

**“NEUTRAL” EMPLOYER POLICIES AND THE ADA:
THE IMPLICATIONS OF *US AIRWAYS, INC. v. BARNETT* BEYOND SENIORITY SYSTEMS**

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I. INTRODUCTION

One of the most controversial provisions of the Americans with Disabilities Act (ADA) is the duty to reassign an employee with disabilities to a vacant position

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as a form of reasonable accommodation.¹ In a statute castigated by some for creating preferential rights for individuals with disabilities,² the reassignment provision raises particularly difficult issues.³ For example, if an employee with a disability is entitled to be reassigned to a vacant position without having to compete for that position, there may be a conflict between that employee's right to the vacant position and the expectations or rights of others who also seek the position. The juxtaposition of these two sets of interests is perhaps most starkly illustrated when the reassignment would be contrary to an established seniority system.

The United States Supreme Court recently addressed reassignment in the seniority plan context in *US Airways, Inc. v. Barnett*.⁴ *Barnett* involved a seniority plan unilaterally implemented by the employer rather than the more common, collectively bargained plan.⁵ In a fractured opinion,⁶ the Court held that a reassignment request that violates a company seniority plan is unreasonable as a matter of law unless the plaintiff-employee can establish special circumstances why that would not be so.⁷

Barnett leaves a lot of unanswered questions about reassignment in the seniority plan context, questions that will likely generate considerable litigation and

1. Americans with Disabilities Act, 42 U.S.C. § 12111(9)(B) (2000).

2. See, e.g., Tama Starr, *So Sue Me . . . ; . . . Everybody Else Has*, WASH. POST, Apr. 11, 1993, at C1 (stating that “[i]t is impossible to find anyone not entitled to a group entitlement”); Leigh Strope, *Chavez Opposes ‘Special Treatment’*, AP ONLINE, Jan. 3, 2001, 2001 WL 3648829 (quoting Linda Chavez as criticizing the ADA as “special treatment in the name of accommodating the disabled”).

3. See Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 222 (1997) (describing “the controversy surrounding whether or not the ADA is an ‘affirmative action’ statute [as] largely centered on [the reassignment provision]”).

4. *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002).

5. *Id.* at 1524. The conflict between reassignment requests and collectively bargained plans has been the subject of both extensive litigation and scholarly commentary. See, e.g., *Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir. 1997) (finding unreasonable a reassignment that would violate a collective bargaining agreement); *Eckles v. Consol. Rail Corp.*, 890 F. Supp. 1391, 1401-02 (7th Cir. 1995) (holding that the ADA does not require reassignment in violation of a bona fide seniority system). See generally Judith Fornalik, Note, *Reasonable Accommodation and Collective Bargaining Agreements: A Continuing Debate*, 31 U. TOL. L. REV. 117 (1999) (critiquing *Kralik* and *Eckles* among other cases). This issue is discussed in more detail *infra* Part III.A.

6. Four justices joined Justice Breyer's opinion in *Barnett*. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1516. Justice O'Connor filed a separate concurrence stating she was joining Justice Breyer's opinion in order to create a majority decision. *Id.* at 1528. Justices Scalia and Thomas filed a dissent, as did Justices Souter and Ginsburg. *Id.* at 1528-32 (Scalia, J., dissenting); *id.* at 1532-34 (Souter, J., dissenting).

7. *Id.* at 1525.

scholarly comment.⁸ This Article does not seek to address those issues. Cases involving reassignment versus seniority plans do not arise very often,⁹ and are not, as this Article predicts, likely to be the most significant impact of *Barnett*.¹⁰ Rather, the more interesting question is whether *Barnett* will broadly affect the way courts handle the conflict between reassignment and various other rules and policies companies have about job transfers.

In a line of lower court decisions, employees have been denied reassignment on the grounds that the request was contrary to their employer's "neutral," or "legitimate, non-discriminatory," policy, such as a requirement that the employee submit a formal application for every vacant position for which the employee believes she is qualified.¹¹ *Barnett* overrules these cases to the extent that it rules out a per se rule of unreasonableness to any requested changes in "neutral" employer policies.¹² Courts may, however, extend *Barnett*'s special circumstances approach¹³ to these neutral policy cases, creating what might be called a "neutral policy presumption."

Such an extension of *Barnett* would be unfortunate, however, because the case improperly conflates elements of the employer's undue hardship defense into the plaintiff's prima facie case. Under the ADA, the employer has a statutory burden to prove that an otherwise reasonable accommodation request poses an undue hardship to the employer's operations.¹⁴ As will be discussed in more detail below, *Barnett*

8. Some of *Barnett*'s unanswered questions include whether the rule applies in collective bargaining agreement cases as well as company plan cases, what counts as a seniority plan sufficient to impose a burden on the plaintiff to prove special circumstances, what special circumstances allow employees to avoid summary dismissal of their claims, whether the employer still has an opportunity to prove undue hardship, and what role juries play in resolving any of these questions.

9. See John W. Boyle, *The Error of Eckles: Why Seniority Rights Present an Undue Hardship for Employees with Disabilities*, 35 DUQ. L. REV. 1023, 1036-37 (1997) (citing Eric J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71, 92-93 (1993) (providing that the rarity of such cases is predicated upon ADA requirements that an employer offer only a reasonable accommodation and not the best accommodation or the accommodation preferred by a disabled employee)).

10. See discussion *infra* Part V.

11. See, e.g., *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 258 (6th Cir. 2000) (holding that an employee's failure to submit an application for positions for which he would be qualified precluded him from recovering under the ADA).

12. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1519 (disregarding the per se unreasonableness approach and holding that reassignment that violates an established seniority plan is unreasonable "in the run of cases"); see *infra* Part IV.A-B.

13. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1519.

14. See 42 U.S.C. § 12112(b)(5)(A) (2000) (providing that the employer discriminates on the basis of disability if it fails to reasonably accommodate a qualified individual with a disability

requires the plaintiff to bear the entire burden of addressing the impact of the reassignment request, out of concern about the expectations of employers and other employees.¹⁵ Because the Court does not limit its approach to cases involving conflicts between reassignment and seniority rights that are contractually enforceable by other employees,¹⁶ its rationale could be extended to any conflict between reassignment and "neutral" employer policies (and for that matter, to conflicts involving any accommodation request and "neutral" policies).

In Part II, this Article explores the general parameters of the ADA's reasonable accommodation mandate and its specific provision for reassignment as one such accommodation. Reassignment as a form of preference, rather than a mere right to compete, is considered in this Part. Part III then examines how a number of circuit courts have adopted what is in essence a "neutral policy defense" to reassignment requests. Despite the fact that the ADA makes undue hardship an affirmative defense, these courts require little proof of hardship by employers beyond articulation of the policy itself.¹⁷ Part IV then discusses the *Barnett* case and its formulation of the "special circumstances" standard in the seniority plan context. Part V evaluates the case's impact on those lower courts adopting the neutral policy defense in other reassignment cases, and predicts that those courts may now use the same "special circumstances" approach to transform the neutral policy defense into a neutral policy presumption, to much the same effect. Finally, Part VI proposes the role that neutral policies should play in the reasonable accommodation/undue hardship evaluation.

II. REASONABLE ACCOMMODATION AND REASSIGNMENT UNDER THE ADA

The ADA provides that an employer has a statutory duty to provide for a reasonable accommodation to the "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,"¹⁸ unless the employer can demonstrate "that the accommodation would impose an

unless the employer demonstrates that the accommodation would pose an undue hardship on the operation of the employer's business).

15. See discussion *infra* Part IV.B-C.

16. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1516. As discussed in Part IV of this Article, the failure to explicitly address lack of contractual enforceability as a "special circumstance" prompted Justice O'Connor to write a separate opinion, joining the plurality decision only to ensure a majority rule. See *infra* note 198 and accompanying text.

17. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028-29 (7th Cir. 2000) (finding that a policy to give a job to the best applicant is legitimate and non-discriminatory, and an employer is not required to modify such a policy to accommodate an employee with a disability).

18. 42 U.S.C. § 12112(a), (b)(5)(A). A "qualified individual with a disability" is one who can perform the essential functions of the job with or without a reasonable accommodation. *Id.* § 12111(8).

undue-hardship on the operation of the business."¹⁹ A "reasonable accommodation" is any modification or adjustment to the job that enables the employee with a disability to enjoy an equal employment opportunity.²⁰ An "undue hardship" is any "action requiring significant difficulty or expense."²¹ The statute sets out several actions that may create reasonable accommodations, including making existing facilities usable by individuals with disabilities, acquiring or modifying equipment, and making modifications in policies.²²

Determination of what constitutes a reasonable accommodation is a fact-intensive, case-by-case process.²³ Generally, it is the responsibility of the employee with a disability to inform an employer of a needed accommodation.²⁴ The employer and employee are then required to engage in an interactive process, looking at the particular job involved, its purpose, and essential functions.²⁵ The ADA requires reasonable accommodations to be made in order to ensure equal opportunity in the application process, to enable a qualified individual with a disability to perform the essential functions of a job, and to enable an employee with a disability to enjoy equal benefits and privileges of employment.²⁶

Congress intended that the duty to provide reasonable accommodation require more than a de minimis burden on the employer. Specifically, Congress indicated that accommodation standards under the ADA were "significantly higher" than the standards for accommodating religious beliefs under Title VII of the Civil Rights Act of 1964.²⁷ Among the accommodations that the disabled employee might seek is

19. *Id.* § 12112(a), (b)(5)(A).

20. 29 C.F.R. § 1630.2(o)(1)(iii) (2001).

21. 42 U.S.C. § 12111(10)(A).

22. *Id.* § 12111(9).

23. *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1520 (2002); see 29 C.F.R. app. § 1630.9 (providing explanations of unlawful activities, by entity, dealing with reasonable accommodations). Because the process of determining reasonable accommodations is so case-specific, the EEOC has issued extensive guidance on that process. See generally EEOC, *Enforcement Guidance, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, in 2 EEOC COMPLIANCE MANUAL § 902 (Supp. Mar. 1, 1999), available at <http://www.eeoc.gov/docs/accommodation.html#reassignment> [hereinafter *Enforcement Guidance*] (providing the newest version of the EEOC *Enforcement Guidance* and outlining the criteria and process for determining reasonable accommodations); EEOC, *A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT* I-3.10(5) (1992) [hereinafter *TECHNICAL ASSISTANCE MANUAL*] (same).

24. 29 C.F.R. app. § 1630.9.

25. *Id.*

26. *Id.* app. § 1630.2(o).

27. H.R. Rep. No. 101-485, at 68 (1990), reprinted in 1990 U.S.C.A.N. 303, 350; see also Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 462-63 (1991) (noting that

reassignment to a vacant position.²⁸ The scope of the employer's duty to make such an accommodation has been the subject of substantial debate.

A. *The Duty to Reassign*

The ADA specifically contemplates that a reasonable accommodation may include reassignment to a vacant position.²⁹ The EEOC has interpreted this to mean that the employer must make a reassignment if it is otherwise reasonable to do so.³⁰ This is subject, however, to several general rules that have been developed through regulation, interpretive guidelines, and court decisions. For example, reassignment is the accommodation of last resort, to be used only if the employee cannot otherwise be accommodated in his or her present position.³¹ An employer is not required to bump another employee from a position to create a vacancy for the employee with a disability,³² to promote the employee with a disability,³³ or to create a new position for the employee.³⁴

These general rules work fine when the issues are straightforward—the position is unquestionably vacant, the employee with a disability is qualified for the position, no employer policies prohibit placing the employee in that position, and the employer is not considering others to fill that position. When the employee's reassignment request conflicts with any of these considerations, however, many

in the legislative history of the ADA, Congress rejected limiting the obligation to accommodate to any per se standard of unreasonableness). The Supreme Court has interpreted the religious accommodation provisions of Title VII to require no more than de minimis cost to the employer. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). The committee reports indicate that Congress was aware of *Hardison* and explicitly rejected its de minimis standard in the ADA. *See* H.R. Rep. No. 101-485, at 68, reprinted in 1990 U.S.C.C.A.N. at 350; S. Rep. No. 101-116, at 36 (1989).

28. *See* 42 U.S.C. § 12111(9)(B) (2000) (providing that reasonable accommodations 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).

29. *Id.*

30. 29 C.F.R. app. § 1630.2(o).

31. *Enforcement Guidance*, *supra* note 23, at 39; *see also* 29 C.F.R. app. § 1630.2(o).

32. TECHNICAL ASSISTANCE MANUAL, *supra* note 23, at I-3.10(5); *see also* *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1175 (10th Cir. 1999) (citing *Enforcement Guidance*, *supra* note 23, at 39). Some courts extend the "no bumping" rule to the bumping of temporary workers. *See Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 680 (7th Cir. 1998) (finding that an employer has no duty to bump a temporary worker out of a job to accommodate a permanent employee with a disability unless the temporary worker was just filling in for an absent employee).

