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Cover Page Footnote

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UNREASONABLE ACCOMMODATION: EXAMINING *EEOC V. ST. JOSEPH'S HOSPITAL, INC.* AND NONCOMPETITIVE REASSIGNMENT

*Amy Rankin**

I. INTRODUCTION

Imagine you work as a hiring manager for a hospital. Your primary concern when making hiring decisions is the safety and well-being of the hospital's patients. Accordingly, it is your practice to staff hospital positions with the best-qualified applicants.

Now, imagine you have two qualified applicants for a position that involves training nurses. Applicant #1 is clearly the better choice; she has more experience and more years of education in the field. However, by law, you must hire Applicant #2, who was recently demoted and has a final written warning on her record. Why? Because your circuit court of appeals has held that if an employer cannot reasonably accommodate an employee with a disability in their current position, the Americans with Disabilities Act ("ADA") requires the employer to reassign that employee to a vacant position, regardless of whether there are more qualified applicants. Because Applicant #2 happens to be an employee with a disability, you must hire her over Applicant #1.¹

Currently, the circuits are split over whether the ADA mandates noncompetitive reassignment in scenarios such as the one described above.² A majority of circuits, including the Second, Fourth, Fifth, Sixth, and Eighth Circuits, have held that noncompetitive

* J.D. Candidate, May 2018, Loyola Law School, Los Angeles; B.A., Political Science, University of California, Santa Barbara. Special thanks to the editors of the *Loyola of Los Angeles Law Review* for their helpful suggestions.

1. The facts of this hypothetical scenario are based on the facts of *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016).

2. Compare *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (holding that the ADA does not require noncompetitive reassignment), with *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) (holding that the ADA does require noncompetitive reassignment).

reassignment is not mandated by the ADA.³ The Seventh, Tenth, and D.C. Circuits, in contrast, have held that the ADA mandates noncompetitive reassignment.⁴ In *EEOC v. St. Joseph's Hospital, Inc.*,⁵ the Eleventh Circuit weighed in on this debate, joining the majority of circuits that do not require noncompetitive reassignment.⁶

Part II of this Comment will describe the facts of *St. Joseph's Hospital*. Part III will discuss how the Eleventh Circuit arrived at the conclusion that the ADA does not mandate noncompetitive reassignment. Part IV will provide a brief background of the ADA and reasonable accommodation. Part V will present an analysis of the noncompetitive reassignment circuit split and explain why the Eleventh Circuit's decision in *St. Joseph's Hospital* is proper in light of the ADA, precedent, and policy considerations. Finally, part VI concludes that the Eleventh Circuit's decision in *St. Joseph's Hospital* was proper and that should the Supreme Court weigh in on this circuit split, it should find that the ADA does not require noncompetitive reassignment.

II. STATEMENT OF THE CASE

A. Factual Background

Leokadia Bryk (“Bryk”) worked as a nurse at St. Joseph’s Hospital (the “Hospital”) from January 2, 1990, until November 21, 2011.⁷ Specifically, Bryk worked in the Hospital’s Behavioral Health Unit (“BHU”), “an in-patient psychiatric unit for patients who . . . [presented] an imminent danger to the patient or to others.”⁸ Patients in the BHU were housed in one of three units: a pediatric unit, a progressive unit, or an intensive unit.⁹ Bryk worked in the

3. See *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384–85 (2d Cir. 1996); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007).

4. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167 (10th Cir. 1999); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998).

5. 842 F.3d 1333 (11th Cir. 2016) (*St. Joseph's Hospital II*).

6. *Id.* at 1345.

7. *EEOC v. St. Joseph's Hosp., Inc.*, No. 8:13-cv-2723-T-30TGW, 2015 WL 685766, at *1 (M.D. Fla. 2015) (*St. Joseph's Hospital I*).

