵ Thus, although *Aka* is typically viewed as being in favor of automatic reassignment for individuals with a disability, similar to the Tenth Circuit’s opinion in *Smith*, there is some language that pro-employer courts could utilize to argue that *Aka* is not as pro-employee as some courts believe it is.

There were two dissenting opinions in *Aka*.¹³⁶ Judge Henderson’s dissent, while acknowledging that in some cases employers must reassign an individual with a disability, determined that this was not such a case.¹³⁷ She believed that allowing the plaintiff to apply for the job was sufficient.¹³⁸

employer’s right to adopt and enforce an MQA. *See, e.g.*, *Daugherty v. City of El Paso*, 56 F.3d 695, 699 (5th Cir. 1995).

¹³¹ *Aka*, 156 F.3d at 1305.

¹³² *Id.* at 1305 (quoting *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

¹³³ *Id.* This statement is one reason why some courts have rejected such a pro-employee interpretation of *Aka*. *See, e.g.*, *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016) (expressing that *Aka* does not stand for the broad proposition for which the EEOC had cited it).

¹³⁴ *See, e.g.*, *St. Joseph’s Hosp.*, 842 F.3d at 1347 n.6.

¹³⁵ 156 F.3d at 1305.

¹³⁶ *See id.* at 1306 (Henderson, J., dissenting); *see also id.* at 1312 (Silberman, J., dissenting).

¹³⁷ *Id.* at 1310–11 (Henderson, J., dissenting).

¹³⁸ *Id.* at 1311.

She stated that the hospital “accommodated [the plaintiff’s] disability by affording him the opportunity to apply for reassignment to the vacant position. It accepted his application and interviewed him for the opening.”¹³⁹ According to Judge Henderson, the hospital “was under no duty to afford [the plaintiff] a hiring preference – because of his disability – over a more qualified, non-disabled applicant.”¹⁴⁰ Judge Henderson relied on the ADA’s legislative history rejecting hiring preferences and upon opinions that concluded that employers were free to hire more-qualified individuals without disabilities over less-qualified individuals with them.¹⁴¹

Judge Silberman authored a separate dissent.¹⁴² He bluntly stated: “the majority’s reading of the ADA is simply wrong.”¹⁴³ He believed the majority focused too much on the meaning of “reassign” and did not look at reassignment in the context of the other accommodations listed in the ADA.¹⁴⁴ After discussing the other accommodations, Judge Silberman stated: “[i]n short, all of these sorts of reasonable accommodation[s] deal with the relationship between the disabled employee and the employer, and have no direct impact on the situation of non-disabled employees or applicants.”¹⁴⁵ He then observed: “[i]f the Congress had intended to grant a preference to the disabled – a rather controversial notion – it would certainly not have done so by slipping the phrase ‘reassignment to a vacant position’ in the middle of the list of reasonable accommodations.”¹⁴⁶ According to Judge Silberman, the reassignment accommodation “must mean that an employer is obligated – if another type of reasonable accommodation cannot be made in the disabled employee’s current position – to allow a disabled employee to compete (on equal terms with non-disabled employees) for vacant positions.”¹⁴⁷ He believed this was consistent with the statement in House Report No. 485(II) that “the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citing H.R. REP. NO. 101-485 pt. 2, at 56 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345-46; *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384 (2d Cir. 1996); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995); and *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

¹⁴² *Id.* at 1312 (Silberman, J., dissenting).

¹⁴³ *Id.* at 1314.

¹⁴⁴ *Id.* at 1314-15.

¹⁴⁵ *Id.* at 1315.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

employer has no obligation . . . to prefer applicants with disabilities over other applicants on the basis of disability.”¹⁴⁸

Despite two dissenting opinions and despite the fact that the majority did not specifically hold that employers with MQAs are obligated to reassign employees with disabilities, plaintiffs have relied on *Aka* when urging courts to reject MQAs.¹⁴⁹ Some courts, however, have not been willing to read *Aka* in such a pro-employee manner, either before or after the Supreme Court’s opinion in *Barnett*, which will be addressed now.¹⁵⁰

IV. THE SUPREME COURT’S OPINION IN *U.S. AIRWAYS, INC. V. BARNETT*

Although the Supreme Court has not addressed automatic reassignment and MQAs, it addressed a similar issue in *Barnett*.¹⁵¹ As a result, many courts have applied *Barnett* to MQA cases.¹⁵² Predictably, however, courts have reached different conclusions regarding how *Barnett* impacts MQAs.¹⁵³

In *Barnett*, the plaintiff injured himself while working.¹⁵⁴ He invoked seniority rights and was transferred to the mail room.¹⁵⁵ That position became open for seniority-based bidding, and at least two employees with more seniority bid for the position.¹⁵⁶ The plaintiff asked for the position on a permanent basis as a reasonable accommodation, and the employer considered, but eventually denied, the request.¹⁵⁷ The plaintiff was then terminated.¹⁵⁸ The plaintiff sued, arguing that U.S. Airways violated the

¹⁴⁸ *Id.* (quoting H.R. REP. NO. 101-485 pt. 2, at 56 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345–46).

¹⁴⁹ See *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016).

¹⁵⁰ See *id.*

¹⁵¹ 535 U.S. 391, 392 (2002).

¹⁵² See, e.g., *St. Joseph’s Hosp.*, 842 F.3d at 1345; *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 762–64 (7th Cir. 2012).

¹⁵³ Compare *St. Joseph’s Hosp.*, 842 F.3d at 1346 (believing that *Barnett* results in a pro-employer outcome), with *United Airlines*, 693 F.3d at 764 (believing that *Barnett* results in a pro-employee outcome).

¹⁵⁴ 535 U.S. at 394.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

ADA when it denied his accommodation request.¹⁵⁹ Eventually, the Supreme Court granted certiorari to answer 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.”¹⁶⁰

The Court first set forth the ADA’s applicable provisions, which were identified earlier in this Article.¹⁶¹ Next, the Court articulated the parties’ positions.¹⁶² The employer argued that because the reassignment would have violated the seniority system, it could never be a reasonable accommodation.¹⁶³ The plaintiff argued that the seniority system does not prove that the accommodation is unreasonable, only that in some cases, the existence of such a policy could present an undue hardship for the employer.¹⁶⁴

The employer also argued that the ADA does not allow for “preferences;” it requires only that employers treat people with disabilities equally.¹⁶⁵ The Court rejected this idea that the ADA does not allow preferences; specifically, the Court noted that preferences *are* sometimes required (in the form of reasonable accommodations) to “achieve the [ADA’s] basic equal opportunity goal,”¹⁶⁶ and that these “preferences” are ones “that are needed for those with disabilities to obtain *the same workplace opportunities* that those without disabilities automatically enjoy.”¹⁶⁷ ADA-required accommodations are, themselves, preferences, and thus any argument that preferences are not sometimes required by the ADA was incorrect.¹⁶⁸ Importantly, the Court stated: “And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot

¹⁵⁹ *Id.* at 394–95.

¹⁶⁰ *Id.* at 395–96.

¹⁶¹ *Id.* at 396 (citing the following ADA provisions: 42 U.S.C. §§ 12111(8), 12111(9)(B), 12112(a), 12112(b)(5)(A) (2012)).

¹⁶² *Id.* at 396–97.

¹⁶³ *Id.* at 396.

¹⁶⁴ *Id.* at 396–97.

¹⁶⁵ *Id.* at 397.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ *Id.*

by itself place the accommodation beyond the Act's potential reach."¹⁶⁹ The Court continued with the following pro-employee language:

In sum, the nature of the "reasonable accommodation" requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such automatic exemption. The simple fact that an accommodation would provide a "preference"—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."¹⁷⁰

U.S. Airways next argued that because the seniority system entitled other employees to the position, the position was not "vacant," and therefore reassignment to it was not within the ADA's list of reasonable accommodations.¹⁷¹ The Court rejected this argument, concluding that the ADA did not intend for the term "vacant" to have specialized meaning.¹⁷²

The Court then addressed the plaintiff's arguments.¹⁷³ The plaintiff argued that "reasonable accommodation" meant "effective accommodation," and because the permanent reassignment would have accommodated the plaintiff's disability, the reassignment was "reasonable."¹⁷⁴ This was consistent with the EEOC's position that a "reasonable accommodation" was one that would "enable a qualified individual with a disability to perform the essential functions of [a] position."¹⁷⁵ The Court rejected this argument as well, believing that the ordinary meaning of "reasonable" is not synonymous with "effective."¹⁷⁶

¹⁶⁹ *Id.* Despite this seemingly pro-employee statement, the Court was not endorsing a position that the ADA trumps all facially neutral policies, as was made clear when the Court ultimately endorsed the seniority system at issue. *Id.* at 404.

¹⁷⁰ *Id.* at 398. Here, the Court was acknowledging that the ADA does, in some cases, allow for preferences; however, as the Court eventually made clear, allowing an employee to be exempt from a bona fide seniority system was not the type of preference the ADA required. *Id.* at 404.

¹⁷¹ *Id.* at 398–99.

¹⁷² *Id.* at 399.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (quoting 29 C.F.R. § 1630.2(o)(ii) (2001)).

¹⁷⁶ *Id.* at 400–01.

Looking at how other courts had viewed the relationship between reasonable accommodations and undue hardships, the Court stated that, to meet his burden of demonstrating that an accommodation is reasonable, a plaintiff must show only “that an accommodation seems reasonable on its face, i.e., ordinarily or in the run of cases.”¹⁷⁷ “Once the plaintiff has made this showing, the [employer] then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”¹⁷⁸

The Court then addressed whether the plaintiff’s requested accommodation was reasonable “on its face.”¹⁷⁹ The Court determined that ordinarily, such a reassignment accommodation *would* be reasonable, but the existence of the seniority system led the Court to conclude that what would ordinarily be a reasonable accommodation in most cases was not reasonable in this case: “it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.”¹⁸⁰

The Court analogized the case to religious accommodation cases where the Court had decided employers are not required to accommodate an employee’s religious needs if doing so would impact other employees’ rights.¹⁸¹ Also, the Court observed that several lower courts decided that collectively-bargained seniority rights take precedence over accommodation requests.¹⁸² Although acknowledging that the seniority system at U.S. Airways was not part of a CBA, the Court noted that a CBA was not required; the same concerns exist in the absence of a CBA.¹⁸³ Specifically, seniority systems create expectations of fair and uniform treatment, and allowing the ADA to trump these seniority systems would undermine the systems and their predictability.¹⁸⁴ With respect to MQAs, the question

¹⁷⁷ *Id.* at 401–02 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

¹⁷⁸ *Id.* at 402.

¹⁷⁹ *Id.* at 402–03.

¹⁸⁰ *Id.* at 403.

¹⁸¹ *Id.* (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79–80 (1977)).

¹⁸² *Id.* at 403–04 (citing *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1047–48 (7th Cir. 1996); *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989); *Carter v. Tisch*, 822 F.2d 465, 469 (4th Cir. 1987); *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 1251–52 (6th Cir. 1985)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 404–05.

remains whether these hiring policies similarly promote fair and uniform treatment in such a way that they are similar enough to seniority systems that they should be treated the same way as seniority systems.¹⁸⁵

The Court did, however, mention that a plaintiff could show “special circumstances” that would render the reassignment accommodation reasonable; most of these circumstances focused on the consistency with which the employer followed the policy and other aspects that relate to employee expectations.¹⁸⁶ In concluding, the Court stated:

In its question presented, U.S. Airways asked us whether the ADA requires an employer to assign a disabled employee to a particular position even though another employee is entitled to that position under the employer’s “established seniority system.” We answer that *ordinarily* the ADA does not require that assignment. Hence, a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer—unless there is more. The plaintiff must present evidence of that “more,” namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.¹⁸⁷

Thus, after *Barnett*, established *seniority systems* will usually make automatic reassignment unreasonable.¹⁸⁸ Although *Barnett* did not address

¹⁸⁵ At least one court has reached this conclusion, albeit in a case involving the Rehabilitation Act. Specifically, the Seventh Circuit in *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002), stated that *Barnett* “holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer’s seniority system.” It then concluded: “[i]f for ‘more senior’ we read ‘better qualified,’ for ‘seniority system’ we read ‘the employer’s normal method of filling vacancies,’ and for ‘superseniority’ we read ‘a break,’ *U.S. Airways* becomes our case.” *Id.* Of course, since *Mays*, the Seventh Circuit has reversed itself on this issue. See *EEOC v. United Airlines, Inc.*, 693 F.3d 761 (7th Cir. 2012). Also, in his dissenting opinion in *Barnett*, Justice Scalia expressed his belief that MQAs should be treated the same way as seniority systems. 535 U.S. at 416 (Scalia, J., dissenting) (“[Reassignment] does not envision the elimination of obstacles to the employee’s service in the new position that have nothing to do with his disability – for example, another employee’s claim to that position under a seniority system, or another employee’s superior qualifications.”).