33. 29 C.F.R. app. § 1630.2(o).

34. TECHNICAL ASSISTANCE MANUAL, *supra* note 23, at I-3.10(5).

courts have been less than willing to consider reassignment a reasonable accommodation.³⁵

B. Right to Compete or "Preference"?

The lower courts disagree about what the reassignment provision means when the employee with a disability seeks a position that others seek as well.³⁶ Some view it through formal equality principles, concluding that the reassignment provision only allows the employee with a disability to compete "equally" with others for a position.³⁷ Others have reasoned that "reassignment" supposes some affirmative obligation on the part of the employer to actually assign the employee to a new position, not just treat the employee as one of a pool of applicants for the position.³⁸

At the heart of the formal equality approach is a resistance to endorsing any statutory interpretation that could be seen as a form of affirmative action. Representative of this view is the Seventh Circuit opinion authored by Judge Richard Posner in *EEOC v. Humiston-Keeling, Inc.*³⁹ Judge Posner sees a limited function for reassignment as a reasonable accommodation:

35. See, e.g., *Buskirk v. Apollo Metals*, No. 01-3556, 2002 WL 31102694, at *8-9 (3d Cir. Sept. 20, 2002) (holding that the ADA does not require an employer to create a new position to accommodate an employee with a disability, nor is an employer required to transform a temporary light-duty position into a permanent position); *Watson v. Lithonia Lighting*, 304 F.3d 749, 752 (7th Cir. 2002) (holding that the ADA does not require employers to create new positions for injured employees); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d at 680 (finding that an employer has no duty to bump a temporary worker out of a job to accommodate a permanent employee with a disability unless the temporary worker was just filling in for an absent employee).

36. 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, 1056-57 (2000) (noting that there is a widening division of opinion regarding whether the ADA requires an employer to reassign an employee with a disability to a position for which there is an applicant with superior qualifications).

37. See, e.g., *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000) (finding that an employer may refuse to reassign an employee with a disability to a vacant position when the employer prefers another candidate); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (holding that the city did not violate the ADA when it refused to allow an employee with a disability to be reassigned to a vacant position because the employee could not show that he was treated differently from any other similarly situated employee).

38. See, e.g., *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc) (holding that reassignment must mean something more than allowing the employee to apply for a job like anyone else); see also *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999) (quoting *Aka's* holding with approval).

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

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.⁴⁰

Judge Posner concluded in *Humiston-Keeling* that an employer is not required to reassign an employee with a disability to a particular position, despite the employee's qualifications for that position, if there is someone whom the employer considers a superior candidate and "it's the employer's consistent and honest policy to hire the best applicant . . . rather than the first qualified applicant."⁴¹ To rule otherwise, according to Posner, would impermissibly convert the statute into one granting a preference to individuals with disabilities:

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 rectify a situation (such as lack of wheelchair access) that is of his own doing.⁴²

40. *Id.* at 1027. Judge Posner's narrow view of the role of reassignment is not surprising given his status as a proponent of the law and economics perspective of law, which favors a more restrictive view of when courts should overrule employer decisions about managing its personnel. *See, e.g., Vande Zande v. Wisc. Dep't of Admin.*, 44 F.3d 538, 544-45 (7th Cir. 1995) (finding that as a general rule, employers are not required to accommodate employees by permitting them to work from home); *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (finding that an employer's use of word-of-mouth to recruit new employees was not a sufficiently affirmative act to be an "employment practice" for purposes of a Title VII disparate impact discrimination claim). *See generally* Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994) (reviewing Judge Posner's record as a law and economics jurist in a discrimination context).

41. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d at 1029.

42. *Id.* In support of his position, Judge Posner offers two hypotheticals critical of the EEOC's interpretation of the reassignment provision. The first involves two individuals with disabilities, A and B, both seeking the same position: "A is not only more severely disabled than B; he is also, let us assume, certain to perform the job much better than B, although B meets the minimum qualifications for the job. Under the Commission's view, B is entitled to the job." *Id.* at 1027. Why the EEOC's position requires B to receive the job over A in this hypothetical is not clear, unless Posner is assuming some additional EEOC rule that the first person with a disability who applies for a position gets it, regardless of other circumstances. This interpretation appears nowhere in the EEOC's regulations or guidance, nor does it necessarily follow from the EEOC's position that the existence of others the employer views as more "qualified" is not relevant. *See Enforcement Guidance, supra* note 23, at 38 (noting that "[t]he employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment"). As between A and B, if the employer decided to give the job to A, and could explain its choice in accommodation terms (i.e., A could not be accommodated

Other courts take this view to task. In *Smith v. Midland Brake, Inc.*,⁴³ the Tenth Circuit described it as "judicial gloss, unwarranted by the statutory language or its legislative history."⁴⁴ The Tenth Circuit noted that Congress defined discrimination to include failure to accommodate disability, including failure to reassign to a vacant position.⁴⁵ It characterized the "right to compete" approach as rendering the reassignment provision "a hollow promise."⁴⁶ As the D.C. Circuit similarly reasoned in *Aka v. Washington Hospital Center*,⁴⁷ if an employee applies for a position and competes with other applicants to land that position, the employee "may have changed jobs, but . . . has done so entirely under [the employee's] own power, rather than having been appointed to a new position."⁴⁸ The D.C. Circuit further reasoned that the ADA already prohibits discrimination based on disability in job application procedures, which would render the reassignment provision redundant if it is read merely as permission to apply for the vacant position.⁴⁹ These courts conclude that Congress has already placed restrictions on the scope of the duty to reassign that are designed to ensure that the employer's business is not unduly

elsewhere, whereas B could), it is unlikely that the EEOC would consider the employer in violation of the duty to reassign B. *See id.*

The second hypothetical involves applicants from different protected classes, B, a white man with a disability, and A, a black woman over the age of forty: "Under the Commission's view, even though A is not only the better applicant but also a member of one of the minority groups that the laws administered by the EEOC are supposed to be protecting, B, the white male, is entitled to the job." *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d at 1027. Posner describes the EEOC's view as involving "a hierarchy of protections for groups entitled to protection against discrimination, with the disabled being placed ahead of the members of racial minorities." *Id.* The flaw in this reasoning is, of course, that the ADA mandates reasonable accommodations, while Title VII does not, at least as to race. *See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation*, 46 *DUKE L.J.* 1, 2-4 (1996) (contrasting the treatment of accommodation issues under the ADA and Title VII). Title VII simply requires the employer to act without regard to race, while the ADA's accommodation mandate actively requires consideration of disability. *See id.* Posner characterized the EEOC as creating a "hierarchy" of protected classes, however, the statutes themselves actually create different rights.

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

44. *Id.* at 1168.

45. *Id.* at 1168-69.

46. *Id.* at 1167 (doubting that Congress intended to provide "a hollow promise" by requiring only consideration for vacant positions).

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

48. *Id.* at 1302, 1304 (observing that the core term "assign" in "reassign" implies some sort of active effort on the part of the employer).

49. *Id.* at 1304.

disrupted, and “[i]f further limitations are to be sought, they must come from Congress.”⁵⁰

The Tenth Circuit also rejects the use of the label “affirmative action,” finding it nothing more than a “conclusory (and politically loaded) description of a requested accommodation.”⁵¹ Other courts are less direct, suggesting that the statute does not create preferences, it simply “levels the playing field.”⁵² As has been pointed out elsewhere, in reality, reassignment has both similarities and differences from “affirmative action” as that term is generally understood in the racial context.⁵³ The two are similar in the sense that both require the employer to prefer an employee for a given position because of the employee’s membership in a protected class.⁵⁴ Reassignment is dissimilar, however, in that it involves someone already employed by the business rather than a mere applicant for the job,⁵⁵ and relies on a case-by-case evaluation rather than a pre-designed “plan” by which a person is selected in order to meet the employer’s numeric goals.⁵⁶ Most significantly, reassignment is different from traditional affirmative action because reassignment is explicitly authorized by statute.⁵⁷ The reassignment provision reflects Congressional acceptance of the view

50. See *Smith v. Midland Brake, Inc.*, 180 F.3d at 1170 (summarizing statutory limitations on the duty to reassign, including vacancy of position sought, qualification of the employee, and defense of undue hardship).

51. *Davoll v. Webb*, 194 F.3d 1116, 1136-37 n.14 (10th Cir. 1999). The Tenth Circuit also noted that use of the term “affirmative action” to describe disability accommodations is somewhat misleading because the Supreme Court has distinguished between affirmative acts that constitute reasonable accommodation and acts that would fundamentally alter the nature of a program, calling only the latter “affirmative action.” *Id.* (citing *Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985)).

52. See, e.g., *Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997) (describing the reassignment provision as “not render[ing] the ADA an affirmative action program, but serv[ing] as a method of leveling the playing field between disabled and nondisabled employees in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer”). The *Ransom* court also noted, however, that the ADA has the additional purpose of “reduc[ing] societal costs of dependency and nonproductivity,” which moves beyond traditional formal equality arguments for “leveling the field.” *Id.*

53. *Befort & Donesky*, *supra* note 36, at 1078-86.

54. *Id.* at 1082.

55. *Id.* at 1085. The employer retains the services of the employee with a disability and “no other employee loses employment as a result of” the reassignment. *Id.*

56. *Id.* at 1084-85. *Befort and Donesky* note that the ADA requires a dialogue between employer and employee, but does not guarantee that reassignment will be the outcome of this dialogue. *Id.* at 1085. In addition, they note that reassignment is less pervasive, given that reassignment is the accommodation of last resort. See *id.*

57. See *id.* at 1082-83 (noting that statutory authorization is the “first and most obvious difference between affirmative action in the race and disability contexts”).

that sometimes "different treatment . . . might be needed [in order] to achieve equality."⁵⁸

In spite of these differences from traditional affirmative action, some courts have taken to re-writing the meaning of "reasonable accommodation" in reassignment cases to limit the circumstances under which the employer is required to modify its practices and procedures.⁵⁹ *Humiston-Keeling's* method was to characterize the employer's practice of selecting the "best" candidate for the job as a "legitimate, non-discriminatory" practice.⁶⁰ As discussed in the next section, that characterization has led a number of courts to conclude that the employer's policies necessarily take precedence over the employee's accommodation request. This is what might be called a "neutral policy" defense.

III. "NEUTRAL" EMPLOYER POLICIES

An employee seeking reassignment commonly encounters a variety of company policies that may limit the employee's right to switch jobs. Among these policies are such things as no transfer policies, "no roll-back" (or no demotion) policies,⁶¹ and seniority systems. These are "neutral" policies in that they do not facially distinguish between employees based on disability. Employees argue that the ADA's reasonable accommodation mandate requires that the employer make modifications and exceptions even to neutral policies unless the employer can show such modifications or exceptions would pose an undue hardship.⁶² This can be determined only by a factual inquiry as to the grounds for the employer's claim of undue hardship.⁶³

A number of courts, however, have been receptive to employer arguments that the ADA does not require modifying policies that are otherwise legitimate and non-

58. *Id.* at 1086 (quoting Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 *BUFF. L. REV.* 123, 146 (1998)).

59. *See supra* notes 37, 39 and text accompanying note 39.

60. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000).

61. A "no roll-back" policy prohibits a salaried, supervisory employee from "rolling back" into an hourly production position. *See, e.g., Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) (providing an example of an employer with a "no roll-back" policy).

62. *See, e.g., EEOC v. Humiston-Keeling, Inc.*, 227 F.3d at 1027 (arguing on employee's behalf that an employer was required to reassign an employee despite "neutral" policy requiring competitive selection unless the employer could show the reassignment posed an undue hardship).

63. *See TECHNICAL ASSISTANCE MANUAL, supra* note 23, at 1-3.9 (describing the undue hardship determination as made on a "case-by-case basis" and outlining the factors to be considered in making that determination).

discriminatory.⁶⁴ As a result, the actual scope of any anticipated disruption to the employer's business from the modification is seldom evaluated. In other words, the employer is not required in these cases to prove undue hardship; it need only assert the existence of some legitimate, "neutral" policy. The courts accepting this "neutral policy defense" appear to be heavily influenced by the standards applicable to other anti-discrimination statutes, such as Title VII, despite significant differences between those statutes and the ADA.⁶⁵

A. *The "Legitimate, Non-Discriminatory Policy" Justification*

The Eleventh Circuit case of *Duckett v. Dunlop Tire Corp.*⁶⁶ reflects how unquestioning courts can be for employer assertions of "neutral" policies. In *Duckett*, the employer had a policy providing that once an employee was promoted from production worker to supervisor, that employee was not later allowed to return, or "roll back," to a production position.⁶⁷ The plaintiff, Mr. Duckett, developed problems with high blood pressure that rendered him unable to perform in a supervisory role.⁶⁸ After his employer insisted that he return to work in his former supervisory position, Duckett sued, alleging his employer failed to accommodate him by either transferring him to a production position or allowing him to remain on medical leave.⁶⁹ The Eleventh Circuit summarily dismissed the reassignment claim on the grounds that it was not aware of any "case under the ADA or Rehabilitation Act where an employer has been required to transfer an employee to another position where the employer (independent of concerns about disability) has a business policy against the pertinent kind of transfer."⁷⁰ This was despite the court's acknowledgment that this employer had made exceptions to its no roll-back policy in the past.⁷¹ The fact that the employer had this business policy was apparently

64. See, e.g., *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354-55 (4th Cir. 2001) (finding that an employer was not required to disrupt a "neutral and non-arbitrary" seniority system); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d at 1028-29 (finding that a policy to give a job to the best applicant is legitimate and non-discriminatory, and an employer is not required to modify such a policy to accommodate an employee with a disability); see also *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (finding that an employee could not sustain an ADA claim because he did not show he was treated any differently than other similarly situated employees based on his disability).