8. *Id.*

9. *Id.*

progressive unit, which housed patients “that were ‘less violent’ than those in the intensive unit.”¹⁰

On October 17, 2011, the Hospital demoted Bryk after she admitted that she had “allowed patients to sleep in the hallway during staff shortages.”¹¹ Prior to her demotion, Bryk was employed as a Clinical Nurse III—a position that involved supervising other nurses in the unit and spending “a significant amount of time behind a desk.”¹² After her demotion, Bryk became a Clinical Nurse II, which involved more patient interaction and more time in the hallways and patient rooms.¹³

Between 2002 and 2009, Bryk developed a series of health problems.¹⁴ In 2002, Bryk began experiencing back pain and was subsequently diagnosed with spinal stenosis.¹⁵ Bryk also developed arthritis and, in 2009, underwent a hip replacement surgery.¹⁶ In 2009, Bryk began using a cane in the psychiatric ward of the Hospital.¹⁷

Susan Wright (“Wright”), the Hospital’s Director of Behavioral Health Operations, began supervising Bryk after her demotion in October 2011.¹⁸ Wright observed Bryk using a cane in the psychiatric ward and became concerned that patients could use the cane as a weapon.¹⁹ Wright raised this concern with Bryk, who then produced a doctor’s note recommending Bryk’s use of the cane in the psychiatric ward.²⁰

On October 21, 2011, the Hospital notified Bryk that due to safety concerns, she could no longer use her cane in the psychiatric unit.²¹ Because Bryk was recently demoted and had a final written warning in her personnel file, she was technically ineligible for a job transfer.²² However, the Hospital made an exception and gave Bryk

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *St. Joseph’s Hospital II*, 842 F.3d 1333, 1338 (11th Cir. 2016).

15. *Id.*

16. *Id.*

17. *Id.*

18. *St. Joseph’s Hosp. I*, 2015 WL 685766, at *1.

19. *St. Joseph’s Hosp. II*, 842 F.3d at 1338.

20. *Id.*

21. *Id.*

22. *Id.*

thirty days to identify and apply for vacant positions.²³ During this thirty-day period, Krista Sikes (“Sikes”), the Manager of Team Resources, was available to Bryk to answer questions and help with the application process.²⁴

At the beginning of Bryk’s thirty-day period, Bryk told Sikes that she was going on a previously scheduled two-week vacation and would not look at the Hospital’s job board until she returned.²⁵ In the following thirty days, Bryk did not contact Sikes about the application process, the application portal, or the details of any position.²⁶ In fact, Bryk did not apply for any position until three weeks into the thirty-day period.²⁷ Of the seven hundred vacant positions listed on the job board, Bryk applied to seven.²⁸ Of these seven positions, Bryk applied to three on the last day of the thirty-day period and one after the period had already expired.²⁹ Although the Hospital had authorized Bryk to apply to these positions as an internal candidate, she submitted all of her applications as an external applicant.³⁰

At trial, the parties focused on three positions that Bryk applied for: Education Specialist, Home Health Clinician, and Care Transition Coordinator.³¹ The Education Specialist position involved training nurses in a variety of units and conducting a monthly orientation of new hires.³² “Although Bryk met the requirements on the job post, [the hiring manager for the position] thought [Bryk] would need at least one or two years of ‘medical surgical experience’ and ‘more education experience, as well.’”³³ Accordingly, the Hospital rejected Bryk’s application.³⁴

The Home Health Clinician position involved caring “for patients in their homes following their discharge from the hospital.”³⁵ The Hospital did not hire Bryk for this position because when Bryk

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1339.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

submitted her application, the Hospital had already filled the position.³⁶ However, the Hospital claimed that even if the position were vacant, Bryk was not the best-qualified candidate for the position because she lacked both home health and wound care experience.³⁷

The Care Transition Coordinator position involved going to hospitals, gathering patient information, and coordinating post-hospital home care.³⁸ However, the Hospital said that this position was “not available and posted in error.”³⁹ In any event, the Hospital claimed that even if the position were available, “Bryk was not sufficiently qualified because she lacked experience in surgery and acute treatment.”⁴⁰