¹⁸⁶ *Barnett*, 535 U.S. at 405.

¹⁸⁷ *Id.* at 406.

¹⁸⁸ There were several opinions in *Barnett*. See *id.* at 406 (Stevens, J., concurring); *id.* at 408 (O’Connor, J., concurring); *id.* at 411 (Scalia, J., dissenting); *id.* at 420 (Souter, J., dissenting).

MQAs, some courts have analogized the seniority system present in *Barnett* to MQAs and have held that MQAs do not violate the ADA and that employers are not required to automatically reassign disabled employees to the positions they seek.¹⁸⁹ Other courts, however, have read *Barnett* in the opposite manner, resulting in a split on the question of automatic

While five Justices were part of the Court's opinion, Justices Stevens and O'Connor wrote separate concurring opinions, and Justices Scalia and Souter wrote separate dissenting opinions. *See id.* The essence of Justice Stevens's opinion was that a potential conflict with an employer's seniority system is relevant to the "reasonableness" inquiry, and not the "undue hardship" inquiry, as the Court of Appeals had believed. *Id.* at 406–07 (Stevens, J., concurring). Justice O'Connor argued that the critical issue regarding the reasonableness of the reassignment accommodation is whether the seniority system was legally enforceable. *Id.* at 408–11 (O'Connor, J., concurring). Justice Scalia made several points in his opinion; specifically, he believed the following: (1) the ADA requires only the suspension of employer rules that the employee's *disability* prevents him from following; (2) the ADA eliminates workplace barriers only if the employee's disability is what prevents him from overcoming the barriers (for example, a work station that cannot accommodate a wheelchair); (3) barriers or policies, such as a seniority system, that "bear no more heavily upon the disabled employee than upon others" do not violate the ADA; (4) the EEOC's position that employers must ignore MQAs and automatically reassign a disabled employee to a vacant position is incorrect; (5) consistent with the goal of *equal opportunity*, automatic reassignment should occur only when there is an open position that nobody else is seeking and where there is not a better-qualified applicant; specifically, reassignment "does not envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability – for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications;" (6) the ADA does not require exceptions to legitimate, nondiscriminatory policies such as MQAs; and (7) some of the EEOC's regulations demonstrate that "only obstacles arising from a person's disability" are the ones the ADA eliminates. *Id.* at 411–19 (Scalia, J., dissenting). Finally, Justice Souter did not think unilateral, employer-created seniority systems should trump the ADA's reassignment provision, and that the plaintiff did show that the accommodation would have been reasonable. *Id.* at 420–24 (Souter, J., dissenting).

¹⁸⁹*See, e.g.,* EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1346 (11th Cir. 2016); United States v. Woody, 220 F. Supp. 3d 682, 692–94 (E.D. Va. 2016). Also, in *Mays*, 301 F.3d at 872, the court stated that *Barnett* "holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system." *Id.* It then concluded: "[i]f for 'more senior' we read 'better qualified,' for 'seniority system' we read 'the employer's normal method of filling vacancies,' and for 'superseniority' we read 'a break,' U.S. Airways becomes our case." *Id.* Of course, since *Mays*, the Seventh Circuit has reversed itself on this issue. *See United Airlines*, 693 F.3d at 761.

reassignment in the context of an MQA.¹⁹⁰ The next section of the Article will highlight some of the cases that have addressed MQAs since *Barnett*.

V. THE POST-*BARNETT* SPLIT REGARDING AUTOMATIC REASSIGNMENT AND MQAS

Because *Barnett* did not directly address MQAs or give a direct answer regarding whether they are consistent with the ADA, a split still exists regarding whether the ADA allows these policies.¹⁹¹ In fact, courts have reached directly conflicting interpretations of *Barnett* with respect to whether it requires automatic reassignment for an individual with a disability.¹⁹² The Article will now discuss post-*Barnett* opinions regarding *Barnett*'s impact on MQAs.

A. Circuit Courts that adopted a pro-employer interpretation after *Barnett*

The circuit to address this issue most recently is the Eleventh Circuit.¹⁹³ In concluding that the ADA and *Barnett* do *not* require automatic reassignment for an individual with a disability,¹⁹⁴ the court joined the list of courts to adopt the pro-employer position on this issue.¹⁹⁵

¹⁹⁰ Compare *St. Joseph's Hosp.*, 842 F.3d at 1346 (believing that *Barnett* results in a pro-employer outcome), with *United Airlines, Inc.*, 693 F.3d at 764 (believing that *Barnett* results in a pro-employee outcome).

¹⁹¹ See *St. Joseph's Hosp.*, 842 F.3d at 1346.

¹⁹² Compare *St. Joseph's Hosp.*, 842 F.3d at 1346 (believing that *Barnett* results in a pro-employer outcome), with *United Airlines, Inc.*, 693 F.3d at 764 (believing that *Barnett* results in a pro-employee outcome).

¹⁹³ *St. Joseph's Hosp.*, 842 F.3d at 1333.

¹⁹⁴ *Id.* at 1345–47.

¹⁹⁵ Although the Eleventh Circuit did adopt the pro-employer approach, it left a small opening for plaintiffs to prevail in these circumstances. *Id.* at 1347 n.7. Specifically, the court stated the following:

In so holding, the Court notes that just because reassignment to a vacant position in violation of an employer's best-qualified hiring policy is not always required as a reasonable accommodation does not mean it never will be. Consistent with the second step in *Barnett*, a plaintiff can show that special circumstances warrant a finding that reassignment is a required accommodation under the particular facts of her case . . .

[The employee] did not show special circumstances in this case.

Id. One such circumstance could be if the employer did not follow its own MQA. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000), *overruled by United Airlines*,

In *St. Joseph's Hospital*, the EEOC sued on behalf of a former employee who was not reassigned to a position after her disability prevented her from continuing in her then-current job.¹⁹⁶ The plaintiff¹⁹⁷ was a nurse who worked in the psychiatric ward.¹⁹⁸ She required a cane; however, the cane was prohibited because it posed a safety risk.¹⁹⁹ Although the plaintiff was allowed to apply to several positions with her employer, she was not hired, and she was eventually terminated.²⁰⁰ The EEOC sued, alleging that the hospital violated the ADA by not allowing the plaintiff to use her cane and by refusing to reassign her to a vacant position.²⁰¹

The district court had stated: “the Court does not hold that the Hospital had an obligation to reassign [the plaintiff] to the vacant positions for which she qualified without competition as a matter of law. Requiring competition is one factor, out of many, that the jury may consider regarding the reasonableness of the accommodation.”²⁰² The jury decided the hospital failed to accommodate the plaintiff, but it also found that the hospital made good-faith efforts to do so, a decision that allowed the district court to enter judgment in favor of the hospital.²⁰³

On appeal, the Eleventh Circuit addressed whether the ADA required “noncompetitive reassignment.”²⁰⁴ The EEOC argued the ADA required it, but the Eleventh Circuit quickly rejected that idea.²⁰⁵ The court noted that the ADA provides a non-exhaustive list of possible reasonable accommodations, one of which is reassignment to a vacant position; however, the court also noted that the accommodations listed in the ADA are preceded by the phrase “may include,” showing that these

Inc., 693 F.3d at 761 (7th Cir. 2012) (noting that to withstand an ADA challenge an MQA should be “consistently implemented”).

¹⁹⁶842 F.3d at 1337.

¹⁹⁷Although the EEOC was considered the plaintiff in this litigation, I will be referring to the former employee as the plaintiff throughout the discussion of this opinion.

¹⁹⁸*St. Joseph's Hosp.*, 842 F.3d at 1337.

¹⁹⁹*Id.*

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.* at 1340–41. The district court also ruled that the thirty-day period the hospital gave the plaintiff to apply for the vacant positions was a reasonable accommodation. *Id.* at 1341.

²⁰³*Id.* at 1341.

²⁰⁴*Id.* at 1345.

²⁰⁵*Id.*

accommodations might not *always* be reasonable.²⁰⁶ According to the court, “the use of the word ‘may’ implies . . . that reassignment will be reasonable in some circumstances but not in others.”²⁰⁷ The court cited pre-*Barnett* cases for the proposition that “employers are only required to provide ‘alternative employment opportunities reasonably available under the employer’s existing policies.’”²⁰⁸

The court then addressed *Barnett*.²⁰⁹ Utilizing the Third Circuit’s interpretation of *Barnett*, the court stated:

The first step requires the employee to show that the accommodation is a type that is reasonable in the run of cases. The second step varies . . . If the accommodation is shown to be reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case. On the other hand, if the accommodation is not shown to be reasonable in the run of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.²¹⁰

Although acknowledging that the hospital’s policy at issue was not a seniority system, but rather an MQA, the court in *St. Joseph’s Hospital* concluded that requiring an employer to abandon the MQA is not reasonable “in the run of cases.”²¹¹ According to the court, employers should not be forced to hire less-qualified employees with disabilities over more-qualified employees without them, and especially in the case of a hospital, employers should be free to hire the best, most-qualified

²⁰⁶ *Id.* (quoting 42 U.S.C. § 12111(9)(B) (2012)).

²⁰⁷ *Id.* (citing *May*, Meriam-Webster.com, <https://www.merriam-webster.com/dictionary/may> (last visited Oct. 28, 2016)).

²⁰⁸ *Id.* (citing *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (quoting *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 289 n.19 (1987)); *Frazier-White v. Gee*, 818 F.3d 1249, 1257 (11th Cir. 2016); *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1306 (11th Cir. 2000)).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1346 (citing *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002)).

²¹¹ *Id.* (quoting *Shapiro*, 292 F.3d at 361). Specifically, the court stated: “requiring reassignment in violation of an employer’s best-qualified hiring or transfer policy is not reasonable ‘in the run of cases.’” *Id.*

candidates.²¹² Finally, the court noted that the ADA was meant to provide only *equal* opportunity; it was not intended to allow discrimination against the non-disabled.²¹³ Thus, the Eleventh Circuit is one court that has adopted the pro-employer position after *Barnett*.

Another court to adopt the pro-employer position after *Barnett* is the Eighth Circuit.²¹⁴ In *Huber*, the plaintiff suffered an injury, could not perform the essential functions of her job, and sought reassignment to a position for which she was not the most qualified.²¹⁵ Her employer did not automatically reassign her, but rather required her to compete for the new job.²¹⁶ The most-qualified candidate was selected, and because the plaintiff ultimately accepted a position that paid significantly less than her initial position, she sued.²¹⁷ The trial court granted the plaintiff's motion for summary judgment, and the employer appealed.²¹⁸ The Eighth Circuit framed the issue in the following way: "[t]he parties' only dispute is whether the ADA requires an employer, as a reasonable accommodation, to give a current disabled employee preference in filling a vacant position when the employee is able to perform the job duties, but is not the most-qualified applicant."²¹⁹

The plaintiff argued that because the ADA specifically lists "reassignment to a vacant position" as a reasonable accommodation, her employer was required to reassign her.²²⁰ Her employer argued that it could follow its non-discriminatory MQA without violating the ADA.²²¹ This was the first time the Eighth Circuit had addressed this issue, and the court

²¹² *Id.*

²¹³ *Id.* The court also cited to several opinions that had reached a similar pro-employer conclusion. *Id.* (citing *Terrell*, 132 F.3d at 627; *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)).

²¹⁴ *Huber*, 486 F.3d at 481. As noted earlier, the Supreme Court had granted certiorari to hear this case, but certiorari was dismissed once the parties settled. *See supra* note 7. Also, the court in *Huber* relied heavily on the Seventh Circuit's pro-employer opinion in *Humiston-Keeling*, which has since been overruled. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012). Whether the Eighth Circuit will adopt a pro-employee approach considering the change in the Seventh Circuit is something to monitor.

²¹⁵ 486 F.3d at 481–82.

²¹⁶ *Id.* at 481.

²¹⁷ *Id.* at 481–82.

²¹⁸ *Id.* at 482.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

noted the split among the circuits.²²² The court first cited the pro-employee opinion in *Smith*,²²³ where the Tenth Circuit concluded the ADA requires reassignment as long as the employee is qualified.²²⁴ The court then referred to the Seventh Circuit's opinion in *Humiston-Keeling* and stated:

The reassignment provision makes clear that the employer must also consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, *and if the reassignment is feasible and does not require the employer to turn away a superior applicant*, the reassignment is mandatory.²²⁵

The Eighth Circuit therefore summarized the Seventh Circuit's opinion as not requiring reassignment where the individual is not the most-qualified applicant.²²⁶ Finding this position "persuasive and in accordance with the purposes of the ADA," the Eighth Circuit decided that employers were not required to reassign disabled individuals to positions for which they were not the most qualified.²²⁷ Believing the other approach turned the ADA into a "mandatory preference statute," the court concluded the ADA was not an affirmative action statute requiring preferences for less-qualified employees.²²⁸

Interestingly, the Eighth Circuit did not refer to *Barnett* until the end of the opinion, but it then noted that *Barnett* "bolstered" its position.²²⁹ Specifically, the court stated that *Barnett* stands for the proposition that an employer "ordinarily is not required to give a disabled employee a higher seniority status to enable the disabled employee to retain his or her job when another qualified employee invokes an entitlement to that position

²²²*Id.* at 482–83. (*comparing* *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc) (ruling in a pro-employee manner on this issue), *with* *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027–29 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (ruling in a pro-employer manner on this issue)).