65. See discussion *infra* Part III.B.

66. *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997).

67. *Id.* at 1225.

68. *Id.* at 1223.

69. *Id.* at 1224.

70. *Id.* at 1225.

71. *Id.* The court explained away the employer's apparent inconsistent assertion of the no roll-back policy by noting that the other employees had been rolled back into their production positions within a few months of their promotion, whereas the employee in that case had been a supervisor for

sufficient for the Eleventh Circuit to preclude attributing any reasonableness to the employee's request.⁷²

Even when a court recognizes that the ADA requires a more fact-based inquiry into the policy, there is still a tendency to defer to the employer's business purposes without scrutinizing the actual impact the accommodation would have on those purposes. For example, in the Seventh Circuit's opinion in *Dalton v. Subaru-Isuzu Automotive, Inc.*,⁷³ the court noted that an employer's policy prohibiting a transfer is subject to challenge if it has a disparate impact on employees with disabilities, or if the employer inflexibly refuses to make reasonable adjustments in the policy in light of a demand for reasonable accommodation.⁷⁴ The court makes this concession, however, only after invoking the standard rhetoric that a rule requiring the employer to violate its own "legitimate, non-discriminatory policy" would convert the ADA into a mandatory preference statute, which it deemed inconsistent with the statute's anti-discriminatory purpose and "an unreasonable imposition" on employers and coworkers.⁷⁵

The court in *Dalton* envisioned the range of jobs available to the plaintiffs as "bounded from above by the employer's freedom not to offer promotions and from below by its legitimate, non-discriminatory limitations on lateral transfers and demotions."⁷⁶ The court's discussion of the employees' specific reassignment requests and the employer's reasons for denying them reflects that the court imposed a substantial burden on the employees to prove that the requested modifications were reasonable in light of its view of the general legitimacy of the employer's policies.⁷⁷

almost eighteen years. *Id.* The employer was apparently never required to establish why the length of time made any difference. *See id.*

72. The court in *Duckett* did note one apparent justification, namely, that there was a collective bargaining agreement that prohibited anyone outside the union from holding production jobs. *Id.* at 1225. There was no discussion in the case of whether there was some barrier to the employee joining the union in order to comply with this requirement. *See id.* The justification appears to be mentioned as an aside after the court already concluded that the ADA does not require the employer to modify a business policy that prohibits the type of reassignment at issue. *See id.*

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

74. *Id.* at 679.

75. *Id.*

76. *Id.*

77. *See id.* One of the plaintiffs' claims in *Dalton* was that the employer used temporary workers to fill positions plaintiffs could have filled. *Id.* at 679-80. The plaintiffs lost on this claim because they could not prove which positions were involved, and, accordingly, whether they were qualified for those positions. *Id.* at 680. The plaintiffs' second claim was that the employer had a program that assigned people to light-duty positions for up to ninety days if they experienced temporary disabling conditions. *Id.* The plaintiffs wanted the employer to modify the temporary injury prerequisite to allow employees with permanent disabilities to participate. *Id.* Apparently there were vacancies in the program. *See id.* at 679 (noting plaintiffs' assertion that the employer had vacancies in

The Sixth Circuit, in *Burns v. Coca-Cola Enterprises*,⁷⁸ subsequently quoted *Dalton* to conclude that the employer could refuse to reassign and terminate an employee who did not complete the company's required "Request for Transfer" form for each job for which he might have been qualified.⁷⁹ The Sixth Circuit characterized the transfer request policy as "a legitimate, non-discriminatory administrative policy" with which the employee was obligated to comply.⁸⁰ Although the multiple request form requirement was, by the court's own finding, merely an administrative policy, the court nevertheless failed to make the employer justify any hardship from modifying it in the plaintiff's case.⁸¹ The "neutral" policy defense was sufficient.

The neutral policy defense also appears in cases in which the requested reassignment clashes with a seniority policy. The legislative history of the ADA contains an explicit statement that seniority systems "may be considered as a factor" in determining whether a requested reassignment is a reasonable accommodation.⁸² The Supreme Court recently ruled on the role of seniority policies in reassignment accommodation cases in *US Airways, Inc. v. Barnett*,⁸³ discussed in detail in Part IV of this Article. Prior to that, most of the appellate courts addressing the issue had ruled that the presence of a bona fide collectively bargained seniority system was not just "a factor," but a per se bar to the employee's claim for reassignment as a reasonable accommodation.⁸⁴ In two additional cases involving unilaterally imposed

the light-duty program). The court characterized the plaintiffs' request as effectively "abolishing" the program. *Id.* at 680. The specific factual basis for this dire consequence is not clear, i.e., how many positions were involved, how many vacancies there were, how often vacancies were available, and how many individuals with permanent disabilities needed reassignment as an accommodation. *See id.* In the Seventh Circuit's view, the request was unreasonable because it was asking the employer to change its rules to allow employees with permanent disabilities to take positions set aside for employees with temporary disabilities, which the court likened to forcing the employer to create new jobs for the employees with permanent disabilities. *See id.*

78. *Burns v. Coca-Cola Enters.*, 222 F.3d 247 (6th Cir. 2000).

79. *Id.* at 250-51, 258.

80. *Id.* at 258. The plaintiff in *Burns* did not fill out a form for each potential position, which permitted the court to characterize him as having "fail[ed] to request a transfer to a new position for which he was otherwise qualified." *Id.*

81. *See id.* at 258-59 (providing that the employer's failure to consider an employee for more than one vacant position, despite the employee's failure to file more than one Request for Transfer, was not a violation of the employer's duty to accommodate the employee under the ADA).

82. *See* H.R. REP. NO. 101-485, at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345 (noting that if a collective bargaining agreement reserves certain jobs based on seniority, this may be considered as a factor in determining whether reassignment of an employee with less seniority is a reasonable accommodation); S. REP. NO. 101-116, at 32 (1989).

83. *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002).

84. *See, e.g., Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 681-82 (9th Cir. 2001); *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000); *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998); *Kralik v.*

company seniority plans (one from the Fourth Circuit and one from the Ninth Circuit), the courts reached opposite conclusions on whether those plans also barred reassignment claims.⁸⁵

While the collective bargaining agreement cases focused primarily on the disruption of the contractual expectations of other workers as justification for the *per se* bar,⁸⁶ the Fourth Circuit case framed its analysis of the company seniority plan within the reasoning of the neutral policy defense cases.⁸⁷ The court emphasized that the policy was "neutral and non-arbitrary,"⁸⁸ and that "[t]he ADA does not require employers to disrupt the operation of a defensible and non-discriminatory company policy in order to provide a reasonable accommodation."⁸⁹ As with the other "neutral" policy cases, the policy itself was sufficient reason to deny the plaintiff's request.⁹⁰

B. Conflation of Title VII Standards into the ADA

Courts likely place so much emphasis on the characterization of the employer's policy as "legitimate" and "non-discriminatory" because they cannot get beyond thinking about the ADA in traditional Title VII terms. The Eleventh Circuit case made the connection explicit, expressing its doubt that "in providing for a [cause] of

Durbin, 130 F.3d 76, 83 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997); *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996); *Benson v. N.W. Airlines*, 62 F.3d 1108, 1114 (8th Cir. 1995); *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995). The EEOC apparently acquiesced in this interpretation. See *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 356 (4th Cir. 2001) (noting the EEOC acknowledged that if the case involved a collectively bargained seniority policy, the plaintiff's reassignment request would not be a reasonable accommodation). The D.C. Circuit initially held that a collective bargaining agreement was not a *per se* bar, but that decision was withdrawn, and the ensuing en banc decision did not address the issue. See *Aka v. Wash. Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir. 1997), *aff'd en banc on other grounds*, 156 F.3d 1284 (D.C. Cir. 1998).

85. Compare *EEOC v. Sara Lee Corp.*, 237 F.3d at 355-56 (upholding the employer's assertion of its seniority policy as a bar to the plaintiff's reassignment accommodation request), with *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1120 (9th Cir. 2000), *rev'd sub nom.* *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1525 (holding a company seniority plan was not a *per se* bar to the plaintiff's accommodation request).

86. See, e.g., *Eckles v. Consol. Rail Corp.*, 94 F.3d at 1051 (concluding that the reassignment provision "does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees"); see also *Kralik v. Durbin*, 130 F.3d at 81-83 (relying extensively on *Eckles*' rationale).

87. See *EEOC v. Sara Lee Corp.*, 237 F.3d at 353-54 (noting that "[v]irtually all circuits that have considered the issue have held that the ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy").

88. *Id.* at 354.

89. *Id.* at 355.

90. See *id.*

action to enforce . . . the ADA, Congress intended . . . a departure from the traditional rules and norms of [civil rights] litigation."⁹¹ The traditional burden-shifting approach to Title VII claims requires the plaintiff to make a prima facie case of discrimination and then asks the employer to produce a legitimate, non-discriminatory reason for its actions.⁹² Under this so-called disparate treatment or "pretext" model, the employer's burden is one of production only; the employer is not required to prove that its actions were not, in fact, based on discrimination.⁹³ The employer must simply raise a question of fact.⁹⁴ The pretext model emphasizes that the employee retains the ultimate burden of proving discrimination.⁹⁵ This model in effect adopts a "perpetrator's perspective" that assumes discriminatory bias is the least likely reason for the employer's actions and, accordingly, makes it extremely difficult for employees to overcome the employers' assertions of justification.⁹⁶

Professor Elizabeth Wilborn Malloy has documented how courts in ADA cases have tended to borrow Title VII's disparate treatment burden shifting mechanisms without sufficient regard for how the ADA's reasonable accommodation provision is

91. *Willis v. Conopco, Inc.*, 108 F.3d 282, 286 (11th Cir. 1997) (allocating burdens of proof on reasonable accommodation and undue hardship); *see also* S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603 (2001) (discussing several ways in which courts have failed to adequately distinguish between ADA and Title VII standards). In the context of sexual harassment law, I have characterized this patterned method of approaching discrimination law as "thinking within the box." *See generally* Cheryl L. Anderson, "Thinking Within the Box": *How Proof Models Are Used to Limit Sexual Harassment Law*, 19 HOFSTRA LAB. & EMP. L.J. 125 (2001).

92. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This is known as the "disparate treatment" model of proof and generally applies when a plaintiff seeks to prove discrimination using indirect evidence. *See* Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 51 (2000) (discussing in detail the order and allocation of proof in cases involving the "disparate treatment" model). There is also the so-called "mixed motive" proof model for cases in which there is direct proof of discrimination, but the employer defends that it would have made the same decision based on a non-discriminatory reason. *See* 42 U.S.C. § 2000e-2(m) (2000) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivate the practice"); *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) (establishing affirmative "same decision" defense superceded in part by § 2000e-2(m)). *But cf.* *Watson v. S.E. Pa. Transp. Auth.*, 207 F.3d 207, 214 n.5 (3d Cir. 2000) (characterizing "pretext" and "mixed motive" labels as misleading because pretext cases may involve a mixture of proper and improper motives, and single motive cases may involve direct rather than indirect evidence of that motive). In mixed motive cases, the employer also has the burden of persuasion, not just production. *Price Waterhouse v. Hopkins*, 490 U.S. at 252.

93. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

94. *Id.*

95. *Id.* at 253.

96. *Ware, supra* note 92, at 39.

different.⁹⁷ She notes that in Title VII cases, there is seldom, if ever, an explicit connection between the employee's race and that person's ability to do the job, and the employer is highly unlikely to admit that race played a part in the employment decision.⁹⁸ As she points out, the basic Title VII model is designed accordingly to compensate for the fact that there is often no direct evidence of intentional discrimination.⁹⁹ These points made by Professor Malloy explain the significance of the employer's assertion of a legitimate, non-discriminatory reason for its actions. Discriminatory intent cannot be gleaned from an action that is based on a legitimate and non-discriminatory rationale.¹⁰⁰ More is required, and it is up to the plaintiff to prove it.