Ultimately, the Hospital did not hire Bryk for any of the positions for which she applied.⁴¹ Accordingly, on November 21, 2011, the Hospital discharged Bryk.⁴²

B. Procedural History

On October 23, 2013, the Equal Employment Opportunity Commission (“EEOC”) filed suit on behalf of Bryk against the Hospital.⁴³ The EEOC alleged that the Hospital violated the ADA in two ways. First, the EEOC claimed that by not allowing Bryk to use her cane in the psychiatric unit, the Hospital failed to provide Bryk with a reasonable accommodation.⁴⁴ Second, the EEOC alleged that by making Bryk compete with other applicants for the vacant positions, the Hospital had violated the ADA.⁴⁵

Before trial, both parties moved for summary judgment. The district court granted both motions in part, finding that although Bryk was considered a person with a disability for purposes of the ADA, “there was a genuine issue of material fact as to whether Bryk was entitled to reassignment to either the Educational Specialist or the

36. *Id.*

37. *Id.* at 1339–40.

38. *Id.* at 1340.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1340.

44. *Id.*

45. *Id.*

Care Transition Coordinator position.”⁴⁶ In a subsequent order, the district court further held that the Hospital was not required to reassign Bryk to a vacant position without competition.⁴⁷ Instead, the court explained, whether an employee with a disability “had to compete with others for the vacant position is one factor, out of many, that the jury may consider regarding the reasonableness of the accommodation.”⁴⁸ In the following section, this Comment will focus on the Eleventh Circuit’s review of this holding.

III. REASONING OF THE COURT

In *St. Joseph’s Hospital II*, the Eleventh Circuit affirmed that Bryk was both “disabled” and a “qualified individual” under the ADA.⁴⁹ Thus, it turned to the question of whether the Hospital violated the ADA by making Bryk compete with other applicants for vacant positions at the Hospital.⁵⁰ To answer this question, the Eleventh Circuit first turned to the text of the ADA, noting that while the ADA requires that an employer reasonably accommodate an employee with a disability, “it does not say how an employer must do that.”⁵¹ Instead, the statute “offers a non-exhaustive list of accommodations that ‘may’ be reasonable,” and reassignment to a vacant position is but one item on this list.⁵² The court noted that the use of the word “may” in this context implied not that reassignment would *always* be reasonable.⁵³

After analyzing the ADA’s reasonable accommodation requirement, the Eleventh Circuit turned to precedent. The court analogized the Hospital’s best-qualified applicant hiring policy to the seniority system at issue in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).⁵⁴

In *Barnett*, the Supreme Court “was confronted with the issue of whether an employer, in order to comply with the ADA’s reasonable accommodation duty, must reassign a disabled employee to a vacant

46. *Id.*

47. *Id.*

48. *Id.* at 1345.

49. *Id.* at 1344.

50. *See id.* at 1345.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See id.*

position in spite of the fact that the employer's longstanding seniority system would award the position to a more senior, non-disabled employee."⁵⁵ There, the Supreme Court established a test to be used in situations where an employer has claimed that a request for reassignment by an employee with a disability would violate a disability-neutral hiring policy.⁵⁶ Under the first step of the *Barnett* test, an employee must show that the requested accommodation is "reasonable in the run of cases."⁵⁷ If the employee makes this showing, "the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case."⁵⁸ If, however, the employee fails to show that the accommodation is 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."⁵⁹

Ultimately, the majority in *Barnett* held that in the run of cases, it would not be reasonable for an employee's ADA request to trump an existing seniority system because of the loss of benefits and other practical difficulties that might accompany a departure from an existing seniority system.⁶⁰ Drawing on this result, the court in *St. Joseph's Hospital* held that, like the seniority system in *Barnett*, the Hospital's best-qualified applicant policy trumped Bryk's request for reassignment.⁶¹ Applying the first step of the *Barnett* test, the Court held that, "[r]equiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable 'in the run of cases.'"⁶² As explained by the court:

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

55. Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans With Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 933 (2003).