²²³180 F.3d 1154.

²²⁴*Huber*, 486 F.3d at 482–83 (citing *Smith*, 180 F.3d at 1164–65).

²²⁵*Id.* at 483 (citing *Humiston-Keeling*, 227 F.3d at 1027–28).

²²⁶*Id.* As has been mentioned, the Seventh Circuit has since changed its opinion on this issue. *See United Airlines*, 693 F.3d at 761.

²²⁷*Huber*, 486 F.3d at 483.

²²⁸*Id.* (quoting *Humiston-Keeling*, 227 F.3d at 1028).

²²⁹*Id.* at 483–84.

conferred by the employer's seniority system."²³⁰ Believing that the plaintiff's position on the issue constituted "affirmative action with a vengeance," the court instructed the district court to enter judgment for the employer.²³¹

Thus, post-*Barnett*, these two courts of appeals adopted the pro-employer position regarding MQAs.²³² The next section of this Article will address the circuit court that adopted the pro-employee approach after *Barnett*.

B. The Circuit Court that adopted a pro-employee interpretation after Barnett

The one circuit court to take a pro-employee approach on this issue after *Barnett* is the Seventh Circuit.²³³ Interestingly, this court used to follow the

²³⁰ *Id.* at 484.

²³¹ *Id.* (quoting *Humiston-Keeling*, 227 F.3d at 1029).

²³² Another case in which a circuit court endorsed the pro-employer approach to this issue, but did not reference *Barnett*, was *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004), in which the Sixth Circuit stated that disabled employees are not entitled to preferential treatment in hiring decisions. *See also* *Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003). Here, the Second Circuit noted, albeit not in a case involving an MQA, the following: "The ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally." *Id.* The court continued: "The interpretation advanced by [the plaintiff] would transform the ADA from an act that prohibits discrimination into an act that requires treating people with disabilities better than others who are not disabled . . ." *Id.* Also, before reversing its position, the Seventh Circuit initially believed that *Barnett* resulted in a pro-employer outcome on this issue. *See* *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002). In *Mays*, the Seventh Circuit allowed the employer to follow its MQA without violating the Rehabilitation Act. *Id.* It analogized the MQA at issue in that case to the seniority system at issue in *Barnett*. *Id.* The court stated that *Barnett* "holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system." *Id.* It then concluded: "[i]f for 'more senior' we read 'better qualified,' for 'seniority system' we read 'the employer's normal method of filling vacancies,' and for 'superseniority' we read 'a break,' U.S. Airways becomes our case." *Id.*

²³³ *See* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012). Although the court did take a pro-plaintiff approach, it did not adopt a blanket rejection of employers' MQAs. *Id.* at 764. Instead, the court simply remanded the case for the district court to utilize *Barnett's* two-step inquiry and determine (1) whether automatic reassignment was ordinarily a reasonable accommodation (which the court suggested it should be) and (2) whether automatic reassignment would result in an undue hardship under United's specific employment policy. *Id.* At least two

pro-employer approach, both before and for some time after *Barnett*, but it has reversed itself.²³⁴ In *United Airlines*, the court addressed whether *Barnett* nullified the Seventh Circuit's previous pro-employer position regarding MQAs.²³⁵ The court ruled that *Humiston-Keeling* did not survive *Barnett* and that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer."²³⁶

The underlying policy at issue in *United Airlines* was somewhat unique. It stated that reassignment *may* be a reasonable accommodation, but the process for reassignment would be a competitive one—the disabled employees would not automatically receive the positions, but they would receive preferential treatment.²³⁷ This preferential treatment allowed the employees to submit unlimited transfer applications, be guaranteed an interview, and enjoy priority over equally-qualified applicants.²³⁸ Despite

courts have noted that *United Airlines* is not as pro-plaintiff as the EEOC and other plaintiffs have tried to interpret it; specifically, the Eleventh Circuit in *St. Joseph's Hospital* noted that the Seventh Circuit simply remanded the case back to the district court for it to decide the issue. *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016). Also, the United States District Court for the Northern District of Texas stated that the Seventh Circuit did not decide this issue in *United Airlines*; the court stated: "[r]ather, the United Airlines, Inc. court remanded the issue to the district court to determine whether 'mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation . . . [and] if there are fact-specific considerations particular to United's employment system that would . . . render mandatory reassignment unreasonable in [that] case.'" *EEOC v. Methodist Hosps. of Dallas*, No. 3:15-CV-3104-G, 2017 WL 930923, at *2 (N.D. Tex. Mar. 9, 2017).

²³⁴Specifically, the previous Seventh Circuit precedent, *Humiston-Keeling*, 227 F.3d 1024, held that employers are not required to automatically reassign an employee with a disability to a vacant position. The Seventh Circuit had also reached this conclusion post-*Barnett* in *Mays*, 301 F.3d at 866, where a different panel of the Seventh Circuit relied on *Humiston-Keeling* and held that the Rehabilitation Act did not require automatic reassignment of a less-qualified individual with a disability.

²³⁵693 F.3d at 760–61.

²³⁶*Id.* at 761 (emphasis added). As will be discussed later in this Article, although some courts view this case as being fully supportive of automatic reassignment in situations involving MQAs, there are also some courts that have pointed out that because of the italicized language, this case might not be as pro-employee as the EEOC and some plaintiffs believe it to be. *See infra* § VII.D.

²³⁷*United Airlines*, 693 F.3d at 761.

²³⁸*Id.*

this preferential treatment, the EEOC claimed the policy violated the ADA.²³⁹

Relying on *Humiston-Keeling*, the district court granted United's motion to dismiss, and the court also rejected the EEOC's argument that *Barnett* nullified *Humiston-Keeling*.²⁴⁰ On appeal, the Seventh Circuit noted that the district court was correct that *Humiston-Keeling* had not been overruled, thus justifying the district court's dismissal decision.²⁴¹ As previously mentioned, the Seventh Circuit in *Humiston-Keeling* had decided that the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question."²⁴²

However, the EEOC urged the Seventh Circuit to re-evaluate *Humiston-Keeling* in light of *Barnett*.²⁴³ The court addressed *Barnett* and whether it applied to policies like United's.²⁴⁴ First noting that the Supreme Court acknowledged that preferences are permissible under the ADA, the court reiterated *Barnett*'s two-step framework.²⁴⁵ The court stated:

The "plaintiff/employee . . . need only show that an 'accommodation' seems reasonable on its face, i.e. ordinarily or in the run of cases." Once the plaintiff has shown he seeks a reasonable method of accommodation, the burden shifts to the defendant/employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."²⁴⁶

The Seventh Circuit also noted from *Barnett* that requiring an employer to violate its seniority rules was typically not reasonable, but there could be circumstances where the requested accommodation was reasonable even

²³⁹ *Id.*

²⁴⁰ *Id.* at 761–62.

²⁴¹ *Id.* at 762.

²⁴² *Id.* (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000), overruled by *United Airlines*, 693 F.3d at 761.

²⁴³ *Id.*

²⁴⁴ *Id.* at 762–63.

²⁴⁵ *Id.* at 762.

²⁴⁶ *Id.* (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002)).

with a seniority system.²⁴⁷ The court continued by noting that *Barnett* acknowledged that preferences were required in some cases.²⁴⁸ Finally, the court opined that U.S. Airways prevailed in *Barnett* because “its situation satisfied a much narrower, fact-specific exception based on the hardship that could be imposed on an employer utilizing a seniority system.”²⁴⁹

Although noting that a separate panel of the Seventh Circuit had previously ruled that *Barnett* supported the pro-employer position regarding MQAs, the court in *United Airlines* rejected that panel’s idea that seniority systems are “essentially the same” as MQAs.²⁵⁰ The *United Airlines* court stated that an MQA does not involve the same property-rights concerns and administrative concerns that seniority systems do and therefore should not be treated in the same manner as seniority systems.²⁵¹ Finally, the court reiterated that the Supreme Court had already determined that reassignment to a vacant position was typically a reasonable accommodation and that unless there is an undue hardship, an employer must reassign the disabled employee.²⁵²

Ultimately, however, the court remanded the case with instructions to follow *Barnett*’s framework.²⁵³ First, the district court was to determine whether “mandatory reassignment [was] ordinarily, in the run of cases, a

²⁴⁷*Id.* at 763.

²⁴⁸*Id.*

²⁴⁹*Id.* Although the court made this statement, the Court in *Barnett* did not really assess the undue hardship analysis; it was not required to do so because the employee was unable to prove that the proposed accommodation was reasonable on its face, or in the run of cases. *See Barnett*, 535 U.S. at 403–06.

²⁵⁰693 F.3d at 764. Specifically, in *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002), the Seventh Circuit allowed the employer to follow its MQA without violating the Rehabilitation Act. It analogized the MQA at issue in that case to the seniority system at issue in *Barnett*. *Mays*, 301 F.3d at 872. The court stated that *Barnett* “holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer’s seniority system.” *Id.* It then concluded: “[i]f for ‘more senior’ we read ‘better qualified,’ for ‘seniority system’ we read ‘the employer’s normal method of filling vacancies,’ and for ‘superseniority’ we read ‘a break,’ *U.S. Airways* becomes our case.” *Id.* But one *potential* distinction is that because of U.S. Airways’ seniority system, the employees at U.S. Airways had more of an expectation that they would be entitled to the at-issue positions than ordinary job applicants would have had regarding open positions for which they applied.

²⁵¹693 F.3d at 764.

²⁵²*Id.* Of course, reassignment was not always reasonable; if there was a seniority system in place, reassignment would not be reasonable. *Id.* at 763.

²⁵³*Id.* at 764.

reasonable accommodation.”²⁵⁴ Second, the district court was to “determine . . . if there [were] fact-specific considerations particular to United’s employment system that would create an undue hardship and render mandatory reassignment unreasonable.”²⁵⁵ Finally, the court noted that two other circuits had reached similar outcomes (albeit before *Barnett*), and that it was appropriate to reject *Humiston-Keeling*.²⁵⁶ Thus, although this case is typically relied on for the propositions that an employer cannot rely on an MQA and that the ADA requires reassignment to a vacant position, the Seventh Circuit’s decision to simply remand the case back to the district court, along with some of the language used in the opinion, suggests that *United Airlines* could be interpreted as not being as pro-employee as plaintiffs and the EEOC argue it is.²⁵⁷

The opinions addressed in the two previous sections of this Article demonstrate that after *Barnett*, there is still uncertainty regarding whether MQAs can trump the ADA’s reassignment provision. This uncertainty exists not only at the circuit-court level, but as the next section of the Article will demonstrate, it also exists at the district-court level.²⁵⁸

VI. POST-*BARNETT* OPINIONS FROM THE UNITED STATES DISTRICT COURTS

Few circuits have visited this specific issue since *Barnett*.²⁵⁹ There have, however, been several opinions at the district-court level, some of which

²⁵⁴*Id.* This court, and others, utilized the term “mandatory reassignment.” *Id.* Throughout this Article, the term “automatic reassignment” has been used instead. For purposes of this Article, the two phrases are synonymous. *See supra* note 4.

²⁵⁵*United Airlines*, 693 F.3d at 764.

²⁵⁶*Id.* at 764–65 (citing *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc)). As has been noted previously in this Article, some courts have not read *Smith* and *Aka* so broadly as to require reassignment of a disabled employee over a more-qualified, non-disabled applicant. *See, e.g.*, *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016).

²⁵⁷*See infra* § VII.D.

²⁵⁸*See infra* § VI.A.

²⁵⁹The Seventh Circuit has addressed this issue directly, *see United Airlines*, 693 F.3d at 761, as has the Eighth Circuit, *see Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 481 (8th Cir. 2008), as well as the Eleventh Circuit, *see St. Joseph’s Hosp.*, 842 F.3d at 1345. The Fifth Circuit will be addressing this issue when it decides *Methodist Hospitals*, which is currently on appeal to that court. *See EEOC v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495, 504–05 (N.D. Tex. 2016), *motion to alter or amend judgment denied*, No. 15-3104, 2017 WL 930923, at *1 (N.D. Tex. Mar. 9, 2017), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017).

have taken a pro-employer approach²⁶⁰ and others that have taken a pro-employee position.²⁶¹ The Article will now discuss some of these district-court cases.