ADA claims are, of course, different. Disability is often an explicit factor in the employer's reasons for its actions.¹⁰¹ More significantly, the duty to provide reasonable accommodation requires that the employee's disability play a direct part in the employment decision.¹⁰² As already discussed, the employer is required to evaluate on a case-by-case basis whether the employee can do the job and what alternative arrangements might be required.¹⁰³ In other words, implicit in reasonable accommodation is the notion that policies may have to be changed, whether they be neutral policies or not.¹⁰⁴ Employers under the ADA have a duty to alter the work

97. See Malloy, *supra* note 91, at 640-49.

98. *Id.* at 643.

99. *Id.* at 645. The purpose of the *McDonnell-Douglas* approach is "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. at 255 n.8).

100. There is, of course, the "mixed motive" model, under which an action can have two or more underlying motivations, one legitimate and one discriminatory. See *supra* note 92. Under the basic *McDonnell-Douglas* "pretext" model, however, the issue is generally more of an "either/or" proposition. Either the employer is credible in the non-discriminatory reason it claims for its actions or the employer is actually using that reason to cover up a true intent to discriminate. See *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. at 254-56 (discussing the role of an employer's explanation in pretext model). *But cf. Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-12 (1993) (holding the court may, but is not required to, find that the employer unlawfully discriminated if the employee proves the employer's explanation is not worthy of credence).

101. See Karlan & Rutherglen, *supra* note 42, at 2-3 (contrasting Title VII and the ADA).

102. See *id.*

103. See *supra* notes 18-26 and accompanying text.

104. Some commentators have asserted that the ADA requires a redistributive rather than corrective justice approach because of its mandate to not only prevent discrimination, but to affirmatively remove barriers to participation by providing reasonable accommodations. See, e.g., Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disabilities Claims*, 78 N.C. L. Rev. 901, 952 (2000) (noting that equal opportunity, as viewed by the ADA, requires "go[ing] beyond a simple mandate preventing discriminatory decisions by the employer (i.e., beyond corrective justice) to remove unnecessary employment barriers (i.e., to a redistributive approach)"). Title VII, by contrast, is predominately

environment, even if the employee with a disability does not measure the same as the employee without a disability under facially-neutral criteria.¹⁰⁵

Courts in the “neutral” policy cases might assert that they recognize this difference. The Seventh Circuit in *Dalton* explicitly noted that employer policies are subject to attack for their disparate impact or for the employer’s inflexible assertion of them.¹⁰⁶ In the end, however, this recognition amounts to mere lip service due to courts’ general resistance to imposing a burden of proof on the employer in discrimination cases.¹⁰⁷ The ADA makes undue hardship an affirmative defense, which should be proven by the party who raises it—the employer.¹⁰⁸ The factual requisite for a finding of undue hardship is substantial under the statute and its interpreting regulations.¹⁰⁹ This does not fit readily with the basic Title VII burden-shifting framework in which no burden of proof is imposed on the employer.¹¹⁰ Nonetheless, courts in “neutral” policy ADA cases treat assertion of that policy as they would the employer’s duty to produce a justification in Title VII cases.¹¹¹ They accept it without ever requiring the employer to prove that modifying its policy in the context of a particular case would be a substantial hardship.¹¹²

based on a corrective justice approach. See John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 741 (2000) (comparing and contrasting the ADA and Title VII). With a limited exception regarding accommodation of religious practices, Title VII otherwise simply prohibits certain actions rather than compelling them. *Id.* Title VII’s religious accommodation provision contemplates only de minimis actions on the part of the employer. See *id.* at 741-42 (noting that the ADA “imposes a much heavier burden on employers than the religious accommodation provisions of Title VII”).

105. Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 315-16 (2001).

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

107. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509-10 (emphasizing that the employer’s burden is only one of production).

108. Malloy, *supra* note 91, at 645; see also 42 U.S.C. § 12112(b)(5)(A) (2000) (providing that failure to make reasonable accommodation is discrimination based on disability “unless [the employer demonstrates] that the accommodation would impose an undue hardship on the operation of the business” of that employer).

109. See 42 U.S.C. § 12111(10) (setting out factors to consider in an undue hardship analysis); 34 C.F.R. § 104.12 (2001) (defining “reasonable accommodation” within the Department of Health and Human Services); 45 C.F.R. § 84.12 (defining “reasonable accommodation” for regulations of the offices of the Department of Education); cf. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139-40 (2d Cir. 1995) (discussing the burden of proving an undue hardship defense).

110. See Malloy, *supra* note 91, at 646.

111. *Id.* cf. at 640-41 (stating courts considering employment discrimination claims under the ADA have applied Title VII’s burden-shifting analysis).

112. See *id.* Professor Malloy concludes:

For the ADA to achieve its intended effect, courts must allocate the burden of proof for a cause of action under the Act differently than they have with other

Dalton is an interesting example of a court viewing all employer policies through a similar lens.¹¹³ The court lists what it describes as "a variety of legitimate job prerequisites that an employer may establish consistently with nondiscrimination laws."¹¹⁴ The list contains policies found legitimate under Title VII (such as an "up-or-out" policy)¹¹⁵ and the Age Discrimination in Employment Act (ADEA)¹¹⁶ (such as considering someone over-qualified for a job),¹¹⁷ as well as the ADA, without differentiating between the statutes.¹¹⁸ The court uses this list to justify its assertion that the employer is not required to violate its legitimate, non-discriminatory policies in order to reassign an employee with a disability.¹¹⁹ But, of course, the ADA requires that any policies asserted to preclude reassignment of an otherwise qualified employee should be scrutinized on a case-by-case basis with the employer bearing the burden of proving not mere existence of the policy, but "undue" hardship from having to modify it in that employee's case.¹²⁰

Unfortunately, the recent Supreme Court decision in *Barnett* may well have endorsed these courts' tendency to avoid shifting the burden of proof to the employer. While that decision initially rejects the neutral policy defense to the extent it is based on hostility toward any form of preferential treatment, the Court ultimately adopts an allocation of the burden of proof that in effect changes the neutral policy defense into a neutral policy presumption. The result is not likely to be any better for employees seeking reassignment.

types of employment discrimination claims. . . . Because of the unique relationship between a disability, an individual's ability to perform a job and the unique affirmative burden on employers to reasonably accommodate workers with disabilities, courts should place higher burdens on employers who wish to escape liability in disability discrimination cases.

Id. at 648-49.

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

114. *Id.* at 679.

115. See *id.* (citing, among other cases, a Title VII case, *Griffin v. Mich. Dep't of Corr.*, 5 F.3d 186, 189 (6th Cir. 1993)).

116. The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2000).

117. *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d at 679 (citing several ADEA cases, including *Senner v. N. Cent. Technical Coll.*, 113 F.3d 750, 756-57 (7th Cir. 1997)).

118. See *id.*

119. See *id.*

120. See 42 U.S.C. § 12111(9)(B) (2000) (defining reasonable accommodation to include appropriate adjustment or modifications in policies); *id.* § 12112(b)(5)(A) (requiring reasonable accommodations unless the employer can establish an undue hardship on the operation of the business).

IV. *US AIRWAYS, INC. v. BARNETT*

In *Barnett*, the Supreme Court addressed what appears on the surface to be the narrow issue of the effect of seniority plans on plaintiffs' requests for reassignment under the ADA.¹²¹ As noted in the first part of this Article, the Court's decision left a number of unresolved issues even in regard to that narrow question.¹²² Beyond that, the decision establishes a much broader precedent for allocation of the burdens of proof in ADA cases. Because of this, and despite language to the contrary in the majority opinion,¹²³ *Barnett* may be used to justify the degree of deference given to employers' "neutral" policies in reassignment cases. This is unfortunate, given that the decision is another in a line of cases from the Supreme Court that unnecessarily alters the ADA's intended statutory scheme.¹²⁴

A. *The Case in Brief*

The plaintiff in *Barnett* injured his back while working as a cargo handler for US Airways, Inc.¹²⁵ US Airways had unilaterally established a company seniority plan, and Barnett initially used his seniority rights under that plan to transfer from his cargo-handling position to a mailroom position.¹²⁶ Under US Airways' seniority plan, however, every position in the company periodically came up for bid, and at least two employees more senior than Barnett decided they wanted his mailroom job.¹²⁷ Barnett asked the company to make an exception to its seniority plan and allow him to retain the mailroom position as a reasonable accommodation of his disability, but the company refused.¹²⁸

As referenced in the Supreme Court's opinion, the district court appeared to analyze the case using the neutral policy defense, although couched in terms of undue hardship.¹²⁹ The district court found that US Airways was justified in relying on this system, which had been in place for decades, and was common to the airline industry.¹³⁰ The district court therefore concluded that "any significant alteration of

121. US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002).

122. See *supra* note 8.

123. See *infra* notes 178-83 and accompanying text.

124. See generally Vicki J. Limas, *Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-By-Case Basis*, 35 TULSA L.J. 505 (2000) (discussing the Supreme Court's 1998-99 term decisions that "severely" restricted the definition of disability).

125. US Airways, Inc. v. Barnett, 122 S. Ct. at 1519.

126. *Id.*

127. *Id.*

128. *Id.*

129. See *id.* at 1520 (using factors relating to undue hardship for the Court's decision).

130. *Id.*

[the] policy would result in undue hardship to both the company and its non-disabled employees."¹³¹ The Ninth Circuit disagreed, focusing on the lack of evidence to prove hardship.¹³² The Court of Appeals noted that Barnett already held the position he desired, and that permanently placing him in that position did not require bumping any other employee.¹³³ It found that US Airways had not provided sufficient evidence that making this particular accommodation would unduly disrupt its seniority system, because the company merely speculated that it could cause some kind of "domino effect."¹³⁴

Unlike the Ninth Circuit, a majority of the Supreme Court in *Barnett* did not view the case from an undue hardship perspective.¹³⁵ At the same time, it did not exactly follow the per se unreasonableness approach taken by other courts.¹³⁶ In a majority opinion written by Justice Breyer, the Court held that, in most cases, the employer would be entitled to summary judgment on the "reasonableness" issue upon a showing of the employer's seniority plan.¹³⁷ An accommodation must be "reasonable on its face, *i.e.*, ordinarily or in the run of cases."¹³⁸ Reassignment that violates an established seniority plan is unreasonable in the run of cases.¹³⁹ Only if the plaintiff/employee can establish "special circumstances" would the case not be dismissed.¹⁴⁰ The Court, in effect, created a rebuttable presumption that reassignment is not a reasonable accommodation if it requires an exception to employer's seniority plan.¹⁴¹

131. *Id.* (citation omitted).

132. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1120 (9th Cir. 2000), *rev'd sub nom.* US Airways v. Barnett, 122 S. Ct. 1516 (2002) ("U.S. Air did not show that the proposed accommodation was an undue hardship.").

133. *Id.*

134. *Id.* The Ninth Circuit suggested that US Airways should have provided evidence of the number of ADA claimants it had at its company, their seniority, and their need to be accommodated by exception to seniority rules. *Id.* at 1120-21. The court also noted that US Airways' seniority plan already contained an exception for catastrophic illness. *Id.* at 1121 n.11.

135. *See US Airways, Inc. v. Barnett*, 122 S. Ct. at 1523-25 (evaluating the reasonableness of the reassignment claim as part of plaintiff's prima facie case); *id.* at 1527-28 (O'Connor, J., concurring) (questioning, but ultimately agreeing with, the plurality's approach).

136. *See supra* note 84 and accompanying text.

137. US Airways, Inc. v. Barnett, 122 S. Ct. at 1519.

138. *Id.* at 1523 (discussing with approval the "run of cases" standard developed in the lower courts for resolving the "reasonableness" issue in reasonable accommodation cases).

139. *Id.*

140. *Id.* at 1519.

141. *Id.* at 1530 (Scalia, J., dissenting). In this regard, the Court arguably comes closer to the legislative intent that seniority systems be only a factor in the reasonable accommodation analysis than did the lower courts applying the per se unreasonableness standard. Interestingly, Justice Breyer's opinion does not reference that part of the legislative history. *See id.* at 1516-20.

Justice O'Connor joined the majority opinion, but wrote a separate concurrence to express her concern about the failure of the majority to require the seniority plan be legally enforceable.¹⁴² If there is a contractual right to an open position, then Justice O'Connor would find the position not to be "vacant" as required by the statute.¹⁴³ Absent a contractual right vested in another employee, she would find the reassignment request reasonable.¹⁴⁴ Justice O'Connor agreed with the majority's "run of cases" standard, suggesting that it prevented the concepts of reasonable accommodation and undue hardship "from overlapping by making reasonableness a general inquiry and undue hardship a specific inquiry."¹⁴⁵ She was troubled, however, that the majority's "special circumstances" approach "seem[ed] to blend the two inquiries."¹⁴⁶ She ultimately joined the majority opinion out of a desire that the Court agree on a rule when interpreting a statute, and her belief that in most cases, the majority's rule will result in the same outcome as her proposed interpretation.¹⁴⁷

Four justices filed dissenting opinions. Justice Souter, joined by Justice Ginsburg, focused specifically on seniority plans, arguing the legislative history did not support the majority's finding that reassignment in violation of a seniority plan was presumptively unreasonable.¹⁴⁸ Justice Scalia, joined by Justice Thomas, echoed the analysis of the lower courts adopting a restrictive view of the right of reassignment, and would not have required the employer to modify any rules that were not specifically disability-related.¹⁴⁹

142. *Id.* at 1526-28 (O'Connor, J., concurring).