56. *St. Joseph's Hosp. II*, 842 F.3d at 1346; *Barnett*, 535 U.S. at 401–03.

57. *St. Joseph's Hosp. II*, 842 F.3d at 1346 (quoting *Shapiro v. Twp. of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002)).

58. *Id.*

59. *Id.*

60. *Barnett*, 535 U.S. at 403.

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

62. *Id.*

efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.⁶³

The court bolstered its conclusion by noting that the purpose of the ADA was not to mandate preferential hiring of employees with disabilities or "turn nondiscrimination into discrimination," but rather to ensure employers provide employees with disabilities with "meaningful *equal* employment opportunities."⁶⁴ Accordingly, the Eleventh Circuit upheld the holding of the lower court.⁶⁵

IV. HISTORICAL FRAMEWORK

A. The Americans with Disabilities Act

In 1990, Congress passed the Americans with Disabilities Act ("ADA").⁶⁶ Its purpose, among other things, was to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]."⁶⁷

The predecessor to the ADA was the Rehabilitation Act of 1973.⁶⁸ However, while the Rehabilitation Act applied only to "federal government agencies, government contractors, and recipients of federal funds," the ADA is significantly more expansive, applying "to enterprises in both public *and private* sectors."⁶⁹

The ADA prohibits employers from discriminating against qualified individuals on the basis of disability.⁷⁰ The statute defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of

63. *Id.*

64. *Id.* at 1346–47.

65. *Id.* at 1347.

66. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1994).

67. *Id.* § 12101(a)(7).

68. Carrie L. Flores, Note, *A Disability Is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195, 202 (2008).

69. *Id.* (emphasis added).

70. 42 U.S.C. § 12112(a).

the employment position that such individual holds or desires.”⁷¹ The Act prohibits discriminatory practices such as: refusing to hire a qualified individual because of his or her disability, firing a qualified individual because of his or her disability, and refusing to promote a qualified individual because of his or her disability.⁷² In this sense, the ADA is similar to other non-discrimination bills passed in the second half of the twentieth century, such as Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Age Discrimination in Employment Act (“ADEA”).⁷³ However, the ADA departs from these statutes in that the ADA is not merely an antidiscrimination statute.⁷⁴ Title VII and the ADEA prohibit employers from making discriminatory hiring decisions, but “do not impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of the job.”⁷⁵ The ADA, in contrast, does impose an affirmative obligation on employers. This is seen in the ADA’s “reasonable accommodation” requirement.

B. Reasonable Accommodation and Reassignment

Under the ADA, an employer discriminates against an employee with a disability if the employer fails to make *reasonable accommodation* for the known physical or mental limitations of an otherwise qualified employee, unless providing the accommodation would cause an undue hardship on the employer.⁷⁶ The statute provides that reasonable accommodation may include: “job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or

71. 42 U.S.C. § 12111(8).

72. 42 U.S.C. § 12112(a).

73. Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1047 (2000).

74. *Id.* at 1047–48; see PETER BLANKE ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY 55 (3d ed. 2014) (“The explicit command that employers accept the burden of paying for accommodations—up to the undue hardship ceiling—arguably sets the ADA apart from other civil rights legislation and has created significant theoretical and practical disputes.”).