A. *Post-Barnett cases from the United States District Courts that have adopted a pro-employer position*

One pro-employer court is the Eastern District of Virginia, which concluded the ADA does not require automatic reassignment.²⁶² In *Woody*, the plaintiff's²⁶³ health condition prevented her from continuing as a deputy sheriff.²⁶⁴ She requested reassignment to a position for which she was qualified.²⁶⁵ Of the four applicants, the plaintiff was the least qualified, and when the employer followed its MQA and did not hire the plaintiff, the plaintiff sued.²⁶⁶ The plaintiff's position was simple: the ADA required reassignment to the sought-after position.²⁶⁷ The court addressed the issue in response to cross-motions for summary judgment.²⁶⁸ Quoting from *Barnett*, the court stated:

To survive summary judgment, the employee must first demonstrate that the accommodation he or she requests "seems reasonable on its face, i.e., ordinarily or in the run of cases." If the plaintiff makes this showing, the employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." If the accommodation requested by the employee is not reasonable in the run of cases,

²⁶⁰ See *infra* § VI.A.

²⁶¹ See *infra* § VI.B.

²⁶² See *United States v. Woody*, 220 F. Supp. 3d 682, 691–92 (E.D. Va. 2016).

²⁶³ The named plaintiff in this action was the United States (on behalf of Emily Hall). *Id.* at 684. Throughout the discussion of this case, however, I will use the term "plaintiff" when referring to the employee at the center of this dispute.

²⁶⁴ *Id.* at 683–84.

²⁶⁵ *Id.* at 684.

²⁶⁶ *Id.* at 684–85.

²⁶⁷ *Id.* at 685.

²⁶⁸ *Id.*

summary judgment for the employer will usually be appropriate²⁶⁹

The court provided an explanation of the ADA, its purposes, its relevant definitions, and its requirements.²⁷⁰ The court then framed the issue as being whether the ADA requires “as an accommodation of last resort, employers must depart from their neutral and nondiscriminatory policy of hiring the most-qualified applicant for a vacancy in order to reassign a minimally qualified disabled employee.”²⁷¹ The court concluded the ADA had no such requirement.²⁷²

The court first addressed the ADA’s text.²⁷³ The court noted that the ADA requires employers to provide reasonable accommodations so long as doing so would not pose an undue hardship, and that the ADA also specifies that reassignment to a vacant position “may” qualify as a reasonable accommodation.²⁷⁴ Determining that these provisions did *not* provide an answer to the question, the court looked to the ADA’s “Findings and Purpose” section.²⁷⁵ Based on this section, which emphasized equality and equality of opportunity, the court concluded that the ADA was not an affirmative action statute in which Congress intended to provide an advantage to individuals with disabilities.²⁷⁶ The court emphasized the “national mandate for the *elimination of discrimination* against individuals with disabilities,”²⁷⁷ and it also noted that Congress wanted the ADA to be an equal-opportunity statute, not a preference statute.²⁷⁸

²⁶⁹*Id.* at 686 (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402–03 (2002)) (citation omitted). The court also noted that plaintiffs can also prevail if they can show that “special circumstances” could result in a conclusion that an accommodation, which ordinarily would not seem reasonable, might be reasonable with a particular set of facts. *Id.* at 686 (quoting *Barnett*, 535 U.S. at 402–05). The plaintiff conceded that no such special circumstances existed in this case. *Id.*

²⁷⁰*Id.* at 687–94.

²⁷¹*Id.* at 687.

²⁷²*Id.*

²⁷³*Id.* at 688.

²⁷⁴*Id.* See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A) (2012).

²⁷⁵*Woody*, 220 F. Supp. 3d at 688.

²⁷⁶*Id.* at 688–89.

²⁷⁷*Id.* at 688 (emphasis in original). Interestingly, the court emphasized/italicized the “elimination of discrimination” language, but it did not emphasize/italicize the words following that phrase, “against individuals with disabilities.” See *id.*

²⁷⁸*Id.* at 688–89.

The court then rejected the pro-employee positions from the Tenth and D.C. Circuits.²⁷⁹ The court relied on *Barnett* when rejecting these positions.²⁸⁰ In wrapping up its application of *Barnett*, the court stated: “In other words, the Supreme Court confirmed in *Barnett* that the plain meaning of the reasonable accommodation provision unambiguously precludes the aggressive interpretation of the ADA advocated by [the plaintiff] and the EEOC.”²⁸¹ The court did, however, continue and evaluate the ADA’s legislative history.²⁸²

The court concluded the legislative history supported the pro-employer position.²⁸³ Relying extensively on the House Committee on Education and Labor Report, the court focused on two statements.²⁸⁴ Specifically, the court emphasized that “an employer is still free to select applicants for reasons unrelated to the existence or consequence of a disability”²⁸⁵ and that “the employer’s obligation is to consider applicants and make decisions without regard to an individual’s disability, or the individual’s need for a reasonable accommodation. But, the employer has no obligation under [the ADA] to prefer applicants with disabilities over other applicants on the basis of disability.”²⁸⁶ The court did not believe this language applied only to new job applicants.²⁸⁷

The court then focused on *Barnett* and the plaintiff’s reliance on *United Airlines*.²⁸⁸ The court rejected *United Airlines* and concluded that the Seventh Circuit misapplied *Barnett*.²⁸⁹ The language from *Barnett* on which *United Airlines* relied accepted the idea that the ADA required preferences in some cases, yet the court in *Woody* rejected the idea that automatic

²⁷⁹ *Id.* at 689–91. Specifically, the court rejected the plaintiff’s reliance on *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–65 (10th Cir. 1999) (en banc), and *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc).

²⁸⁰ *Woody*, 220 F. Supp. 3d at 690–91.

²⁸¹ *Id.* at 691. In making this pronouncement, the court explicitly rejected the EEOC’s position. *Id.* at 691 n.8.

²⁸² *Id.* at 691.

²⁸³ *Id.*

²⁸⁴ *Id.* at 691–92. Specifically, the court quoted extensively from H.R. REP. NO. 101-485 pt. 2, at 55–56 (1990).

²⁸⁵ *Woody*, 220 F. Supp. 3d at 692 (quoting H.R. REP. NO. 101-485 pt. 2, at 56 (1990)).

²⁸⁶ *Id.* (quoting H.R. REP. NO. 101-485 pt. 2, at 56 (1990)).

²⁸⁷ *Id.* at 692.

²⁸⁸ *Id.* at 692–95.

²⁸⁹ *Id.* at 693–94.

reassignment in favor of a less-qualified individual was the type of preference to which *Barnett* was referring.²⁹⁰ Although acknowledging that *Barnett* does allow for preferences, the court in *Woody* stated that preferences should exist only when furthering the ADA's goal of *equal opportunity*.²⁹¹ The court also rejected the plaintiff's argument that the only time reassignment was prohibited was when there was a seniority system.²⁹² In conclusion, the court decided the ADA does not require reassigning a disabled employee over the hiring of a more-qualified applicant.²⁹³ If an employer utilizes a neutral MQA, it is not required to deviate from it.²⁹⁴ According to the court, this was consistent with the ADA and *Barnett*.²⁹⁵

More recently, the Northern District of Texas also decided the ADA does not require reassignment for individuals with a disability.²⁹⁶ In *Methodist Hospitals*, the EEOC alleged the hospital's policy of requiring individuals with disabilities to compete for vacant positions violated the ADA.²⁹⁷ The court granted summary judgment in favor of the hospital, and

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 694.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 693–94. The court in *Woody* also noted that, prior to *Barnett*, the Fourth Circuit had stated that “[t]he ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers.” *Id.* at 687 n.4 (quoting *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001)). The court in *Woody* did, however, comment that it was not relying on *Sara Lee* in reaching its decision. *Id.* Unfortunately, because the parties in *Woody* settled prior to disposition on appeal, the Fourth Circuit will not have the opportunity to resolve the issue. Another case, which is currently pending on appeal to the Fourth Circuit, presents a similar, but slightly different, claim. See *EEOC v. McLeod Health, Inc.*, 271 F. Supp 3d 813, 821 (D.S.C. 2017) (*appeal docketed*, No. 17-2335 (4th Cir. Nov. 21, 2017)). The EEOC brought a wrongful termination claim against McLeod on behalf of the plaintiff, alleging that an unlawful medical examination revealed the plaintiff to be a “high-fall” risk and unsuited to work on the medical campus. *Id.* at 819. Although the plaintiff did not bring a failure-to-reassign claim, the parties thoroughly briefed the issue and the circuit split, and the Magistrate Judge concluded “that Defendant did not have an affirmative responsibility to reassign [the plaintiff] to a vacant position without requiring [her] to apply or compete for the position.” *Id.* at 821. However, the district court declined to decide the reassignment issue, stating that it could not “redraft Plaintiff’s complaint to add claims that are not squarely presented.” *Id.* at 831. Thus, it is unlikely that the Fourth Circuit will reach the reassignment issue on appeal.

²⁹⁶ *EEOC v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495, 504–05 (N.D. Tex. 2016), *motion to alter or amend judgment denied*, No. 15-3104, 2017 WL 930923, at *1 (N.D. Tex. Mar. 9, 2017), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017).

²⁹⁷ *Id.* at 496–97.

the EEOC moved to alter or amend the judgment.²⁹⁸ The EEOC argued that the ADA's language and history supported its pro-employee position, and that Congress chose to treat current employees seeking reassignment differently than new job applicants.²⁹⁹ Also, the EEOC stated that allowing individuals with disabilities to compete for jobs was not an accommodation; the ADA required more.³⁰⁰ Finally, the EEOC cited *Barnett* for the proposition that "reasonable accommodation incorporates the possibility of granting what can be viewed as a preference in order to maintain the employment of a disabled individual."³⁰¹

The EEOC argued that three United States Courts of Appeals had adopted this pro-employee approach³⁰² (the Seventh Circuit,³⁰³ the Tenth Circuit,³⁰⁴ and the D.C. Circuit³⁰⁵), but the court rejected this position.³⁰⁶ Specifically, the court observed that only one of the cases upon which the EEOC relied was post-*Barnett*.³⁰⁷ The court then disputed the EEOC's claim that *United Airlines* held that the ADA mandates reassignment.³⁰⁸ Specifically, the court interpreted *United Airlines* as a case in which the Seventh Circuit simply instructed the district court to decide whether reassignment was, "in the run of cases," a reasonable accommodation and whether there were facts peculiar to that case that would make reassignment unreasonable.³⁰⁹ The court did not address the pre-*Barnett* cases in any detail.³¹⁰

After addressing *United Airlines*, the court addressed the Eighth Circuit's opinion in *Huber*.³¹¹ It relied on the Eighth Circuit's statement that

²⁹⁸ See *id.* at 505-06; see also EEOC v. Methodist Hosps. of Dallas, No. 15-3104, 2017 WL 930923, at *1 (N.D. Tex. Mar. 9, 2017) (denying motion to alter or amend judgment).

²⁹⁹ *Methodist Hosps.*, 2017 WL 930923, at *1.

³⁰⁰ *Id.*

³⁰¹ *Id.* (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002)).

³⁰² *Id.* at *2.

³⁰³ EEOC v. *United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012).

³⁰⁴ *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc).

³⁰⁵ *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

³⁰⁶ *Methodist Hosps.*, 2017 WL 930923, at *2-3.

³⁰⁷ *Id.* at *2. Specifically, only the Seventh Circuit's opinion in *United Airlines* was decided after *Barnett*.

³⁰⁸ *Id.* at *2-3.

³⁰⁹ *Id.*

³¹⁰ See *id.*

³¹¹ *Id.* at *2. See *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2008).

the ADA was not an affirmative action statute and did not require reassignment.³¹²

The court then addressed the Fifth Circuit, the jurisdiction in which the court was located, but a circuit that had not directly addressed MQAs post-*Barnett*.³¹³ Believing that the Fifth Circuit did not interpret the ADA as giving disabled employees the right to reassignment,³¹⁴ the court noted that this interpretation was consistent with the recently-decided *St. Joseph's Hospital* case from the Eleventh Circuit.³¹⁵ Relying primarily on *St. Joseph's Hospital* ("the ADA does not require reassignment without competition for, or preferential treatment of, the disabled;"³¹⁶ "requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable 'in the run of cases'"³¹⁷), the court rejected the EEOC's position.³¹⁸ According to the court, the ADA required only that the disabled employee be given an opportunity to compete for the position.³¹⁹

These are two examples of United States District Courts adopting the pro-employer interpretation post-*Barnett*. There are additional cases that reached the same result,³²⁰ but the next section of this Article will address United States District Courts that took the opposite approach.

³¹²*Methodist Hosps.*, 2017 WL 930923, at *2 (citing *Huber*, 486 F.3d at 483).

³¹³*Id.* at *2–3. Of course, the Fifth Circuit had already decided *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), which several courts have interpreted as approving of MQAs. *See, e.g.*, *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1346–47 (11th Cir. 2016).