143. *Id.* at 1527.

144. *Id.*

145. *Id.* at 1527-28.

146. *Id.* at 1528.

147. *Id.* at 1526, 1528.

148. *Id.* at 1533-34 (Souter, J., dissenting). Justice Souter noted that while Congress modeled several aspects of the ADA on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (2000), it did not include Title VII's explicit protection of seniority plans. *Id.* at 1532-33 (citing 42 U.S.C. § 2000e-2(h)). In addition, he noted that the committee reports in both the House and the Senate specifically rejected as authoritative a prior Supreme Court decision finding religious accommodations that violate an established seniority plan not "reasonable." *Id.* at 1533-34 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); H.R. Rep. No. 101-485, at 68 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 350; S. Rep. No. 101-116, at 36 (1989)); see also *supra* note 27. He would have found that under the run of cases standard articulated by the majority, the requested accommodation in this case was feasible, and therefore reasonable. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1534 (Souter, J., dissenting). The burden of proof should have shifted to US Airways to prove undue hardship, and Justice Souter would have affirmed the Ninth Circuit's finding that US Airways failed to sustain that burden. *Id.*

149. *Id.* at 1528-30. (Scalia, J., dissenting). Justice Scalia argued that the majority erred in allowing any rule to be challenged that did not pose a "distinctive obstacle" to the individual with a disability. *Id.* He reasoned that the ADA requires only that employers not discriminate "because of disability," and this means elimination of obstacles only if they are disability-related:

B. Unreasonable in the "Run of Cases," Absent Special Circumstances

At the heart of *Barnett* is the distinction between what the plaintiff must prove regarding reasonable accommodation and what the employer must prove regarding undue hardship. The distinction has proved to be a tricky one as the two concepts seem to overlap.¹⁵⁰ Their relationship has been described as follows:

Although the ADA treats "reasonable accommodation" and "undue hardship" as definitionally distinct, and it would technically be possible for an accommodation both to be reasonable and to be unduly burdensome, as a practical matter the two concepts operate in tandem: courts that find a particular accommodation to be "reasonable" are unlikely to exempt employers from undertaking it, and courts that find a particular accommodation to pose an "undue hardship" are correspondingly unlikely to demand that an employer shoulder it.¹⁵¹

In other words, courts seem to take a "we approve or we don't" approach to resolving reasonableness versus undue hardship. If they approve of the accommodation, it is reasonable. If they do not approve, it is unreasonable and the plaintiff's claim is summarily dismissed. This has less to do with the statutory scheme than with each court's sense of what is right.¹⁵²

[The reassignment provision of the ADA] envisions elimination of the obstacle of the *current position* (which requires activity the disabled employee cannot tolerate) when there is an alternative position freely available. If he is qualified for that position, and no one else is seeking it, or no one else who seeks it is better qualified, he *must* be given the position. But "reassignment to a vacant position" 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.

Id. at 1530. To the extent that a workplace policy "burden[ed] the disabled and nondisabled alike" (i.e., a neutral policy), Justice Scalia would not make that policy subject to challenge under the ADA.

See id. at 1529 (suggesting a contrary interpretation would make the ADA "a standardless grab bag").

150. *See* Karlan & Rutherglen, *supra* note 42, at 9 (describing reasonable accommodation and undue hardship as "tangled concepts").

151. *Id.* at 11 (footnote omitted).

152. This attitude greatly explains the outcome in collective-bargaining cases, in which many courts appear simply unwilling to consider that the statute might have intended to alter what courts believe are settled rules regarding the special nature of seniority rights. *See* *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1052 (7th Cir. 1996) (finding that "collectively bargained seniority rights have a pre-existing special status in the law and that Congress to date has shown no intent to alter this status by the duties created under the ADA").

The majority in *Barnett* deviates from this pattern to the extent that it allows the plaintiff to have a second chance to prove reasonableness through the special circumstances exception, but the underlying premise is the same. As represented in the opinion, the two parties to the case had widely divergent views of the reasonableness inquiry.¹⁵³ The employer wanted the Court to adopt a per se rule of unreasonableness that required no further factual inquiry.¹⁵⁴ The employee sought a standard of "reasonableness" that required only a showing that the requested accommodation was "effective."¹⁵⁵ The employee had good authority for his interpretation—one of the drafters of the ADA asserted that "reasonableness" was intended to focus on the effectiveness of the accommodation, while "undue hardship" was intended to focus on employer costs.¹⁵⁶ This was also the EEOC's interpretation.¹⁵⁷

None of the circuit courts to consider the issue, however, accepted the argument that effectiveness equals reasonableness.¹⁵⁸ The typical response was that effectiveness was inherently part of the notion of "accommodation," but that "reasonableness" is relational, which requires consideration of costs and benefits.¹⁵⁹ This latter view was adopted by the Court in *Barnett*.¹⁶⁰

153. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1520.

154. See *id.* (noting US Airways' argument that an accommodation that violates a seniority plan is "always" unreasonable).

155. See *id.* at 1522 (noting Barnett's argument that "reasonable accommodation" means only "effective accommodation," and requires no more consideration than whether the requested accommodation meets the employee's disability-related needs).

156. Chai R. Feldblum, *The (R)evolution of Physical Anti-discrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613, 619-20 (1996).

157. See TECHNICAL ASSISTANCE MANUAL, *supra* note 23, at I-3.4 (describing reasonable accommodation as "an effective accommodation"); see also *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (rejecting the EEOC's interpretation of reasonable accommodation as requiring only an effective accommodation); cf. Jeffrey O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism & the Practical Limits of Practical Wisdom*, 74 TUL. L. REV. 1207, 1223 (2000) (noting that to the extent the legislative history addresses the burden of proving reasonableness of an accommodation, it tends to reinforce the EEOC's interpretation).

158. *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259 n.4 (noting that no circuit court has adopted the EEOC's position that "reasonable" means "effective").

159. See, e.g., *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (describing "reasonable" as a "relational term" that evaluates desirability and consequences of an accommodation); *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (discussing the cost/benefit analysis required of reasonable accommodation inquiry).

160. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1522-23. Interestingly, the Court makes no reference to either the legislative history or the EEOC's interpretation of "reasonableness." See *id.* The Court's overlooking of the legislative history is consistent with its recent ADA decision that "disability" should be defined after consideration of mitigating measures such as medication despite explicit legislative history to the contrary. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504-05 (1999) (Stevens, J., dissenting). The failure to consider the EEOC's interpretation is less consistent

Justice Breyer's opinion cites favorably the standard of proof of "reasonableness" used by some of the circuits, namely that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."¹⁶¹ The cases Justice Breyer cites refer to this as a showing of "feasibility" or "plausibility."¹⁶² Exactly what makes an accommodation "feasible" or "plausible" is not, however, entirely clear in the cases. One of the cases Justice Breyer cites suggests this standard may be met by showing that the accommodation is one referenced in the statute or regulations.¹⁶³ Another case from the First Circuit rather unhelpfully suggests that feasibility is related to the difficulty of providing an accommodation:

[T]he difficulty of providing plaintiff's proposed accommodation will often be relevant both to the reasonableness of the accommodation and to whether it imposes an undue hardship. Plaintiff will often need to take such difficulties into account in proving whether the accommodation is facially practicable, and defendant will of course need to provide evidence of them in attempting to prove undue hardship. Indeed, where the costs of an accommodation are relatively obvious—where they really are what they appear to be on the face of things—plaintiff's burden and defendant's burden may in application be quite similar, even to the extent of being mirror images. Where the burdens will significantly differ is when the costs of an accommodation are not evident on the face of things, but rather are better known to the employer. . . . Given the inexactness of that dividing line, wise counsel for both parties will err on the side of offering proof beyond what their burdens require.¹⁶⁴

with recent decisions, including one issued shortly before *Barnett*, in which the Court upheld the EEOC's controversial interpretation of the "direct threat" provision of the ADA. *See Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045, 2049-53 (2002) (finding that the EEOC could interpret a "direct threat" to include a threat to the employee's self despite absence of that language in the statutory definition).

161. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1523 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259; *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d at 138; *Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

162. *See id.* (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259 (providing that a plaintiff has to show that an accommodation is "feasible"); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d at 138 (holding that a plaintiff has to show a "plausible accommodation")) (other citations omitted).

163. *See, e.g., Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d at 142 (finding that the plaintiff's requested accommodation of a teaching assistant "plainly" fell within the range of reasonableness because, in part, it was contemplated in the regulations).

164. *Reed v. LePage Bakeries, Inc.*, 244 F.3d at 259-60.

As the quoted language demonstrates, the “run of cases” approach is essentially the “we approve or we don’t” approach described above.¹⁶⁵ If the court thinks the accommodation is reasonable, it will find it “feasible.” If the court does not think it reasonable, it will blur the distinction between “reasonableness” and “undue hardship,” in effect heightening the employee’s burden of showing feasibility. This is, in fact, what the Court in *Barnett* does. While the requested accommodation arguably was feasible on its face—US Airways could have modified its seniority plan to allow the plaintiff to retain the mailroom job, especially given the company’s argument that the plan did not create contractual rights in its employees¹⁶⁶—the Court instead found that “it would not be reasonable in the run of cases that the assignment in question trumps the rules of a seniority system.”¹⁶⁷

This conclusion provides little guidance for the next case. If the employee seeks reassignment but the employer has a policy that prohibits that reassignment, such as a policy that all candidates be competitively selected, what should the court consider when evaluating whether the request is reasonable on its face? What role does the employer’s policy play? Is the employee’s burden heightened whenever the employer has adopted a business policy that is contrary to what the employee seeks? Given that the Court rejects the idea that a neutral policy cannot be challenged if

165. See *supra* text accompanying note 151. In his dissent in *Barnett*, Justice Scalia expresses a similar concern about courts being able to pick and choose among accommodation requests, albeit for a different reason. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1529 (Scalia, J., dissenting). In his view, if reasonable accommodation extends beyond those cases involving disability-related, rather than neutral, obstacles to the employee’s employment, “the ADA’s accommodation provision becomes a standardless grab bag leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed ‘reasonable’ to ‘make up for’ the particular employee’s disability.” *Id.* His characterization of accommodation requests as “making up” for a person’s disability reflects his strong anti-preference view of civil rights laws like the ADA. Cf. *PGA Tour, Inc., v. Martin*, 532 U.S. 661, 702-03 (Scalia, J., dissenting) (suggesting that a rule requiring the PGA to reasonably accommodate a professional golfer created a “special dispensation” for that golfer and required courts in future cases to make arbitrary distinctions based on individualized case facts).

166. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1534. (Souter, J., dissenting). In his dissenting opinion, Justice Souter would find that *Barnett* established feasibility:

He [*Barnett*] held the mailroom job for two years before learning that employees with greater seniority planned to bid for the position, given U.S. Airways’ decision to declare the job “vacant.” . . . *Barnett* was seeking not a change but a continuation of the status quo. All he asked was that U.S. Airways refrain from declaring the position “vacant”; he did not ask to bump any other employee and no one would have lost a job on his account. There was no evidence in the District Court of any unmanageable ripple effects from *Barnett*’s request, or showing that he would have overstepped an inordinate number of seniority levels by remaining where he was.

Id.

167. *Id.* at 1524.

modifying it would in effect operate as a preference,¹⁶⁸ there seems to be a good argument for feasibility despite the presence of the policy. On the other hand, *Barnett's* facial showing of reasonableness might require that no specific barrier (i.e., policy) be in place that prohibits the requested accommodation.¹⁶⁹

The Court only muddied the waters by creating the "special circumstances" exception. The Court adopted this exception because it recognized that the "run of cases" standard is not sufficiently comprehensive.¹⁷⁰ Some cases adopting the "run of cases" approach have recognized that some jobs are *sui generis*, and comparisons to other workplaces are not determinative.¹⁷¹ Following this logic, the majority in *Barnett* concluded that the employee is entitled to show, on case-specific facts, that an exception to the seniority plan is reasonable in that particular case.¹⁷² These case-specific facts include such things as "fairly frequent" exercise of a reserved right to unilaterally change the plan, or a plan so full of exceptions that one more "is unlikely to matter."¹⁷³

The problem is that those types of case-specific facts, or at least their antithesis, are supposed to be part of the employer's defense to accommodation requests.¹⁷⁴ The statutory definition of "undue hardship" speaks in terms of "significant difficulty," which is to be determined by reference to factors that include the impact on company operations and the composition, structure, and functions of the workforce.¹⁷⁵ The absence of exceptions in a seniority plan, or the long-term stability and contractual expectations of other employees, are facts that establish the significant difficulty that granting an exception would cause a particular employer. Employers who administer these policies and keep company records should have no difficulty accessing such factual information and presenting it to the court, if it indeed exists.¹⁷⁶ By contrast,

168. *Id.* at 1521.