75. Befort & Donesky, *supra* note 73, at 1047.

76. 42 U.S.C. § 12112(5)(A).

interpreters, and other similar accommodations for individuals with disabilities.”⁷⁷

The ADA’s reasonable accommodation requirement has been heavily litigated.⁷⁸ Reassignment, in particular, has proven to be a subject of much controversy.⁷⁹ Reassignment is typically the “reasonable accommodation of last resort,” meaning it is generally employed only when an employer has exhausted all other alternatives that might allow an employee to remain in their position.⁸⁰ The primary question that has arisen regarding reassignment is whether this form of reasonable accommodation requires employers to reassign employees with disabilities to vacant positions, even where there are more-qualified applicants.⁸¹ In *Barnett*, as discussed above, the Supreme Court addressed this issue in the context of a seniority system.⁸² However, in its 5-4 decision, the deeply divided court appeared to resolve this issue only in part. Although the court held that noncompetitive reassignment was unreasonable “in the run of cases[,]” it did not address whether noncompetitive reassignment would be reasonable in the context of non seniority-based hiring systems.⁸³ Thus, courts have been left to determine whether this holding can be extended to other nondiscriminatory hiring policies. *Barnett*’s five separate opinions indicate that even the Supreme Court has not come to a consensus on this issue.

V. ANALYSIS

In the following section, this Comment will provide an analysis of the noncompetitive reassignment circuit split. It will then defend the Eleventh Circuit’s reasoning in *St. Joseph’s Hospital* and discuss why its holding is appropriate in light of the ADA, precedent, and policy considerations.

77. 42 U.S.C. § 12111(9)(B) (emphasis added).

78. Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 440–41 (2002).

79. *Id.* at 441.

80. Befort & Donesky, *supra* note 73, at 1085.

81. Befort, *supra* note 78, at 453–55.

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

83. *Id.* at 403.

A. *The Circuit Split*

In the period since *Barnett*, courts have come to varying conclusions regarding whether noncompetitive reassignment is mandated in non seniority-based hiring systems.⁸⁴ In *Huber v. Wal-Mart Stores, Inc.*,⁸⁵ the Eighth Circuit used the reasoning of *Barnett* to conclude that the ADA “does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”⁸⁶ The Seventh Circuit, in contrast, has read *Barnett* to require reassignment without competition.⁸⁷

In 2007, the Supreme Court granted certiorari in *Huber*.⁸⁸ Many believed that the Supreme Court would take this opportunity to ultimately resolve the noncompetitive reassignment circuit split. However, the parties settled before oral argument commenced.⁸⁹ Thus, the circuits remain split.

The circuits that have weighed in on this issue have primarily taken one of two positions. The circuits that have held in favor of noncompetitive reassignment have typically held “that Congress designed the ADA to compel employers to make reasonable accommodations for disabled employees, not simply to consider providing accommodations. If reassignment is optional, the argument goes, the ADA’s reassignment provision lacks any bite.”⁹⁰ These circuits have also emphasized that this conclusion is appropriate in light of the EEOC’s Interpretative Guidance, which states that

84. Michael Creta, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693, 1708 (2014).

85. 486 F.3d 480 (2007).

86. *Id.* at 483.

87. See *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). Prior to *Barnett*, the Seventh Circuit held that the ADA does *not* mandate noncompetitive reassignment. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000). However, in *United Airlines*, the circuit reversed its course in light of *Barnett*. See *United Airlines*, 693 F.3d at 760.

88. See *Huber v. Wal-Mart Stores, Inc.*, 552 U.S. 1074 (2007) (granting certiorari in part).

89. Lyle Denniston, *Granted Case on Disability Rights Dismissed*, SCOTUSBLOG (Jan. 14, 2008, 10:08 A.M.), <http://www.scotusblog.com/2008/01/court-seeks-advice-on-settling-worker-claims>.

90. Nicholas Dorsey, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 445 (2009).

reassignment must not involve any competition for the vacant position.⁹¹

The circuits that have rejected mandatory reassignment, however, have largely contended that forcing employers to reassign employees with disabilities to vacant positions constitutes “affirmative action with a vengeance” and is simply not warranted by the ADA.⁹² As stated by the Seventh Circuit in *Dalton v. Subaru–Isuzu Auto., Inc.*:

[W]e have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, . . . and for good reason. The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.⁹³

These circuits have also noted that if Congress intended to require noncompetitive reassignment—a controversial proposition—“it would certainly not have done so by slipping the phrase ‘reassignment to a vacant position’ in the middle of this list of reasonable accommodations.”⁹⁴ Accordingly, these courts have found that mandating noncompetitive reassignment constitutes an impermissible expansion of the ADA.⁹⁵

B. Mandatory Noncompetitive Reassignment Is Contrary to Congressional Intent

Although the ADA requires that employers make reasonable accommodations for workers with disabilities, it does not provide that employees with disabilities receive preferential treatment over

91. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act* at 44 (1999).