³¹⁴*Methodist Hosps.*, 2017 WL 930923, at *2–3. The court relied on the following cases for this proposition: *Daugherty*, 56 F.3d at 700; *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); and *Turco v. Hoechst Celanese Co.*, 101 F.3d 1090, 1094 (5th Cir. 1996).

³¹⁵*Methodist Hosps.*, 2017 WL 930923, at *2–3 (relying on *St. Joseph's Hosp.*, 842 F.3d at 1345).

³¹⁶842 F.3d at 1345.

³¹⁷*Id.* at 1346.

³¹⁸*Methodist Hosps.*, 2017 WL 930923, at *2–3.

³¹⁹*Id.*

³²⁰*See, e.g.*, *Marshall v. AT&T Mobility*, 793 F. Supp. 2d 761, 768 (D.S.C. 2011) (noting that although the Fourth Circuit had not yet decided the issue, "[the employer's] failure to award one of these open positions to the Plaintiff as an accommodation for his disability is, in itself not a violation either."). The court cited the Eighth Circuit's opinion in *Huber* for this proposition. *Id.* *See also* *Jackson v. FUJIFILM Mfg., USA, Inc.*, No. 09-01328, 2011 WL 494281 (D.S.C. Feb. 7, 2011) (stating that most courts agree that employers can rely on MQAs and not reassign a less-qualified individual with a disability); *Haynes v. AT&T Mobility, LLC*, No. 09-4502011, 2011 WL 532218, at *4 (M.D. Pa. Feb. 8, 2011) (relying on *Barnett* and stating that "[the plaintiff] seeks reassignment over another candidate who is more qualified for the job, when the most-qualified applicant would normally be entitled to the job under the employer's established hiring

B. Post-Barnett cases from the United States District Courts that adopted a pro-employee position

The United States District Court for the District of Maine is another court to address the ADA and MQAs.³²¹ Unlike the previously discussed district-court cases, and unlike another district court from within the First Circuit,³²² the court in *Rowe* decided that the Tenth Circuit's rationale in *Smith*, which favored automatic reassignment, was more persuasive than the Seventh Circuit's reasoning in *Humiston-Keeling*, which rejected the idea of automatic reassignment.³²³

In *Rowe*, the plaintiff suffered an injury that prevented her from performing work-related tasks.³²⁴ Although the employer accommodated her to a certain extent, the plaintiff believed she was entitled to one of the positions for which she applied, regardless of whether she was the most qualified.³²⁵ This, according to the employer, would have been a "preferential reassignment" that was not required.³²⁶ The employer argued it had to only consider the plaintiff as a "competitive applicant" for the jobs to which she wanted to be reassigned, and that it was not required to offer her one of the positions.³²⁷

practices. [The plaintiff] has failed to show that such an accommodation is reasonable in the run of cases."); *Garcia v. Whirlpool Corp.*, No. 08-02944, 2010 WL 4628627, at *7 (N.D. Ohio Nov. 5, 2010), *aff'd*, 468 Fed. App'x. 609 (6th Cir. 2012) (stating that the ADA does not require "preferential treatment" in reassignment cases); *Chapple v. Waste Mgmt.*, No. 05-2583, 2007 U.S. Dist. LEXIS 14151, at *11 (D. Minn. Feb. 28, 2007) (adopting the pro-employer approach, prior to the Eighth Circuit's decision in *Huber*, in part because of circuit precedent of not requiring an employer to violate a legitimate, nondiscriminatory policy).

³²¹See *Rowe v. Aroostook Med. Ctr.*, No. 09-182, 2010 U.S. Dist. LEXIS 102969, at *1 (D. Me. Aug. 17, 2010).

³²²*Castro-Medina v. Procter & Gamble Commercial Co.*, 565 F. Supp. 2d 343, 374 (D.P.R. 2008). In *Castro-Medina*, the United States District Court for the District of Puerto Rico observed that an employer is permitted to hire the most-qualified person for a position without violating the ADA. *Id.*

³²³2010 U.S. Dist. LEXIS 102969, at *33–34. Of course, the Seventh Circuit has since reversed its position. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012).

³²⁴2010 U.S. Dist. LEXIS 102969, at *3.

³²⁵*Id.* at *12–13.

³²⁶*Id.* at *29. This case involved the Rehabilitation Act, not the ADA; nonetheless, the issue is evaluated the same way under both federal statutes. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1165 n.4 (10th Cir. 1999) (en banc).

³²⁷*Rowe*, 2010 U.S. Dist. LEXIS 102969, at *29.

The court started the opinion by citing to *Barnett*.³²⁸ The court noted that while an established seniority system would ordinarily trump a reassignment request, the existence of such a seniority system was “pivotal,” relying on the Supreme Court’s statement that normally, a reassignment “would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system.”³²⁹ This applied regardless of whether the seniority system was contained in a CBA; this was so because seniority systems, provided they are followed, provide fairness, uniform treatment, and an “element of due process.”³³⁰

The employer argued that, similar to *Barnett*, it had an established system for filling positions; that system being a “competitive application process” that resulted in the hiring of the most-qualified candidate.³³¹ As a result, deviating from this policy would not be reasonable under *Barnett*.³³² The court viewed this as the employer arguing for a “hard-and-fast legal rule that would foreclose reassignment as a reasonable accommodation if a defendant can attest, through a suitable employee, to the existence of a uniform (or perhaps customary) policy of hiring the most-qualified applicant for a job posting, and the plaintiff is unable to produce evidence to the contrary.”³³³ The employer relied on *Huber*, *Humiston-Keeling*, and *Daugherty*.³³⁴ The employer also acknowledged the pro-employee position from the Tenth Circuit.³³⁵

With very little analysis, the court determined the Tenth Circuit’s pro-employee rationale was “better reasoned” and “more thorough,” and that it “adhere[d] to both the plain meaning and the congressional purpose behind the statutory language at issue.”³³⁶ After determining that the employer failed to establish “an established hiring system that would trump the reassignment,” the magistrate recommended (and the district judge later

³²⁸ *Id.* at *31.

³²⁹ *Id.* at *31–32 (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002)).

³³⁰ *Id.* at *32.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at *32–33.

³³⁴ *Id.* at *33.

³³⁵ *Id.*

³³⁶ *Id.* at *34.

agreed) that denying the defendant's motion for summary judgment was appropriate.³³⁷

Another court to adopt a pro-employee position is the Eastern District of Pennsylvania.³³⁸ In *Kosakoski*, the plaintiff sued her employer, alleging violations of the ADEA and the ADA.³³⁹ The plaintiff had a disability and applied for several "inside" positions.³⁴⁰ The company had an MQA, and although the plaintiff was minimally qualified for the positions, she did not receive an offer.³⁴¹ She found employment elsewhere and eventually sued her former employer.³⁴²

After addressing the plaintiff's non-ADA claims, the court addressed whether the plaintiff should have been entitled to reassignment.³⁴³ The defendant argued that it did not have to reassign the plaintiff, relying on the Eighth Circuit's opinion in *Huber*.³⁴⁴ The court rejected the defendant's reliance on *Huber*, noting *Huber* had relied heavily on *Humiston-Keeling*, which had since been overruled.³⁴⁵ Relying on *United Airlines*, the court stated: "accommodation through appointment to a vacant position is reasonable' and that 'absent a showing of undue hardship, an employer must implement such a reassignment policy.'"³⁴⁶ The court also noted the following from *United Airlines*: "a 'best-qualified selection policy' does not categorically amount to an undue hardship for an employer."³⁴⁷

The court also noted that *Huber* "may be contrary to Third Circuit precedent."³⁴⁸ Specifically, the court relied on *Shapiro v. Township of Lakewood*³⁴⁹ and noted the following based on its interpretation of *Barnett*:

³³⁷ *Id.* at *36–37. The District Court judge ultimately adopted the Magistrate Judge's recommendation. See *Rowe v. Aroostook Med. Ctr.*, No. 09-182, 2010 U.S. Dist. LEXIS 102960, at *1 (D. Me. Sept. 28, 2010).

³³⁸ See *Kosakoski v. PNC Fin. Servs. Grp., Inc.*, No. 12-00038, 2013 U.S. Dist. LEXIS 138234, at *1 (E.D. Pa. Sept. 26, 2013).

³³⁹ *Id.* at *22.

³⁴⁰ *Id.* at *17.

³⁴¹ *Id.* at *17–19.

³⁴² *Id.* at *22.

³⁴³ *Id.* at *44–45.

³⁴⁴ *Id.* at *47.

³⁴⁵ *Id.* at *47–48.

³⁴⁶ *Id.* (citing *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012)).

³⁴⁷ *Id.* at *48 (citing *United Airlines*, 693 F.3d at 764).

³⁴⁸ *Id.* Despite this statement, the policy at issue in the Third Circuit case to which the court referred, *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 360 (3d Cir. 2002), was not an MQA; it was a policy that required individuals seeking reassignment to review job postings on a bulletin board

In cases in which a requested accommodation in the form of a job reassignment is claimed to violate an employer's disability-neutral rule, a court must consider if the accommodation appears reasonable on its face. If the accommodation appears reasonable, the employer must show that it would cause an undue hardship.³⁵⁰

Because the court believed the plaintiff's reassignment request was reasonable, it was up to the employer to demonstrate undue hardship.³⁵¹ The employer argued that it would have been an undue hardship to hire the plaintiff because of its MQA; however, the court, relying on *United Airlines*, stated this type of policy does not "categorically" amount to an undue hardship.³⁵² And in this case, where there was evidence the employer failed to hire the most-qualified person for the positions at issue, the court concluded that reassigning the plaintiff would not have created an undue hardship.³⁵³

As the previous sections of this Article demonstrate, the district courts, like the courts of appeals, are split on the issue of MQAs and the ADA. Eventually, this will probably be resolved by the Supreme Court, and when the Court does so, it will rely on the arguments made by the litigants in the previously-discussed cases. Unfortunately for individuals with disabilities, as the next section of this Article will demonstrate, the resolution of this issue will most likely result in a pro-employer outcome.

and then formally apply for any desired position. *Id.* at 358. Certainly, forcing an employer to disregard that policy is more reasonable than forcing an employer to hire a less-qualified applicant. Although then-Judge Alito wrote the *Shapiro* opinion, that opinion sheds little light on how he would rule on the MQA issue. Although he issued a pro-employee opinion in *Shapiro*, the tone of the opinion suggested that he felt that the employer's refusal to stray from its "bulletin-board policy" was unreasonable or petty. *See id.* at 360–61. Whether he would feel that way about forcing an employer to stray from an MQA was not clear in *Shapiro*.

³⁴⁹292 F.3d 356, 360 (3d Cir. 2001).

³⁵⁰*Kosakoski*, 2013 U.S. Dist. LEXIS 138234, at *48 (quoting *Shapiro*, 292 F.3d at 361). Of course, if the accommodation does not appear to be reasonable on its face, pursuant to *Barnett*, the plaintiff can still show special circumstances to show that the accommodation request was, in fact, reasonable in that case. 535 U.S. 391, 405–06 (2002).

³⁵¹*Kosakoski*, 2013 U.S. Dist. LEXIS 138234, at *49.

³⁵²*Id.* at *49–50 (relying on *United Airlines*, 693 F.3d at 764).

³⁵³*Id.* at *50–51.

VII. WHY THE COURT WILL MOST LIKELY CONCLUDE EMPLOYERS CAN RELY ON MQAS

Admittedly, there are arguments on both sides of this issue. Nonetheless, this section of the Article will explain why the Supreme Court, when it decides the issue, will most likely allow employers to rely on MQAs, *provided the employers routinely follow them*. The reasons the Court will most likely allow employers to rely on MQAs are the following: (A) the statutory language (both the substantive provisions and the “Findings and Purpose” section) does not require employers to hire less-qualified candidates; (B) the legislative history does not support requiring employers to hire less-qualified candidates; (C) although *Barnett* does allow for preferences in some cases, it does not support requiring employers to hire less-qualified candidates with disabilities over more-qualified candidates without them; (D) the cases that allegedly support the idea that the ADA can trump an MQA are not as pro-employee as employees and the EEOC believe they are; and (E) policy reasons support allowing employers to hire the most-qualified applicants for the positions they seek to fill.³⁵⁴ These reasons will now be addressed.

³⁵⁴For several of the above-referenced reasons, the EEOC’s pro-employee interpretation regarding this issue should be rejected. Although the EEOC, which is charged with enforcing the ADA, believes that disabled employees who are qualified for a vacant position are entitled to that position, regardless of whether they are the most-qualified applicants, *see* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, at 44 (1999) (“[t]he employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment;” “reassignment must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position;” and “[a pro-employer interpretation] nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.”), the Court is not likely to follow the EEOC’s approach.