169. *See supra* note 161 and accompanying text.

170. *Id.* at 1525 (quoting language from *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 137 (2d Cir. 1995) (providing that the particular circumstances of the employer might require of it something unreasonable as to other employers)).

171. *See, e.g., Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 n.5 (1st Cir. 2001) (providing that although reasonableness of accommodations may be established by showing feasibility in the run of cases, this is not the hard and fast rule).

172. *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1525.

173. *Id.*

174. In *Barnett*, Justice Breyer in fact recognizes that case-specific facts of special circumstances are part of the employer's case. *See id.* at 1523 (describing the employer's burden as showing "special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances").

175. 42 U.S.C. § 12111(10)(A), (B) (2000).

176. *See Malloy, supra* note 91, at 645-46 (noting that an employer has "the knowledge, experience and resources to determine whether it can make reasonable accommodations for the

employees may face a daunting task of trying to develop evidence regarding past exceptions to seniority plans and past modifications of plans, information unlikely to come from any one source other than the employer.¹⁷⁷

Thus, although the Court adopts what might appear to be a plaintiff-friendly standard of facial feasibility or plausibility, the way the Court interprets undue hardship requires employees to prove case-specific facts that should have been part of the employer's burden. The Court, in other words, reworks Congressional intent by shifting the burden of addressing hardship to the employee.

C. *Proving Absence of Hardship*

Although Justice Breyer denies it in his opinion, the Court's ruling in effect changes "undue hardship" into "hardship" and requires the employee to prove its absence.¹⁷⁸ The Court sets up a minimal burden by which the employer can impose a burden to prove special circumstances on the employee.¹⁷⁹ The employer need only establish that a seniority plan would be violated if the reassignment request is granted.¹⁸⁰ The Court appears to be talking about a mere facial showing of a technical violation of the plan.¹⁸¹ The employer does not even have to show that the plan is in fact an actual bar to the requested reassignment.¹⁸² The types of "special

plaintiff"); cf. Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 12 (1959) (articulating the "fairness" notion of the burden of proof allocation, which properly places the burden on the party who has superior access to information); L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 61, 77 (1990) (applying Cleary's "fairness" theory to argue that employers should bear the burden of proving a business necessity in Title VII disparate impact claims because they have better access to evidence of their business's needs).

177. Although *Barnett* cites the First Circuit opinion in *Reed* with apparent approval of its articulation of the plaintiff's burden of proof, see *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1523, the Court does not fully acknowledge another aspect of *Reed* that suggests when the costs of an accommodation are not evident on their face, the employer bears the burden of addressing those costs. See *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 260 (1st Cir. 2001); see also *supra* note 164 and accompanying quote in text. Presumably, this is because the Court viewed the costs of the modification of the seniority plan as obvious. They may well be, but only if viewed from a generalized perspective, which is not what the ADA intends. See 29 C.F.R. app. § 1630.9 (2001) (determining that reasonable accommodation is a fact-intensive, case-by-case process).

178. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1522 (rejecting the plaintiff's argument that forcing him to "counter a claim of 'seniority rule violation' in order to prove that an 'accommodation' request is reasonable" effectively requires him to prove absence of hardship).

179. See *id.* at 1525.

180. See *id.* (stating that "a showing that the assignment would violate the rules of a seniority plan warrants summary judgment for the employer" absent a showing of special circumstances by the employee).

181. See *id.* at 1523-25.

182. See *id.*

circumstances" that Justice Breyer describes, i.e., changeability and a number of past exceptions, confirms this.¹⁸³ The employer is being let off the hook on hardship merely by showing that it has something that can be characterized as a seniority plan which facially seems to prohibit the reassignment.¹⁸⁴ Rather than having to plead undue hardship as an affirmative defense, the employer need now only sit back and poke holes in the employee's reasonableness case.¹⁸⁵

This is far less than the burden Congress anticipated in creating the statutory definition of undue hardship.¹⁸⁶ It contradicts Congress's explicit statement that it intended the employer to bear a significantly higher burden under the ADA than under Title VII.¹⁸⁷ Presumably, the Court viewed all issues regarding reasonableness and hardship as being resolved once the special circumstances inquiry was completed.¹⁸⁸ If that is the case, undue hardship is written out of the statute as a limited, case-specific defense.

183. See *id.* at 1525 (discussing what plaintiffs might show to prove special circumstances).

184. Whether a seniority plan actually would prohibit a reassignment accommodation can be a vigorously contested issue. For example, in a case decided by the Court of Appeals for the District of Columbia, the parties disputed whether language in a collective-bargaining agreement that allowed the employer to reassign employees who became disabled "in [its] sole discretion" overrode the agreement's other provisions on seniority preferences. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1301-03 (D.C. Cir. 1998) (holding that conflict between provisions of a collective-bargaining agreement was issue of fact and remanding the issue to the lower court). That case does not clearly address who bore the burden of proving the meaning of the agreement. See *id.*

185. A case from the Fifth Circuit reflects how employers may take advantage of the Court's rule. See *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678 (5th Cir. 1996). In that case, the employer failed to plead undue hardship, choosing instead to argue that the employee's requested modifications were not reasonable, in part because they would violate a company policy that prohibited transferring employees who were not performing up to standards. *Id.* at 683-84. The Fifth Circuit found that the employee's request to have certain deadlines changed or to be transferred to a position without such deadlines was reasonable, thus the employer was required to plead and prove undue hardship. *Id.* at 684. Otherwise, the court observed, the employer would be "[placing] the burden of proof of undue hardship on [the employee] merely by refusing to plead the affirmative defense and then attacking his proposed accommodations as unreasonable in his specific circumstance." *Id.* After *Barnett*, an employer in a case like *Riel* may well succeed with that strategy.

186. See 42 U.S.C. § 12111(10) (2000) (defining undue hardship and outlining a factor-based test for undue hardship that focuses on significant difficulty or expense).

187. See *supra* note 27 and accompanying text. The Court not only fails to acknowledge the legislative history setting the bar significantly higher in ADA cases than for religious accommodation cases under Title VII, it also cites the case whose standard Congress explicitly rejected as support for its decision that modifying a seniority plan is not reasonable in the run of cases. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1524 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-80 (1977)).

188. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1525. Either the employee loses on the special circumstances inquiry and the case is dismissed on summary judgment in favor of the employer, or the employee wins because she succeeded in proving that the reassignment does not actually upset

The Court rewrites the statute because it sees the real hardship as forcing the employer to make a factual case when it has a seniority system in place and the employee wants a reassignment outside of that system. Justice Breyer worries that "to require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend."¹⁸⁹ In other words, seniority systems serve such important interests that employers who adopt them should face only a limited burden defending them, lest neither employer nor employees realize the good that flows from them.¹⁹⁰

Curiously, despite this emphasis on upholding expectations, Justice Breyer's opinion is vague as to whether contractual enforceability, or its absence, is relevant to determining whether the requested reassignment is reasonable.¹⁹¹ Justice Breyer described the benefits of seniority systems as including "job security" and "an element of due process," both of which suggest enforceable rights vested in covered employees.¹⁹² The Justice's subsequent discussion of why the plaintiff is allowed to show special circumstances presupposes these characteristics will be present: "That is because special circumstances might alter *the important expectations described above*."¹⁹³ Then, however, Justice Breyer articulates the types of special circumstances that might preclude a finding of unreasonableness, without explicitly referencing contractual enforceability.¹⁹⁴

Justice Breyer's opinion in fact may have implicitly ruled out the relevance of contractual enforceability by coupling the employer's retention of the right to change the plan unilaterally with the actual exercise of that right.¹⁹⁵ Justice O'Connor, who

an adequately established plan. In other words, the employee wins only by showing no significant difficulty or cost to the employer in making the reassignment. This would seem to subsume the undue hardship inquiry.

189. *Id.* at 1524.

190. In this regard, the good that the Court sees in seniority systems transcends whether they are the result of a collective-bargaining process or unilaterally imposed by the employer. Apparently, in either context, employers should be encouraged to choose these systems, and the law should be read to support that choice.

191. *See id.*

192. *See id.*

193. *Id.* at 1525 (emphasis added).

194. *See id.* The plurality opinion also does not reference US Airways' assertions during oral argument that it did not view its seniority system as creating enforceable rights in its employees or the provision in its Personnel Policy Guide that disclaimed the creation of any legally enforceable rights or obligations, although Justice O'Connor's opinion references both. *See id.* at 1519, 1527.

195. *See US Airways, Inc. v. Barnett*, 122 S. Ct. at 1525. The opinion suggests special circumstances may be established if the employee shows that "the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed . . ." *Id.*

wrote a separate concurrence because she found the Breyer plurality's failure to require contractual enforceability "problematic," nonetheless reinforces Breyer's coupling of retention of rights and actual exercise by concluding that the Court's test "will often lead to the [correct] outcome" because employers with unenforceable seniority plans are likely to "retai[n] the right to change the system' and will often 'permi[t] exceptions,'" leading to a finding of special circumstances.¹⁹⁶ In general employment law, retention of the right to modify a plan in itself may be sufficient to rebut a claim that a policy creates a contractual right.¹⁹⁷ Apparently, however, based on *Barnett*, an employee cannot prove reasonableness in the ADA context by showing a retention of rights alone. The fact that Justice O'Connor felt compelled to write separately on the scope of the special circumstances exception in order to explicitly address the enforceability issue reflects that the Justices who joined Justice Breyer's opinion did not agree that lack of enforceability was itself a special circumstance.¹⁹⁸

In any event, neither Justice Breyer's plurality nor Justice O'Connor would impose on the employer an obligation to prove anything more than the existence of a company policy (whether a writing matters is unclear) that sets out a seniority system that would be violated if the employee's reassignment request was met.¹⁹⁹ Whether the employer actually followed this policy or the extent to which it actually created

196. *Id.* at 1526, 1528 (O'Connor, J., concurring) (internal citations to plurality opinion omitted).

197. *See* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW 677-79* (2d ed. 1999) (explaining that a disclaimer in an employee handbook will usually protect employers from claims based on their handbooks).

198. *See* *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1528 (O'Connor, J., concurring). Justice O'Connor, in fact, notes in her opinion that "[t]he Court . . . is divided in opinion," and that "if each member voted consistently with his or her beliefs, [they] would not agree on a resolution of the question presented in this case." *Id.* at 1526 (quoting *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result)). While this makes the fact of disagreement clear, it does not explain the basis for that disagreement. The issue might have been O'Connor's equating "vacant position" with lack of existence of another's contractual right to that position. *See id.* at 1526-27 (stating a vacant position is one in which no employee currently works, or has legal entitlement to, and opining that an employee expecting assignment under a seniority policy would have no contractual right to the position in a workplace with an unenforceable seniority policy, thus making the position vacant). Some of the Justices in the plurality may have disagreed with her narrow view of "vacant," while others may not have wished to limit the standard to only contractually enforceable claims to the position in question.

199. *See id.* at 1525-26 (holding that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient"); *see id.* at 1526 (O'Connor, J. concurring) (providing that "the effect of a seniority system on the reasonableness of a reassignment as an accommodation for purposes of the ADA depends on whether the seniority system is legally enforceable").

expectations or rights in employees are all issues the plaintiff has to address at the prima facie stage.²⁰⁰

Justice Breyer's failure to address, let alone require, contractual enforceability is curious because the Court's decision makes sense only if it rests on a belief that protecting the rights of other employees under the seniority plan is an overriding consideration.²⁰¹ Indeed, this belief is reflected in the way his opinion rejects the employee's argument that the Court is making him show absence of hardship rather than reasonableness.²⁰² Justice Breyer worries that an analysis of undue hardship factors will not adequately account for the real hardship experienced in these cases, because those factors refer to hardship on the operation of the business.²⁰³ Justice Breyer observed:

Yet a demand for effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.²⁰⁴

This is, in the first instance, an unnecessarily narrow reading of the undue hardship factors. It suggests that employers can show undue hardship only when the accommodation would affect the company's financial bottom line. Yet, "dismissals, relocations, [and] modifications of employee benefits" can have a substantial effect on the efficiency of an operation, even if not immediately financially discernable. The EEOC's regulations recognize that "impact" on "business operations" includes such things as the effect of the accommodation on other employees.²⁰⁵ Undue hardship standards, therefore, can readily extend to the kinds of issues Justice Breyer describes.