92. *Dorsey*, *supra* note 90, at 445–46; *see Humiston-Keeling*, 227 F.3d at 1029.

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

94. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1315 (D.C. Cir. 1998) (Silberman, J., dissenting).

95. *See Smith*, 180 F.3d at 1182 (Kelly, J., dissenting).

equally qualified (or more qualified) employees without disabilities. In fact, in preparing the ADA, Congress noted that its intent was to level the playing field and give individuals with disabilities a way to fully engage in society and business⁹⁶, not to tip the scales in favor of individuals with disabilities. As stated in *Humiston-Keeling*:

The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory.⁹⁷

Additionally, if Congress wished to mandate noncompetitive reassignment, it could have done so explicitly. Instead, Congress couched the reassignment language within a list of ways that an employer *may* reasonably accommodate an employee.⁹⁸ This language indicates that reasonable accommodation does not require reassignment in all cases, but rather, that such a form of reasonable accommodation *may* be reasonable in certain instances, but not in others.

C. *Barnett Does Not Mandate Noncompetitive Reassignment*

Barnett has provided little guidance for courts struggling to understand the parameters of the ADA's reasonable accommodation requirement and, specifically, reassignment. Since this decision was handed down, courts have used its reasoning to come to dramatically different conclusions about whether the ADA mandates noncompetitive reassignment in non seniority-based systems.⁹⁹ The spectrum of conclusions reached by lower courts is itself evidence of the limited value of *Barnett* in the context of non seniority-based hiring systems. Unless the Supreme Court grants certiorari and

96. See 42 U.S.C. § 12112(b)(5)(A) (2016).

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

98. See 42 U.S.C. § 12111(9)(B) (“[R]easonable accommodation may include . . . job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”) (emphasis added).

99. *Compare St. Joseph's Hosp. II*, 842 F.3d 1333, 1346 (11th Cir. 2016), with *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012).

resolves this split, courts will continue to use *Barnett's* reasoning to come to vastly different conclusions. By granting certiorari in *Huber*, the Supreme Court demonstrated a willingness to take up the mandatory reassignment circuit split. Thus, it is likely that this issue will ultimately be decided by the highest court.

D. Noncompetitive Reassignment Is Unduly Burdensome

When the Supreme Court inevitably takes up the mandatory reassignment circuit split, it should hold not only that noncompetitive reassignment is unwarranted by the ADA, but also that it is unwarranted in light of policy considerations.

The ADA does not mandate that employers provide employees with perfect accommodation. Rather, it mandates *reasonable* accommodation. Mandating noncompetitive reassignment goes too far. It imposes a burden on employers to make perfect accommodations for employees with disabilities at the expense of an employer's legitimate business interests and the interests of other applicants. A business has a duty not only to its consumers, but also to its employees, to hire the most qualified candidates in order to preserve efficiency, provide quality products, and provide competent services. In a hospital setting, the placement of a potentially lesser-qualified candidate can have a significant impact on the health and safety of patients. To require an employer to abandon its best-qualified applicant policy in such circumstances is undesirable for both employers and patients alike.

VI. CONCLUSION

The circuit split regarding noncompetitive reassignment has serious repercussions for employers and employees across the nation. Ultimately, it is likely that the Supreme Court will grant certiorari to resolve this split in the near future. If it does, the Supreme Court should find that the ADA does not require noncompetitive reassignment