Many courts have rejected the EEOC’s pro-employee position, doing so based largely upon the previously-referenced arguments regarding the statutory language, legislative history, and *Barnett*. See *United States v. Woody*, 220 F. Supp. 3d 682, 691 n.8 (E.D. Va. 2016) (stating that the EEOC’s position lacked the power to persuade and was “manifestly contrary to the statute,” and was thus not entitled to either *Skidmore* or *Chevron* deference); but see *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1166–67 (10th Cir. 1999) (en banc) (following the EEOC’s position that “[r]eassignment means that the employee gets the vacant position if s/he is qualified for it.”). The EEOC’s position is also seemingly inconsistent with the Code of Federal Regulations. Specifically, the CFR provides the following definitions of “Reasonable Accommodations”:

A. *The ADA’s language, including its substantive provisions and its “Findings and Purpose” section, supports allowing employers to rely on MQAs*

When addressing MQAs, all courts look to the ADA’s language,³⁵⁵ however, no court has yet decided that the ADA’s language provides a clear answer regarding how MQAs “fit” with the ADA’s reassignment provision.³⁵⁶ Plaintiffs who rely on the ADA’s substantive provisions argue the following: (1) the ADA prohibits discrimination; (2) discrimination includes not providing reasonable accommodations to qualified individuals with disabilities; (3) “reassignment to a vacant position” is specifically listed as a reasonable accommodation; and, therefore, (4) an employee with a disability is entitled to reassignment to the vacant position so long as he is minimally qualified for it.³⁵⁷ Although this argument has some appeal, most

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability *to be considered for the position* such qualified applicant desires; or

...

(iii) Modifications or adjustments that enable a covered entity’s employee with a disability *to enjoy equal benefits and privileges of employment* as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. § 1630.2(o)(1) (2017) (emphasis added). Here, the emphasis is on allowing an individual with a disability to be *considered* for a position, and, more importantly, the accommodations are intended to allow individuals with disabilities to enjoy *equal* benefits and privileges of employment; there is no indication that individuals with disabilities should be given any type of preference with respect to hiring decisions. *Id.* Although Supreme Court Justices have deferred to the EEOC on other issues in the past, *see, e.g.*, *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 601–02 (2004) (Scalia, J., dissenting) (deferring to the EEOC’s position that under the ADEA, employers are prohibited from making hiring decisions based on age, including favoring older workers over younger workers), they will most likely not do so when deciding the MQA issue.

³⁵⁵*See, e.g.*, *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1345 (11th Cir. 2016). This is consistent with the canon of statutory construction that courts should first look at a statute’s language when trying to interpret the statute. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (observing that when interpreting a statute, the Court must start with the statutory language).

³⁵⁶One court, however, has concluded that the language, although clear, is not conclusive. *See Woody*, 220 F. Supp. 3d at 687–88.

³⁵⁷Typically, however, reassignment is viewed as an “accommodation of last resort,” which is considered only after it is clear that no other accommodation would allow the employee to stay in his then-current position. *See id.* at 687.

courts have concluded this statutory language does not support such a pro-employee interpretation.³⁵⁸

One court to reach this conclusion was the Eleventh Circuit, which it did in *St. Joseph's Hospital*.³⁵⁹ Specifically, when addressing whether the reassignment provision *requires* reassignment, the court stated: “the use of the word ‘may’ implies . . . that reassignment will be reasonable in some circumstances but not in others.”³⁶⁰ The Eleventh Circuit also stated the following regarding the ADA’s language: “Had Congress understood the ADA to mandate reassignment, it could easily have used mandatory language. That it did not do so at least suggests that it did not intend reassignment to be required in all circumstances.”³⁶¹ The fact that Congress did use mandatory language in other parts of the ADA added support to the court’s position.³⁶² This is one example of where the ADA’s substantive provisions were one factor that led to a pro-employer outcome regarding MQAs.³⁶³

Another pro-employer opinion that relied on the ADA’s substantive provisions to resolve this issue was *Woody*.³⁶⁴ Although concluding that the language was “clear but inconclusive,” the court suggested the language did not favor automatic reassignment.³⁶⁵ The court stated:

[B]ecause of the reassignment language, employers may not fire such a person without first seeking to place the employee in a vacant position for which he or she is qualified. Furthermore, *if no circumstances exist that make a potential reassignment unreasonable*, then reassignment

³⁵⁸As will be discussed below, the court in *St. Joseph's Hospital* emphasized that Congress used the word “may” in its examples of reasonable accommodations, and this word choice was further evidence that automatic reassignment is not *required*. *St. Joseph's Hosp., Inc.*, 842 F.3d at 1345.

³⁵⁹*Id.*

³⁶⁰*Id.* (citing *May*, *Meriam-Webster.com*, www.merriam-webster.com/dictionary/may (last visited Oct. 28, 2016)).

³⁶¹*Id.* at 1345 n.5.

³⁶²*Id.*

³⁶³In his separate opinion in *Smith*, Judge Kelly also focused on the “may” language and concluded that automatic reassignment read that word out of the statute. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1183–84 (10th Cir. 1999) (en banc) (Kelly, J., concurring in part and dissenting in part).

³⁶⁴220 F. Supp. 3d 682, 687–91 (E.D. Va. 2016).

³⁶⁵*Id.* at 688.

will be required of the employer [N]othing about this interpretation renders the reassignment provision “redundant.” To the contrary, this is the only reading of the statute that gives effect to every term.³⁶⁶

Thus, the court interpreted the ADA’s language as not *requiring* reassignment if there are circumstances that would make such a reassignment unreasonable, and because the court ultimately decided that automatic reassignment was not required in that case (which involved an MQA), an employer’s MQA would be one situation where reassignment would be unreasonable.³⁶⁷ In essence, the court interpreted the reassignment language as obligating the employer to only *consider* whether a reassignment would be appropriate.³⁶⁸

The court also noted that a pro-employee interpretation would have been inconsistent with the tool of statutory interpretation that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions”³⁶⁹ According to the court in *Woody*, Congress would not have created an affirmative action statute simply by including “reassignment to a vacant position” as an example of a reasonable accommodation in the definitions section of the ADA.³⁷⁰ Essentially, Congress would not have hidden such a serious part of the legislation in one definition in the “definitions” section of the statute.³⁷¹ This idea was also conveyed in Judge Silberman’s dissenting opinion in *Aka*; specifically, in his dissent, Judge Silberman stated the following: “If Congress had intended to grant a preference to the disabled—a rather controversial notion—it certainly would not have done so by slipping the phrase ‘reassignment to a vacant position’ in the middle of [the] list of reasonable accommodations.”³⁷² Thus, this is more evidence that the ADA’s substantive provisions do not support automatic reassignment.

³⁶⁶ *Id.* at 690.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 689–90. The court in *Woody* then proceeded to conclude that requiring reassignment where an employer has an MQA would not be reasonable. *Id.* at 694.

³⁶⁹ *Id.* at 688 (quoting *Whitman v. Am. Trucking Ass’n., Inc.*, 531 U.S. 457, 468 (2001)).

³⁷⁰ *Id.* at 688–89.

³⁷¹ *Id.* at 689.

³⁷² 156 F.3d 1284, 1315 (D.C. Cir. 1998) (Silberman, J., dissenting).

Another part of the ADA's language that favors a pro-employer outcome is the "Findings and Purpose" section.³⁷³ Specifically, that section provides the following, in part: "the Nation's proper goal[] regarding individuals with disabilities [is] to assure *equality of opportunity*"³⁷⁴ and "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the *opportunity to compete on an equal basis* and to pursue those opportunities for which our free society is justifiably famous."³⁷⁵ Because the emphasis of this language is on equality of opportunity, some courts have interpreted these provisions to mean the ADA does not require automatic reassignment, which would go beyond providing an equal opportunity for these individuals.³⁷⁶

The court in *Woody* evaluated the ADA's Findings and Purpose section and interpreted Congress's focus on equality of opportunity to mean the ADA was *not* an affirmative action statute requiring employers to hire less-qualified individuals with disabilities over more-qualified individuals without disabilities: "[T]hese express findings certainly teach . . . that Congress passed the ADA to eliminate barriers to equal opportunity facing disabled Americans, not to grant disabled Americans a competitive edge."³⁷⁷ The court also believed that such a pro-employer interpretation of those findings was consistent with the ADA's purpose, which was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."³⁷⁸ Essentially, the ADA was designed to *prevent* discrimination, not to grant individuals with disabilities special hiring preferences.³⁷⁹ The court noted the following: "Indeed, it would be quite surprising to learn that Congress had required

³⁷³42 U.S.C. § 12101 (2012). The Court has looked at the "Findings and Purpose" section of the ADA in the past; in fact, it used that section as part of its reasoning in *Sutton v. United Air Lines, Inc.*, which was one of the opinions that led Congress to pass the ADAAA. 527 U.S. 471, 484–85 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553. *See also* ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(a)(4).

³⁷⁴42 U.S.C. § 12101(a)(7).

³⁷⁵42 U.S.C. § 12101(a)(8).

³⁷⁶*See, e.g., Woody*, 220 F. Supp. 3d at 687–91. Admittedly, the ADAAA also has a "Findings and Purposes" section, and in that section, Congress expressed its desire to have broad protections for individuals with disabilities. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2. Most of the focus of the ADAAA, however, was on the definition of "disability," and it did not focus on the issue of automatic reassignment. *See id.* at § 4.

³⁷⁷220 F. Supp. 3d at 688.

³⁷⁸*Id.* at 686 (quoting 42 U.S.C. § 12101(b)(1)).

³⁷⁹*Id.* at 688.

employers to make hiring decisions exclusively based on disability in an act that affirmatively prohibits that conduct and that expressly aims to achieve only ‘equal opportunity.’”³⁸⁰

The Eleventh Circuit in *St. Joseph’s Hospital* also concluded that the ADA’s purpose was to provide equal opportunity, not to give individuals with disabilities any type of hiring preference.³⁸¹ The court was “cognizant that ‘the intent of the ADA is that an employer needs only to provide meaningful equal employment opportunities,’ and that ‘[t]he ADA was never intended to turn nondiscrimination into discrimination’ against the non-disabled.”³⁸² It was thus stating its belief that the ADA’s language did not favor automatic reassignment.³⁸³

³⁸⁰*Id.* at 689. Judge Kelly’s opinion in *Smith* also addressed the concern that a pro-employee interpretation of the ADA’s reassignment duty would run afoul of the ADA’s goal of equality of treatment. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1182 (10th Cir. 1999) (en banc) (Kelly, J., concurring in part and dissenting in part).

³⁸¹842 F.3d 1333, 1346 (11th Cir. 2016). Although the Court in *Barnett* did allow for the possibility of some preferences, the examples the Court provided did not support such a large preference such as one granting hiring preferences for individuals with disabilities over individuals without them. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397–98 (2002). *See, e.g.*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000) (allowing extended leave beyond company’s neutral policy); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 699 (7th Cir. 1998) (allowing exception to neutral physical fitness requirement).

³⁸²*St. Joseph’s Hosp.*, 842 F.3d at 1346 (quoting *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998)); *see also* *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (noting how such a pro-employee interpretation would not be consistent with the ADA’s purposes); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028–29 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (noting that requiring reassignment of a less-qualified individual with a disability over a more-qualified individual without one would be “affirmative action with a vengeance,” which was something the court did not believe was required under the ADA).

³⁸³Admittedly, some courts have interpreted the ADA’s language in a pro-employee manner. *See, e.g.*, *Smith*, 180 F.3d at 1164. After looking at the ADA’s language, the Tenth Circuit in *Smith* noted that the language does “not say ‘*consideration of* a reassignment to a vacant position,’” and because of that, the reassignment provision “must mean something more than the mere opportunity to apply for a job with the rest of the world.” *Id.* That court also concluded that the reference to reassignment would be redundant if the reassignment provision meant only that the employee would be *considered* for the new position. *Id.* at 1164–65. *See also* *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304–05 (D.C. Cir. 1998) (en banc) (expressing the belief that “reassign” must mean more than simply *consider* an employee for a transfer, and that a pro-employer interpretation of the ADA’s language would result in statutory redundancy). Additionally, some courts have used the ADA’s “Findings and Purpose” section to support the pro-employee position. *See, e.g.*, *Smith*, 180 F.3d at 1168. The court in *Smith* focused on the ADA’s stated goals of “full participation [in the work force], independent living, and economic

When the Supreme Court addresses this issue, it will start its analysis with the ADA's language.³⁸⁴ It will most likely conclude that the language does not support a pro-employee outcome; specifically, a passing reference that reassignment to a vacant position "may" constitute a reasonable accommodation, along with language that focuses on equality of opportunity, are not sufficient to conclude that Congress intended to require automatic reassignment.³⁸⁵ If the Court is not convinced that the language supports a pro-employer outcome, or that it definitively supports either outcome, the Court will look elsewhere to decide whether MQAs can trump the reassignment provision. One such place will be the ADA's legislative history, which will be addressed now.