200. See *id.* at 1525 (holding that where the plaintiff seeks reassignment as a reasonable accommodation, but the reassignment would violate the employer's "established seniority system," the plaintiff must present evidence of special circumstances to avoid summary judgment for the employer).

201. See *id.* at 1524 (relying on *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 62, 79-80 (1977)) (characterizing collectively bargained rights as "[l]ying] at the core of our national labor policy" because they are "aimed at effecting workable and enforceable agreements between management and labor") (emphasis added).

202. See *id.* at 1522 (rejecting the plaintiff's argument that forcing him to "counter a claim of 'seniority rule violation' in order to prove that an 'accommodation' request is reasonable" effectively requires him to prove absence of hardship).

203. See *id.*

204. *Id.*

205. See 29 C.F.R. § 1630.1(p)(v) (2001) (including the consideration of "the impact on the ability of other employees to perform their duties" in undue hardship factors).

More to the point, if Justice Breyer's concern has any relevance, it is only if a seniority plan conveys upon those other employees "rights," as compared to "expectations." If the problem is that expectations may be upset, then the entire accommodation mandate is vulnerable to attack. The ADA reflects an intent to upset "expectations" to the extent that they limit the employability of individuals with disabilities.²⁰⁶ For example, the Act defines a qualified individual with a disability as a someone who can perform the essential functions of the job with or without reasonable accommodation.²⁰⁷ Accordingly, if there are some non-essential, or marginal, functions of the job that the employee cannot perform because of her disability, the employer may be required to reassign those marginal functions in order to accommodate an employee.²⁰⁸ This means that other employees, who may have expected to share those duties or avoid them altogether, may be required to bear the entire burden of the marginal tasks.

On the one hand, it does not seem likely that the Court intended to impose a presumption of unreasonableness on plaintiffs when this type of expectational interest is at stake. On the other hand, however, it is not clear how to distinguish between expectations that trump ADA rights and expectations that must give way. A reassignment-related example that illustrates this is the debate over competitive versus automatic selection for a vacant position. Even in companies without formal seniority plans, employees may have expectations about intra-company promotion and transfer that are defeated by the employer's reassignment of an employee with a disability. Is this enough like the expectation in *Barnett* to impose a presumption of unreasonableness?

Barnett could have been worse for employees, of course, in that the Court could have adopted the per se bar of the lower courts. Instead, employees still have some means to gain accommodations in workplaces with seniority plans.²⁰⁹ *Barnett* is nevertheless the most recent in a line of ADA cases in which the Court has altered Congress's intended statutory scheme.²¹⁰ The Court's willingness to transform what

206. See 42 U.S.C. § 12101(a)(5) (2000) (finding that individuals with disabilities continually encounter discrimination in various forms including "overprotective rules and policies" and "exclusionary qualification standards and criteria"); *id.* § 12101(a)(9) (finding that continued "unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis" and results, among other things, in dependency and non-productivity costs to the country).

207. *Id.* § 12111(8).

208. 29 C.F.R. § 1630.2(o).

209. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1525 (providing that a plaintiff may show special circumstances which warrant a finding that the accommodation is reasonable despite the presence of a seniority system).

210. See *supra* notes 124, 160.

should have been a fact-specific inquiry of the employer's defense into a presumptive unreasonableness rule is likely to have far-reaching consequences in ADA law.

V. *BARNETT'S* IMPACT ON OTHER NEUTRAL POLICY CASES

Barnett could have had interesting consequences if it was limited to seniority plans only. Would employers have seen some new benefit to adopting consistently applied institutional seniority systems, which would in turn benefit employees as a whole?²¹¹ *Barnett*, however, seems to reach beyond seniority cases, setting a standard for evaluation of reasonable accommodation claims generally.²¹² The Court's presumption of unreasonableness has implications that reverberate to the struggle employees have faced when employers assert no duty to accommodate because of "neutral" employment policies.²¹³ While the Court rejects neutrality as a per se defense, it may have laid the groundwork for a substitute limitation on the right to reasonable accommodation—a "neutral policy presumption."

A. *No Such Thing as the Neutral Policy Defense*

In *Barnett*, US Airways argued that requiring an employer to violate a disability-neutral rule would give the employee with a disability a preference and that the neutrality of the rule was in itself reason to deny the accommodation request.²¹⁴ As discussed in Part III.A of this Article, a number of courts accepted this interpretation of the Act. The United States Supreme Court, however, disagreed.²¹⁵ Justice Breyer's opinion closes the lid on the lower courts' outright hostility to reassignment as a form of preference, noting that the ADA inherently expects many otherwise neutral rules to be modified:

211. Of course, if seniority plans do not have to be contractually enforceable in order for employers to reap the benefits of the presumption of unreasonableness, then *Barnett* would not amount to a gain for employees, with or without disabilities.

212. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1516-25 (discussing and evaluating reasonable accommodation in somewhat broader terms than seniority systems).

213. A Third Circuit opinion issued after *Barnett* reflects that courts are generalizing *Barnett* beyond seniority cases. See *Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002). The court in *Shapiro* described *Barnett* as creating a "two-step approach for cases in which a requested accommodation . . . is claimed to violate a disability-neutral rule of the employer." *Id.* at 361 (articulating the first step as determining whether the accommodation "is reasonable in the run of cases" and the second step as either shifting a burden to the employer or requiring the plaintiff to prove special circumstances, depending on the outcome of the first step).

214. See *US Airways, Inc. v. Barnett*, 122 S. Ct. at 1520-21.

215. Although Justice O'Connor did not explicitly address the issue, the fact that she believed a fact-specific inquiry was required regarding contractual enforceability indicates she rejected US Airways' argument that the disability-neutrality of a rule precludes the accommodation request. See *id.* at 1526 (O'Connor, J., concurring).

By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. . . . 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."²¹⁶

Accordingly, to the extent that lower courts were dismissing ADA reassignment on the theory that no employer can be required to change its "legitimate, non-discriminatory company policies" regarding intra-company transfer,²¹⁷ those decisions are no longer good law. There is no such thing as the neutral policy defense under the ADA.

Is that the end of the neutral policy defense? Probably not. The defense may live on in the form of a neutral policy presumption, under which courts will simply shift the burden of proof to the employee to show it would not be a hardship for the employer to have to violate its neutral rule.

B. *Creating a New Neutral Policy Presumption?*

The broad reading of *Barnett* is this: When the accommodation request intrudes upon the expectations of others manifested in legitimate, non-discriminatory workplace policies, the request is unreasonable unless the plaintiff proves special circumstances why it is not.²¹⁸ In other words, there is a presumption of reasonableness in "neutral" policies that the plaintiff must overcome.²¹⁹ Arguably, this reading of *Barnett* does not rule out the accommodation, and thus is not the *per se* bar the majority rejected. It is merely an interpretation of what the term "reasonable" means in "reasonable accommodation."²²⁰ An accommodation is not "reasonable on its face . . . in the run of cases"²²¹ when it requires modification of neutral company policies on transfer, etcetera, unless there are special circumstances

216. *Id.* at 1521. The neutral policy issue was clearly joined in the case, in that Justices Scalia and Thomas would have adopted a rule that unless an employee could show that the rule fell more harshly on him because of his disability, the ADA did not require the employer to modify its rule. *See id.* at 1529 (Scalia, J., dissenting) (suggesting that seniority rules have no more harsh effect on employees with disabilities than other employees as a general rule).

217. *See Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 678 (7th Cir. 1998).

218. *See US Airways, Inc. v. Barnett*, 122 S. Ct. at 1524-25.

219. *See id.* (holding that it would be unreasonable to allow the accommodation to prevail in most cases).

220. *See id.* at 1522 (discussing the meaning of "reasonable" accommodation).

221. *Id.* at 1523.

that warrant modification. The fact that an employee has a disability under the ADA and requires an accommodation would not be circumstance enough.

Although it is too early to tell whether courts will read *Barnett* this way, there is already precedent from the Courts of Appeals that applies *Barnett* to non-seniority systems cases.²²² The Third Circuit recently applied *Barnett*'s proof process to a case involving an employer's transfer application process.²²³ Because the case was remanded to the district court for further consideration in light of *Barnett*, it is not clear from that case whether the circuit court viewed the policy at issue as one which the plaintiff might have to show special circumstances to overcome.²²⁴ The court nonetheless seemingly left the door open to that possibility.

In any event, the broad potential reading of *Barnett* would make it significantly more difficult for employees to obtain not only reassignment, but other accommodations as well, such as modification of work schedules, job restructuring, and the like. In each of those cases, the accommodation intrudes upon the expectations of other employees. As a matter of common sense, this interpretation should be rejected. As already noted, the ADA by its very nature anticipates "expectations" to be intruded upon.²²⁵ Indeed, Justice Breyer's rejection of the

222. *Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002).

223. *Id.* at 358-59 (describing the employer's policy of requiring—for interdepartmental transfers—the employee identify a vacant job posting from a bulletin board and file an application for each position the employee desired).

224. The Third Circuit in *Shapiro* reversed the summary judgment granted to the employer in the lower court because the lower court's decision was based solely on the employee's failure to comply with the transfer request application policy. *Id.* at 361. The Third Circuit found this inconsistent with *Barnett*'s proof process, which it described as a two step process:

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 depending on the outcome of the first step. If the accommodation is shown to be a type of accommodation that is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship on the particular circumstances of the case. On the other hand, if the accommodation is not shown to be a type of accommodation that 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.

Id. Because the court sent the case back to the district court without any guidance on how the proof process would play out on the facts of that case, it left open the possibility that the court could decide this was a policy subject to the "special circumstances" prong. *See id.* (directing the lower court to "follow the approach prescribed by *Barnett*").

225. *See* 42 U.S.C. § 12101(a)(5) (2000) (finding that "individuals with disabilities continually encounter various forms of discrimination," then listing various examples of such); *see also supra* text accompanying note 187.

neutral policy defense reflects a recognition of this very point.²²⁶ Yet, this reading of *Barnett* is not so easily dismissed. Justice Breyer's approach certainly stems from his concern for the interests of other employees, but by failing to clearly connect his reasoning to a primacy of employee contractual rights over ADA rights, and by framing the case within the general rules for allocation of burdens of proof in accommodation cases, he provides no basis for limiting the presumptive approach to seniority system cases.

VI. PUTTING "NEUTRAL" POLICIES IN THEIR PROPER CONTEXT

How should a case be analyzed if the employer asserts that the requested accommodation violates an otherwise "legitimate, non-discriminatory" policy? Some have argued that neutral policies should be favored unless the policy would "essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation."²²⁷ This approach is too narrow and does not adequately distinguish between policies that must be modified and those that do not. Rather, the approach most appropriate to the statutory scheme of the ADA (and consistent with the "run of cases" standard) requires the employer to show that there is a particular reason, beyond the mere existence of a policy and its "neutrality," why that policy cannot be modified for this particular employee. In other words, the employer should be required to show modification of the policy for this particular employee is an undue hardship because it will cause irreparable, lasting damage.

A. *Misplaced Distinctions*

Courts and commentators argue for minimal scrutiny of neutral policies because of the customary respect that anti-discrimination law affords business practices that seem to advance legitimate business needs and interests.²²⁸ One problem with this has already been discussed:²²⁹ It fails to acknowledge that the ADA has a different statutory scheme from other anti-discrimination statutes. It also does not explain how to select between policies that should be upheld and those that should not. This is illustrated by a recent article in which the authors argue for a general rule favoring neutral transfer and assignment policies because they are concerned about the "losses non-disabled employees sustain" if such rules were

226. See *supra* text accompanying note 196.

227. See, e.g., Befort & Donesky, *supra* note 36, at 1092-93.

228. See *id.* at 1092 (reasoning that most anti-discrimination statutes, including the ADA, recognize the legitimacy of neutral policies as long as they serve legitimate business interests).

229. See discussion *supra* Part III.B.

subject to modification under the ADA.²³⁰ The Article's authors contrast this to a situation where the employer must choose an employee with a disability over an employee without a disability, even if the employee without is more qualified.²³¹ They argue that forcing the latter choice is justified because it results in the employee with a disability retaining a job, arises only as a last resort when no other accommodation is available, will likely arise only on a few occasions, and still allows the employer to prove undue hardship if there is some special reason foregoing the other candidate will be harmful to the business.²³² On the other hand, requiring the employer to change otherwise neutral rules prevents employers from taking advantage of the benefits of legitimate employee expectations regarding consistent, fair, and predictable rules, and fails to sufficiently preserve the employer's right to manage its enterprise.²³³

Following this line of logic, the authors suggest that in addition to seniority systems, no-demotion policies and transfer preferences for full-time versus part-time workers should be upheld as against reassignment requests, but blanket policies prohibiting reassignment, policies to hire only the most qualified applicant, and mandatory competitive selection policies should not.²³⁴ The asserted distinction between these groups of policies is that the latter "essentially vitiate" the accommodation requirement,²³⁵ while the former apparently do not.