B. The ADA's legislative history favors the position that employers are not required to hire less-qualified individuals with disabilities over more-qualified individuals without them

Several courts have reviewed the ADA's legislative history when trying to determine whether the ADA requires automatic reassignment for a disabled employee.³⁸⁶ As is the case with many pieces of legislation, there is history that favors each side of this debate; nonetheless, the pro-employer legislative history is more direct and persuasive than the legislative history upon which plaintiffs and the EEOC have relied when arguing in favor of automatic reassignment.³⁸⁷

There is one substantial piece of the ADA's legislative history that *could* confirm that employers are not required to ignore MQAs and automatically reassign disabled employees. Specifically, the House Committee on Education and Labor Report provides the following:

By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to

self-sufficiency" for individuals with disabilities, and it concluded that automatic reassignment furthered those objectives. *Id.* (quoting 42 U.S.C. § 12101(a)(8) (2012)).

³⁸⁴ See *supra* note 35.

³⁸⁵ See *St. Joseph's Hosp.*, 842 F.3d at 1346 (holding the ADA's purpose was to provide equal opportunity, not to give individuals with disabilities any type of hiring preference); see also *Woody*, 220 F. Supp. 3d at 688 (same).

³⁸⁶ See, e.g., *Smith*, 180 F.3d at 1161–62; *Aka*, 156 F.3d at 1284; *Woody*, 220 F. Supp. 3d at 691.

³⁸⁷ See *infra* note 392.

choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

Thus, under this legislation an employer is still free to select applicants for reasons unrelated to the existence or consequence of a disability. . . .

. . . .

. . . In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. *But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.*³⁸⁸

Although the *Woody* court conceded that this language *could* apply only to new job applicants, it ultimately rejected that idea.³⁸⁹ Similarly, one of the dissenting judges in *Aka* also relied on the above-mentioned legislative history for the proposition that automatic reassignment was not required.³⁹⁰ This piece of legislative history is the most commonly-cited statement to support the pro-employer interpretation of the ADA's reassignment provision, and regardless of whether it was intended only for new job applicants, it still demonstrates Congressional intent for an employer to be able to hire the most-qualified applicants.³⁹¹

³⁸⁸ *Woody*, 220 F. Supp. 3d at 691–92 (quoting H.R. Rep. No. 101-485 pt. 2, at 55–56 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 338 (emphasis added)). Judge Kelly's separate opinion in *Smith* also relies on this legislative history to support the pro-employer position. 180 F.3d at 1180–81 (Kelly, J., concurring in part and dissenting in part). The D.C. Circuit in *Aka* and the majority in *Smith* also relied on this Report; however, neither of those majority opinions cited this pro-employer language from the House Report. See *Aka*, 156 F.3d at 1304; see *Smith*, 180 F.3d at 1161–62.

³⁸⁹ 220 F. Supp. 3d at 692. *But see Smith*, 180 F.3d at 1168 (addressing the dissent's characterization of the House Report and stating that this part of the legislative history applied only to new applicants).

³⁹⁰ 156 F.3d at 1311 (D.C. Cir. 1998) (LeCraft, J., dissenting).

³⁹¹ Unlike the pro-employer legislative history, which is fairly clear that employers have no obligation to prefer less-qualified applicants with disabilities over more-qualified applicants

In addition to the information contained in the previously-mentioned House Report, there were also statements made by members of Congress; statements that reject the idea of preferential hiring for individuals with disabilities. Specifically, Congressman Steny Hoyer (D - Maryland) stated that the ADA guarantees only “a level playing field.”³⁹² Also, Congressman Don Edwards (D - California) stated that the “ADA does not require employers to hire unqualified persons, nor does it require employers to give preferences to persons with disabilities. The ADA simply states that a person’s disability should not be an adverse factor in the employment process.”³⁹³ And although the Court in *Barnett* rejected this “anti-preference” interpretation of the ADA by stating that all accommodations are, to a certain extent, preferences,³⁹⁴ the types of accommodations referenced by the Court in *Barnett* (ones that allowed an employee to perform the essential functions of a job; not ones that gave a hiring

without them, the pro-employee legislative history is less direct. Specifically, an often-cited, pro-employee piece of legislative history states the following:

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, 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.

H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345–46. According to *Aka*, this non-definitive statement supported automatic reassignment. 156 F.3d at 1301. Also, the Tenth Circuit stated:

However, the legislative history clearly distinguishes between the affirmative action of modifying the essential functions of a job (which is not required) and the duty to reassign a disabled person to an existing vacant job, if necessary to enable the disabled person to keep his or her employment with the company (which is required).

Smith, 180 F.3d at 1168 (relying on H.R. Rep. No. 101-485 pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345–46. Despite this and some other courts’ attempts to read the ADA’s legislative history as requiring automatic reassignment, the history, while perhaps not conclusive, favors the interpretation of allowing employers to choose the most-qualified candidates. *See, e.g., Smith*, 180 F.3d at 1181 n.1 (Kelly, J., concurring in part and dissenting in part) (explaining that allowing preferences for disabled applicants seeking reassignment violates the clear language of the House Report).

³⁹²136 Cong. Rec. 10,856 (1990) (statement of Rep. Hoyer). *See* Brief for Appellant at 42, *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016) (No. 15-14551).

³⁹³136 Cong. Rec. 10,868 (1990) (statement of Rep. Edwards). *See* Brief for Appellant at 43, *St. Joseph’s Hosp.*, 842 F.3d at 1333 (No. 15-14551).

³⁹⁴535 U.S. 391, 397–98 (2002).

advantage to him) were not ones that tipped the playing field in favor of individuals with disabilities; they were ones that simply leveled that playing field.³⁹⁵

Thus, the legislative history also seems to support the rejection of automatic reassignment for individuals with disabilities.³⁹⁶ Although there is some question as to whether the very pro-employer language in the House Report applies only to new job applicants and not to disabled employees seeking reassignment, and although there is some legislative history that arguably supports a pro-employee interpretation of the ADA,³⁹⁷ most courts have concluded that the ADA's history rejects the idea of forcing employers to reassign less-qualified employees to jobs sought by more-qualified first-time job applicants.³⁹⁸ Because this history does not necessarily provide a conclusive answer, however, and because the Court has addressed an issue similar to automatic reassignment in *Barnett*, the Court will most likely next evaluate *Barnett*.

C. *Barnett* supports a pro-employer position with respect to MQAs

One of the most important sources the Court will most likely consider when considering whether an MQA can trump the ADA's reassignment provision will be its *Barnett* decision.³⁹⁹ There is some language in that opinion that is pro-employee, and there is some language that is pro-employer; it is therefore not surprising that courts have come to different conclusions regarding *Barnett*'s impact on MQAs.⁴⁰⁰ Ultimately, the Court will have to decide the following: (1) whether MQAs are sufficiently similar to employer-imposed seniority systems such that they are treated the same way, and forcing an employer to deviate from an MQA would, in the

³⁹⁵*Id.* at 397 (mentioning the ADA's "basic equal opportunity goal," and that accommodations are ones "that are needed for those with disabilities to obtain *the same workplace opportunities* that those without disabilities automatically enjoy" (emphasis added)).

³⁹⁶Several courts have arrived at this conclusion. *See, e.g.*, United States v. Woody, 220 F. Supp. 3d 682, 691–92 (E.D. Va. 2016).

³⁹⁷*See supra* note 391.

³⁹⁸*See supra* note 396.

³⁹⁹535 U.S. at 391.

⁴⁰⁰As examples of pro-employee points in *Barnett*, the Court (1) rejected the idea that the ADA does not allow for preferences; and (2) stated that, ordinarily, reassignment would be a reasonable accommodation. *Id.* at 401–03. Of course, the Court also stated that the presence of a bona fide seniority system changed its position regarding (2), above. *Id.*

run of cases, be unreasonable,⁴⁰¹ and (2) whether *Barnett's* emphasis on allowing preferences when they are *necessary to promote equality of opportunity* warrants a finding that the ADA's reassignment provision cannot trump an MQA.⁴⁰²

One of the more recent Courts of Appeals to reach a pro-employer outcome based partly on *Barnett* was the Eleventh Circuit.⁴⁰³ That court discussed the framework established in *Barnett* and concluded that the framework was equally applicable to MQAs.⁴⁰⁴ Regarding *Barnett*, the court stated:

This case does not involve a seniority system or a civil service system, but a best-qualified applicant policy. Nevertheless, *Barnett's* framework is instructive in this context. Requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable "in the run of cases." As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance.⁴⁰⁵

Thus, the Eleventh Circuit concluded that the MQA was analogous to the seniority system at issue in *Barnett*.⁴⁰⁶ As a result, the court concluded that violating the MQA was not reasonable.⁴⁰⁷

⁴⁰¹ See *supra* note 185.

⁴⁰² 535 U.S. at 403. Of course, if an employee can demonstrate that the employer does not follow its MQA, the employee would most likely be able to show that such a reassignment request would be reasonable in that situation. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027–29 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (noting that to withstand an ADA challenge, an MQA should be "consistently implemented").

⁴⁰³ *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1347 (11th Cir. 2016).

⁴⁰⁴ *Id.* at 1346.

⁴⁰⁵ *Id.* The court also suggested that this is even more relevant in the hospital setting, where people's lives and health can be put at risk if the hospital does not follow an MQA and hire the best applicants for the positions. *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 1346–47. See also *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483–84 (8th Cir. 2007), where the Eighth Circuit expressed its belief that *Barnett* supported its pro-employer position on this issue. Also, prior to *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir.

The court in *Woody* also took a pro-employer view of *Barnett*.⁴⁰⁸ In *Woody*, the court noted that while *Barnett* did allow for preferences, automatic reassignment was not the type of preference approved of in *Barnett*.⁴⁰⁹ The plaintiff in *Woody* unsuccessfully relied on the following statements from *Barnett*: (1) "And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach"⁴¹⁰ and (2) "[w]e also assume that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system."⁴¹¹ The court disagreed that these statements supported automatic reassignment.⁴¹²

Specifically, the court noted that the *Barnett* Court did, in fact, make these statements, but also added that preferences are required *if* they further the ADA's "basic equal opportunity goal."⁴¹³ *Barnett* noted that the accommodations must be ones that "are needed for those with disabilities to obtain the *same workplace opportunities* that those without disabilities automatically enjoy."⁴¹⁴ These statements from *Barnett* demonstrate that only accommodations that "level the playing field" are necessary; ones that provide a competitive advantage to individuals with disabilities are not.⁴¹⁵ Because the *Barnett* Court focused on "preferences" (accommodations) that allow employees with disabilities to compete equally with other, non-disabled employees, *Barnett*'s "theme" suggests that granting this type of hiring preference will prove to be unreasonable.⁴¹⁶

2012), the Seventh Circuit agreed that MQAs were sufficiently similar to seniority systems that the *Barnett* rationale applied. *See* *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002). Also, in his *Barnett* opinion, Justice Scalia expressed his belief that MQAs should be treated the same way as seniority systems. 535 U.S. at 416 (Scalia, J., dissenting).

⁴⁰⁸ 220 F. Supp. 3d 682, 692–93 (E.D. Va. 2016).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 693 (quoting *Barnett*, 535 U.S. at 397–98).

⁴¹¹ *Id.* (quoting *Barnett*, 535 U.S. at 403).

⁴¹² *Id.* at 693–94.

⁴¹³ *Id.* at 693.

⁴¹⁴ *Id.* at 693–94 (quoting *Barnett*, 535 U.S. at 397) (emphasis added).

⁴¹⁵ *Id.* This paragraph focused on how the *Woody* court rejected the plaintiff's reliance on statement (1), above. With respect to the second statement, the court simply rejected the plaintiff's argument that seniority systems are the *only* type of situations that would trump an employer's duty to provide automatic reassignment. *Id.*

⁴¹⁶ Admittedly, some courts have taken a different view of *Barnett*'s impact on MQAs. *See, e.g.,* *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012); *Rowe v. Aroostook Med. Ctr.*,

Ultimately, the Court will have to decide whether MQAs are similar enough to *Barnett*-type seniority-based policies such that it would be unreasonable to violate them in the run of cases.⁴¹⁷ If the Court decides that they do not implicate the same contractual or “expectational” rights as employer-imposed, seniority-based systems do, or if the Court decides an employer’s right to hire the most-qualified work force is not a right worth protecting, the Court could decide that violating an MQA is reasonable, presumably meaning that an employer could prevail only if it could then demonstrate an undue hardship.⁴¹⁸ If, however, the Court decides that people who apply to companies that utilize MQAs have some type of legitimate expectation to a position for which they are the most qualified, or that an employer should have the right to hire the most-qualified work force, the Court could conclude that reassignment would not be reasonable “in the run of cases.”⁴¹⁹ Additionally, the Court will have to consider whether *Barnett*’s emphasis on allowing preferences—*when they are necessary to promote equality of opportunity*—allows for a finding that the ADA’s reassignment provision cannot trump an MQA. To this point, more courts have determined that *Barnett* supports an employer’s right to rely on

No. 09-182, 2010 U.S. Dist. LEXIS 102969, at *33 (D. Me. Aug. 17, 2010). One court of appeals that took a pro-employee view of *Barnett* was the Seventh Circuit. See *United Airlines*, 693 F.3d at 761. In overruling its previous opinion in *Humiston-Keeling*, the court relied on *Barnett* to conclude that the pro-employee approach was the correct one. *Id.* at 763–65. The court stated the following regarding *Barnett*: “[t]he *Barnett* Court rejected this anti-preference interpretation of the ADA, noting that this argument ‘fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.’” *Id.* at 763. Although *Barnett* rejected the anti-preference interpretation of the ADA, it did not necessarily endorse an interpretation that gave individuals with a disability anything other than an equal opportunity to compete. See *Barnett*, 535 U.S. at 397 (simply noting that a preference may at times prove necessary to achieve the ADA’s “basic equal opportunity goal”).