Is there really a reasoned distinction between these different policies, or are the authors basing their distinctions on some gut sense about what rightly serves legitimate business needs?²³⁶ For example, just as with the employer's forced choice of the employee with a disability for a vacant position, modification of a transfer preference or no-demotion policy to allow reassignment of the employee with a disability is the accommodation of last resort that enables the employee with a disability to stay employed, is likely to arise only infrequently, and could be denied if the employer specifically proves there is a special reason it would unduly affect the

230. Befort & Donesky, *supra* note 36, at 1092.

231. *See id.*

232. *See id.* at 1087-90.

233. *See id.* at 1092.

234. *See id.* at 1092-93.

235. *See id.* at 1093 (quoting *Ransom v. Ariz. Bd. of Regents*, 983 F. Supp. 895, 899 (D. Ariz. 1997)).

236. Put another way, is this just another version of the "we approve or we don't" approach followed by many courts, which was discussed earlier in this Article? *See Karian & Rutherglen, supra* note 42, at 11-12 (observing that courts which find a certain accommodation reasonable will not prevent an employer from using it; similarly, courts that find an accommodation is an undue hardship will not force an employer to use it); *see also supra* note 165-67 accompanying text.

operation of the business.²³⁷ In other words, the same arguments for recognizing a duty to reassign apply in this context as well. Why is it any less disruptive of employee or employer expectations when the employer insists on having a competitive selection process than it is if the employer has a no-demotion policy? In either case, the same arguments regarding predictability and fairness can be made regarding any deviation from an otherwise neutral policy. Further, the Seventh Circuit, at the very least, disagrees with the proposition that maintaining a competitive process for vacancies would vitiate the accommodation mandate,²³⁸ which suggests that a vitiation standard is not likely to result in any more clear distinctions.

Why would the same reasoning not apply to any other barrier to accommodation that can be characterized as "neutral" or "legitimate and non-discriminatory," such as a fixed work schedule policy?²³⁹ Especially if *Barnett* is not limited to cases involving conflicting rights that are contractually enforceable, there is no reasoned basis to distinguish between neutral policies that may have to be accommodated, e.g., a nine-to-five work schedule,²⁴⁰ and neutral policies that do not, e.g., a prohibition on rolling back from supervisory to production jobs,²⁴¹ except to the extent that the employer gives us a case-specific explanation of the impact of those policies. Reassignment has been a clearer target for judicial limitation because of its perceived affirmative action nature, but the statute does not single reassignment out as a special category of accommodation.

Fundamentally, the problem lies in thinking any of these situations can be approached through general rules about the legitimacy of the employer's practices.

237. As courts like the Tenth Circuit recognize, general statutory restrictions on reassignment suffice to protect the employer from undue disruption. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999). Any other limitations should come from Congress. *Id.*

238. See *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027-28 (7th Cir. 2000) (pointing out that "[p]lenty is left" of the duty to reassign even if the employee has to compete for any open vacancies). Judge Posner's vision of "plenty" is that the employer is required to consider the feasibility of assigning the employee to another position and cannot limit the employee to the position he or she already holds. *Id.* at 1027-28.

239. See 42 U.S.C. § 12111(9)(B) (2000) (including modified or part-time work schedules as one type of reasonable accommodation under the ADA).

240. Changing a fixed work schedule is specifically addressed in the *Enforcement Guidance*. See *Enforcement Guidance*, *supra* note 23, at 32-35 (giving examples of circumstances in which flexible scheduling would be a reasonable accommodation); see also *Ward v. Mass. Health Research Inst.*, 209 F.3d 29, 36-37 (1st Cir. 2000) (finding a genuine issue of fact regarding whether an employee's request for an open work schedule was reasonable, and requiring the employer to submit at least some evidence of the disruption the accommodation would cause).

241. See *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) (finding the employer's roll-back policy did not have to be modified to allow employee's reassignment).

Congress recognized this when it characterized seniority systems as "a factor" in the reasonable accommodation analysis.²⁴² The no-demotion policy is again a good example. If the employer can demonstrate a rationale for the rule that would be irreparably affected by the requested job reassignment, the employer should, as a matter of undue hardship, be able to insist on keeping its no-demotion policy, even if it means firing the employee with a disability. In *Duckett*, which involved a no-demotion policy, the Eleventh Circuit identified only one apparent justification other than the mere neutrality of the rule: The company's collective-bargaining agreement prohibited anyone who was not a union member from holding a production job.²⁴³ This rationale seemed ripe for consideration of the specific facts of the case (i.e., was there any barrier to the employee joining the union once reassigned to the vacant production position), rather than application of a general rule favoring the neutral policy.

Barnett at least partially changes the calculus in neutral policy cases. Now, legitimacy does not prevent scrutiny.²⁴⁴ That is good as far as it goes, but, at the same time, *Barnett* seems to follow the status quo of elevating employers' business purposes over the interests of the statutory protected class.²⁴⁵ The decision tells us that some policies (seniority plans) are treated under general rules regarding their reasonableness, with the employer having only a minimal burden to justify them because they are so clearly legitimate and important policies.²⁴⁶

Unfortunately, the case's reliance on expectational (but apparently not necessarily contractual) interests of other employees clouds the issue when other types of policies invoking expectational interests are at issue. It would nonetheless be wrong for courts to use *Barnett* in other neutral policy cases to force employees to prove special circumstances in order to obtain a modification of that policy. To do so would impose on employees a heightened duty to prove a requested accommodation does not pose a hardship. The undue hardship defense needs to be returned to its intended statutory framework.

242. See *supra* note 82 and accompanying text.

243. *Duckett v. Dunlop Tire Corp.*, 120 F.3d at 1225.

244. See discussion *supra* Part V.A (discussing the non-existence of the neutral policy defense in the wake of *Barnett*).

245. See *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1524-25 (2002) (holding that absent special circumstances, collectively bargained seniority systems trump the need for reasonable accommodation).

246. See *id.*

B. Resurrecting Undue Hardship

A rule that presumes unreasonableness out of a desire to avoid putting the employer to case-specific proof is overprotective of employers and underprotective of employees. In the findings section of the Act, Congress described "overprotective rules and policies" as a type of discrimination that individuals with disabilities face.²⁴⁷ To combat this, Congress explicitly set the bar higher for employer policies in disability-related cases.²⁴⁸ Rather than adopting the same deference to "legitimate, non-discriminatory" policies that is used in other anti-discrimination contexts such as Title VII,²⁴⁹ Congress required employers to affirmatively prove the difficulty or expense of modifying their rules and policies.²⁵⁰ In other words, the undue hardship defense requires employers to prove that their rules and policies are not overprotective of their interests.

Ultimately, *Barnett* upholds seniority systems over accommodation requests when it is merely a hardship to accommodate the employee with a disability, not an undue hardship.²⁵¹ The employee's proof of special circumstances is tantamount to a finding of no substantial impact on the employer's policy. The proof model is the reverse of what the ADA contemplates.

Would it be unduly disruptive of seniority plans to require employers to put on a more fact-specific justification for their refusal to accommodate? Critics of the lower courts' per se bar point out that conflicts between accommodation and seniority systems arise only rarely and do not necessarily disrupt significant groups of employees or have lasting effect.²⁵² Contrary to the picture Justice Breyer paints,²⁵³

247. 42 U.S.C. § 12101(a)(5) (2000).

248. *See id.* § 12112(b)(5)(A).

249. *See* Karlan & Rutherglen, *supra* note 42, at 2-3 (contrasting Title VII and the ADA).

250. *Id.*

251. *See* US Airways, Inc. v. Barnett, 122 S. Ct. at 1516.

252. *See, e.g.,* Boyle, *supra* note 9, at 1036-37; Stahlhut, *supra* note 9, at 92; *see* Kymberly D. Hankinson, Comment, *Navigating Between a Rock and a Hard Place: An Employer's Obligation to Reasonably Accommodate the Disabled in the Unionized Workplace*, 15 J. CONTEMP. HEALTH L. & POL'Y 245, 269-72 (1998) (advocating a balancing test that includes consideration of the number of employees who are disrupted by the employer's accommodation of the employee with a disability).

253. *See* US Airways, Inc. v. Barnett, 122 S. Ct. at 1524-25 (suggesting that requiring an employer to show more than the existence of a plan would require an employer to substitute complex, case-specific determinations for its uniform system "fairly frequently," and the ADA could not have intended to undermine seniority systems that way). In support of his apocalyptic view of the frequency of case specific determinations, Justice Breyer cites the 43 million figure contained in the Act's findings and purposes section as an estimate of the number of people in the United States with one or more disabilities. *See id.* at 1525 (citing 42 U.S.C. § 12101(a)(1)). The reference is disingenuous in no small part because it ignores the fact that reassignment is the accommodation of last resort, in that

requiring employers to make case-specific determinations in the few reassignment cases they are likely to encounter is unlikely to bring down the use of seniority systems.

Nevertheless, whatever justification there may be for using the presumptive approach in seniority system cases, the same cannot be said for other "neutral" policy cases. The "reasonable in the run of cases" standard for reasonable accommodation requests should reflect the ADA's intent to require employers to demonstrate their policies are not overprotective. Accordingly, a reassignment request is reasonable in the run of cases if the accommodation requires that the employer modify only a self-imposed policy regarding transfers and the employee is otherwise qualified for the position.²⁵⁴ The remainder of the case should focus on whether the employer can prove substantial impact on the operation of its business.

Specific to reassignment, hardship might include the inability to apply the policy again in any case in the future. It might include loss of an employee with special expertise that the employer cannot readily replace. One assumption underlying the grant of preferential reassignment rights to an individual with disabilities is that individuals with disabilities find it difficult to obtain any employment, while others without disabilities will not face the same limitation on their employment opportunities and will likely find desirable employment.²⁵⁵ Another is that employers who cannot hire the person of their choice for a particular opening because of a duty to reassign will be able to hire that individual for the next opening, thus delaying rather than denying them the services of the desired employee.²⁵⁶ If an employer in a particular case demonstrates that these assumptions are not true and that the loss of the more-qualified applicant would have lasting effect, this should be sufficient to show undue hardship. That conclusion would be reached, of course, only after the court requires the employer to make a fact-specific

considerably fewer than 43 million people will ever be in a position to assert a right to it. *See Enforcement Guidance, supra* note 23, at 39 (characterizing reassignment as an accommodation of "last resort").

254. In a prior ADA case involving modification of a job qualification, the Court characterized as "crucial" the fact that the employer was not insisting on a qualification "merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable." *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570 (1999) (finding that the employer was not required to waive the Department of Transportation's Motor Carrier Safety Regulations on visual acuity for commercial drivers).

255. *See Befort & Donesky, supra* note 36, at 1089; *Stahlhut, supra* note 9, at 92-93.

256. *See Befort & Donesky, supra* note 36, at 1089.

showing of the actual impact on the operation of its business, to bring the case in line with the intended statutory scheme.²⁵⁷

Regardless of whether the court thinks the policy is legitimate and non-discriminatory on its face, it must require more of the employer than the articulation of that policy. *Barnett* should be limited to its facts; the special circumstances exception should be limited to seniority system cases. Otherwise, the undue hardship defense will be effectively written out of the statute in reassignment cases.

VII. CONCLUSION

Even after the enactment of the ADA, individuals with disabilities continue to fight the tide that limits their employment opportunities. Courts hesitate to tell businesses what policies to adopt and how to manage their workforce. The reassignment provision of the ADA forces employers to give what many feel is improper preference for work opportunities. Not surprisingly, those courts construe the ADA's statutory scheme in such a way as to lessen the employer's burden to justify its actions. The Supreme Court's decision in *Barnett* is a disappointing example of a court going out of its way to enshrine an employer policy, in that case a seniority system. Although the Court rejects the lower court's preference rhetoric, in final analysis, it adopts a proof model that is just as dangerous.

The undue hardship defense should be embraced for the purpose it serves. It recognizes that much of what holds individuals with disabilities back in the workforce is an unthinking status quo.²⁵⁸ Simply because a policy is legitimate does not mean that it is entitled to heightened protection, at least not when the charge is that it violates the ADA. Neither the neutral policy defense nor a neutral policy presumption fits within the letter or the spirit of the ADA. Employers should be required to prove on case-specific facts just what impact modifying their policy will have on their ability to run their business and manage their workers. Absent that showing of substantial, real impact, the company policy is one that overprotects employers and should not stand in the way of an accommodation that is otherwise reasonable in the run of cases.

257. See 42 U.S.C. § 12112(b)(5)(A) (articulating undue hardship as an affirmative defense); *id.* § 12111(10)(A)-(B) (setting out factor-based analysis of undue hardship).

258. See *id.* § 12101(a)(5) (noting that discrimination against individuals with disabilities results not only from intentional exclusion, but from the effects of such things as overprotective rules and policies and failure to modify existing facilities and practices).