⁴¹⁷ 535 U.S. at 404–05.

⁴¹⁸ This is certainly one option for the Court to consider: It is not unreasonable “in the run of cases” to force an employer to deviate from its MQA, but the employer could still prevail if it could demonstrate that doing so would result in an undue hardship. This would switch the burden of proof from the plaintiff having to prove reasonableness to the employer having to demonstrate an undue hardship. See *United Airlines*, 693 F.3d at 762–63 (explaining that, under the *Barnett* framework, once an accommodation is shown to be reasonable in the run of cases, the employee prevails, unless the employer can “demonstrate undue hardship in the particular circumstances”).

⁴¹⁹ If that were the case, a plaintiff would still be allowed to demonstrate special circumstances that demonstrate reassignment would be reasonable. See *id.* at 764 n.3; see also *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1347 n.7 (11th Cir. 2016).

such an MQA rather than be forced to reassign a less-qualified employee with a disability over a more-qualified individual without one.⁴²⁰

D. The cases that allegedly support automatic reassignment do not do so unconditionally

Although the EEOC and some plaintiffs have argued that three U.S. Courts of Appeals have approved of automatic reassignment for individuals with disabilities,⁴²¹ the cases that allegedly stand for that proposition are not as unconditionally pro-employee as the EEOC and plaintiffs have argued.⁴²² Some of these cases contained caveats that could result in the approval of MQAs, and the other cases did not specifically address whether the ADA's reassignment provision trumps an employer's MQA.⁴²³

The most recent (and only post-*Barnett*) circuit-court opinion that seems supportive of automatic reassignment is the Seventh Circuit's opinion in *United Airlines*.⁴²⁴ Although the court did reach a pro-employee outcome, two points must be made. First, the court stated the following: "[W]e . . . hold that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."⁴²⁵ Second, the court simply remanded the case back to the district court to determine "if mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation" and if so, whether there were other factors that would have made such a policy unreasonable or would have created an undue hardship.⁴²⁶ This decision was therefore just an instruction to the district court to follow *Barnett*'s framework and decide whether the facts of that case would have resulted in a finding that the proposed reassignment was reasonable (or created an undue hardship); it was not an unconditional

⁴²⁰ See, e.g., *St. Joseph's Hosp.*, 842 F.3d at 1346; *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483–84 (8th Cir. 2007).

⁴²¹ See, e.g., *St. Joseph's Hosp.*, 842 F.3d at 1347 n.6.

⁴²² See *infra* this section.

⁴²³ See *infra* note 428.

⁴²⁴ 693 F.3d 760, 765 (7th Cir. 2012).

⁴²⁵ *Id.* at 761 (emphasis added).

⁴²⁶ *Id.* at 764. Admittedly, the court did strongly suggest that the reassignment would be reasonable. *Id.* at n.3.

statement supporting the position that the ADA's reassignment provision trumps an MQA.⁴²⁷

Similar to *United Airlines*, the Tenth Circuit's opinion in *Smith* also requires closer inspection.⁴²⁸ First, the court noted the following: "[w]e conclude that reassignment of an employee to a vacant position in a company is one of the range of reasonable accommodations which must be considered and, *if appropriate*, offered if the employee is unable to perform his or her existing job."⁴²⁹ Second, and perhaps more importantly, the court noted that "[a]n employer need not violate other important fundamental policies underlying legitimate business interests."⁴³⁰ And the court specifically stated that it was *not* attempting to identify all types of policies that would be able to survive an ADA challenge.⁴³¹ These caveats certainly allow for a less pro-employee interpretation of this opinion.

Finally, although some courts view the D.C. Circuit's opinion in *Aka* as supporting automatic reassignment, that case did not address MQAs.⁴³² Also, and similar to what the Tenth Circuit did in *Smith*, the court in *Aka* stated that an employer "is not required to reassign a disabled employee in circumstances 'when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.'"⁴³³ Unfortunately, the D.C. Circuit, like the Tenth Circuit in *Smith*, also failed to specify the "contours" of the employer's reassignment obligation in these circumstances.⁴³⁴ Thus, while *Aka* is often cited for the pro-employee position regarding MQAs, the case does not definitively support the position for which it has been cited.⁴³⁵

When ruling in favor of an employer's MQA policy, the Eleventh Circuit in *St. Joseph's Hospital* pointed out that the three previously-

⁴²⁷ See *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1347 n.6 (11th Cir. 2016). See also *EEOC v. Methodist Hosps. of Dallas*, 218 F. Supp. 3d 495, 504–05 (N.D. Tex. 2016), *motion to alter or amend judgment denied*, No. 15-3104, 2017 WL 930923, at *1, *2 (N.D. Tex. Mar. 9, 2017), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017) (noting that the court in *United Airlines* did not actually decide whether an MQA is ordinarily reasonable, but rather remanded the issue for further consideration).

⁴²⁸ 180 F.3d 1154 (10th Cir. 1999) (en banc).

⁴²⁹ *Id.* at 1167.

⁴³⁰ *Id.* at 1175.

⁴³¹ *Id.* at 1175–76.

⁴³² 156 F.3d 1284 (D.C. Cir. 1998).

⁴³³ *Id.* at 1305 (quoting *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

⁴³⁴ *Id.*

⁴³⁵ See *id.*

discussed cases are not as pro-employee as the EEOC, plaintiffs, and pro-employee courts believe they are.⁴³⁶ Specifically, the Eleventh Circuit stated the following regarding these opinions:

Instead of actually deciding the issue, the Seventh Circuit remanded it to the district court for decision in the first instance The Tenth Circuit in *Smith* was not confronted with an employer's best-qualified applicant policy, or any policy at all; in fact, it noted that "there may be other important employment policies besides protecting rights guaranteed under a collective bargaining agreement that would make it unreasonable to require an employer to reassign a disabled employee to a particular job." . . . Finally, while the D.C. Circuit's opinion in *Aka* does contain *dictum* rejecting the view that "a disabled employee is never entitled to any more consideration for a vacant position than an ordinary applicant," the court "decline[d] to decide the precise contours of an employer's reassignment obligations" because it did not need to do so and was "[w]ithout briefing or any record on the issue."⁴³⁷

This interpretation of the "pro-employee" circuits' opinions certainly highlights that these opinions are not as pro-employee as some courts believe them to be.⁴³⁸ And although the Supreme Court is certainly free to decide this issue regardless of how other courts have done so, the fact that very few courts of appeal have affirmatively supported automatic reassignment over MQAs could suggest that the Court is also unlikely to do so.

⁴³⁶842 F.3d 1333, 1347 n.6 (11th Cir. 2016).

⁴³⁷*Id.* (citations omitted). *See also* EEOC v. Methodist Hosps. of Dallas, 218 F. Supp. 3d 495, 504–05 (N.D. Tex. 2016), *motion to alter or amend judgment denied*, No. 15-3104, 2017 WL 930923, at *1, *2 (N.D. Tex. Mar. 9, 2017), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017) (noting that the court in *United Airlines* did not actually decide whether an MQA is ordinarily reasonable, but rather remanded the issue for further consideration).

⁴³⁸The Eighth Circuit in *Huber* also expressed concern regarding the actual holding of *Aka* and concluded that it does not stand for the proposition that the ADA required automatic reassignment. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 n.2 (8th Cir. 2007).

E. There are policy reasons to not require automatic reassignment to a vacant position

There are policy reasons that support allowing employers to rely on MQAs. The most important of these is that employers should be able to hire the most-qualified applicants for the positions they wish to fill.⁴³⁹ This is especially true in some types of positions where health/safety is involved. And while not all courts addressing MQAs have addressed policy considerations such as this, the most recent case from the Eleventh Circuit did raise this issue.⁴⁴⁰ Specifically, in *St. Joseph's Hospital*, the Eleventh Circuit stated the following: “[a]s things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance.”⁴⁴¹

Prior to its change of heart in *United Airlines*, the Seventh Circuit in *Humiston-Keeling* also expressed concern regarding forcing employers to hire less-qualified people.⁴⁴² In approving of MQAs and frowning upon forcing an employer to hire inferior candidates, the court stated:

But there 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. That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group.⁴⁴³

⁴³⁹This section of the Article will focus on this policy reason for endorsing MQAs; however, another policy reason for allowing employers to rely on MQAs is that almost all courts have agreed that they should not act as “super-personnel departments,” second-guessing employers’ hiring decisions. *See, e.g.*, *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 32 (1st Cir. 2007); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

⁴⁴⁰*St. Joseph's Hosp.*, 842 F.3d at 1346.

⁴⁴¹*Id.*

⁴⁴²227 F.3d 1024, 1028–29 (7th Cir. 2000), *overruled by* *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012).

⁴⁴³*Id.*

Thus, as courts have expressed in the past, employers should not be required to hire less-qualified employees simply because those employees might have a disability. And as was the case in *St. Joseph's Hospital*, this should certainly hold true in cases involving issues such as health or public safety.⁴⁴⁴ This policy is one more reason the Court could conclude that MQAs should trump the ADA's reassignment "requirement."⁴⁴⁵

VIII. CONCLUSION

Although the ADA and the ADAAA were certainly intended to help individuals with disabilities compete in the workplace, courts at all levels have realized that this does not require a pro-employee interpretation of every provision contained in the ADA and the ADAAA. As this Article has made clear, one provision most courts have interpreted in a pro-employer manner is the reassignment provision, which states that reassignment to a vacant position "may" constitute a reasonable accommodation.⁴⁴⁶ Those courts have concluded that employers may rely on MQAs and refuse to reassign an employee with a disability to a position for which he is not the most-qualified applicant.⁴⁴⁷

Although some courts have rejected the majority approach, the majority approach is the one the Supreme Court will most likely adopt when it decides this issue. This is because: (1) the ADA's substantive provisions do not require automatic reassignment; (2) the ADA's "Findings and Purpose" section focuses more on providing individuals with disabilities an opportunity to compete on an *equal* basis with individuals without disabilities; the section does not suggest that individuals with disabilities

⁴⁴⁴842 F.3d at 1346 ("In the case of hospitals . . . the well-being and even the lives of patients can depend on having the best-qualified personnel.").

⁴⁴⁵Admittedly, there are also policy reasons that *favor* automatic reassignment: (1) allowing MQAs to trump the reassignment provision would allow employers to establish an MQA and then refuse to reassign employees with disabilities who can no longer perform their original jobs, and (2) requiring reassignment would further the ADA's goals of fostering economic self-reliance and independence for individuals with disabilities. The first concern was briefly addressed in *Rowe v. Aroostook Med. Ctr.*, No. 09-182, 2010 U.S. Dist. LEXIS 102969, at *32-33 (D. Me. Aug. 17, 2010), as well as in the pro-employer opinion in *St. Joseph's Hosp.*, 842 F.3d at 1346 n.5. The second concern was addressed in *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168 (10th Cir. 1999) (en banc).

⁴⁴⁶*See St. Joseph's Hosp.*, 842 F.3d at 1345 (recognizing the term "may" implies that reassignment will be reasonable in some circumstances but not in others); *see also Smith*, 180 F.3d at 1183-84 (noticing that automatic reassignment would read out "may" from the statute).

⁴⁴⁷*See, e.g., United States v. Woody*, 220 F. Supp. 3d 682, 687; *Smith*, 180 F.3d at 1182.

should receive a competitive advantage; (3) the ADA's legislative history is more suggestive of allowing employers to select the most-qualified applicants for vacant positions; (4) most courts have concluded that the Supreme Court's opinion in *Barnett* supports the use of MQAs; (5) many of the cases that allegedly support the idea that the ADA trumps MQAs have not truly held that; and (6) there are policy reasons for allowing employers to select the most-qualified applicants for vacant positions.⁴⁴⁸

Because of the reasons articulated above, the Court will probably conclude that employers can rely on MQAs without facing ADA liability. When this happens, disability-rights advocates will have to once again lobby Congress and attempt to convince legislators to amend the ADA in order to allow it to achieve the lofty goals President George H.W. Bush discussed upon signing the original ADA legislation.

⁴⁴⁸ See *supra* note 445.