Nebraska Law Review

Volume 102 | Issue 3 Article 7

2024

Enforcing the ADA: How the Eighth Circuit Has Interpreted Undue Hardship to Employers When Examining Mandatory Reassignment as a Reasonable Accommodation Under the ADA—*Huber v. Wal-Mart Stores, Inc.*

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Enforcing the ADA: How the Eighth Circuit Has Interpreted Undue Hardship to Employers When Examining Mandatory Reassignment as a Reasonable Accommodation Under the ADA – *Huber v. Wal-Mart Stores, Inc.*

ABSTRACT

In Huber v. Wal-Mart Stores, Inc., the Eighth Circuit joined a circuit split regarding whether it is mandatory under the Americans with Disabilities Act of 1990 for an employer to accommodate a disabled employee by reassigning them to a vacant position, even if they are not the most qualified individual available to fill that position. The Eighth Circuit asserts that the ADA is an anti-discrimination statute, and therefore should not impose automatic employment preferences like mandatory reassignment. Courts on the opposite side of the split have held that the ADA requires mandatory reassignment because if it did not, the reassignment provision would lack meaning and enforceability. While Huber continues to embody the stance of the Eighth Circuit, other courts have continued to uphold mandatory reassignment under the ADA with legal analysis and argument that was not considered by the Eighth Circuit. This Note provides background and analysis of the ADA and the circuit split regarding mandatory reassignment and provides

* J.D. 2023, University of Nebraska College of Law; B.A. 2020, University of Florida in History. I would like to thank my friends and family, especially my wife, for always supporting me in every endeavor. I would also like to extend special gratitude to the team at the Nebraska Law Review, both for their hard work on this article and for everything I learned during my time as a Member and Executive Editor.

an argument that the Eighth Circuit should reevaluate its position opposing mandatory reassignment as a reasonable accommodation under the ADA.

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I. INTRODUCTION

In 2007, the Eighth Circuit decided *Huber v. Wal-Mart Stores, Inc.*. By doing so, it joined a circuit split, debating whether the Americans with Disabilities Act of 1990 (the ADA) requires an employer to accommodate a disabled employee by reassigning them to a vacant position, even if they are not the most qualified individual available to fill that position.[1] In *Huber*, the Eighth Circuit asserts that the ADA is an anti-discrimination statute, and therefore should not impose automatic employment preferences like mandatory reassignment.[2] Courts on the

1. Nicholas A. Dorsey, Note, *Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability*, 94 CORNELL L. REV. 443, 445 (2009).
2. *Id.* at 445–46.

opposite side of the split have held that the ADA requires mandatory reassignment because if it did not, the reassignment provision would lack meaning and enforceability.[3] While *Huber* remains the standard for the Eighth Circuit on this issue, other courts have continued to uphold mandatory reassignment under the ADA with increasingly critical and detailed analysis.[4] This brings the reasoning of the Eighth Circuit in *Huber* into question.

The analysis presented in this Article has two major sections. First, this Article provides background on the ADA and the circuit split regarding mandatory reassignment. This section also includes an analysis of the Supreme Court's decision in *US Airways Inc., v. Barnett*—the only Supreme Court case to significantly touch on the issue—and a detailed examination of *Huber* itself. Second, this Article provides an in-depth analysis of the major arguments both for and against mandatory reassignment, followed by a synthesized argument for why, if the opportunity arises, the Eighth Circuit should reevaluate its stance in *Huber*.

This Article argues that the Eighth Circuit should reevaluate its position opposing mandatory reassignment as a reasonable accommodation under the ADA. The Eighth Circuit based much of its decision in *Huber* on the reasoning of the Seventh Circuit, which has since reversed its decision on the issue. Additionally, in recent years, other courts have made many strong arguments in favor of mandatory reassignment. These facts support the need for a reevaluation of the reasoning in *Huber*.

II. BACKGROUND

A. The Americans with Disabilities Act of 1990

1. History of the ADA

In 1990, Congress passed the ADA to end discrimination against persons with disabilities and bring those individuals into the economic and social mainstream of society.[5] The ADA largely improved upon a previous law, the Rehabilitation Act of 1973, which was intended to limit discrimination against disabled individuals.[6] When passed, the Rehabilitation Act provided disabled individuals with significant new

3. *Id.* at 445.
4. *See generally* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012); Eustace v. Springfield Pub. Schs., 463 F.Supp.3d 87 (D. Mass. 2020) (both of these cases are critical of the analysis used in *Huber.* This will be discussed in more detail later in this Article).
5. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1425 (1991).
6. *Id.*

employment protections, such as requiring federal agencies and holders of certain government contracts to implement plans that guaranteed employment opportunities and requiring those receiving federal funds to not discriminate against disabled individuals in their programs.[7]

Despite the Rehabilitation Act's improvements, several crucial barriers limited the law's ability to fully provide equal employment to disabled individuals. First, the broad language of the Rehabilitation Act and the lack of concrete legislative history surrounding its employment provisions made it difficult to clearly interpret the scope of Congress' intended burden on employers.[8] Furthermore, many courts were unwilling to read the regulations that implemented the Rehabilitation Act broadly, likely because they were worried the regulations exceeded congressional intent. As a result, courts confined many of the Rehabilitation Act's provisions to a narrow interpretation that limited enforcement.[9] Also, the reach of the Rehabilitation Act was inherently limited; its employment provisions only applied to the federal government and certain others directly tied to it.[10] Consequently, the Rehabilitation Act did not affect most private employers, and therefore failed to provide many of the protections still needed.[11]

2. Intent & Purpose of the ADA

In light of the abovementioned shortcomings, the ADA's main improvement to the Rehabilitation Act is the extension of its provisions to any employer with fifteen or more employees.[12] This expansion finally provided protections to disabled employees beyond the limited sphere of the federal government.[13] This broader scope of the ADA is evident in its definition of discrimination, which states, "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[14]

The above subsection of the ADA, which constructs a general discrimination rule, provides several specific examples of what type of employer conduct could be considered discrimination under the ADA.[15]

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7. *Id.* at 1424–25.
8. *Id.*
9. *Id.* at 1425.
10. *Id.*
11. *See* Hodges v. Atchison, Topeka & Santa Fe Ry. Co., 728 F2d 414, 416 (10th Cir. 1984) (holding that the Rehabilitation Act does not provide for a private cause of action); *see also Cooper*, *supra* note 5 (explaining the limited reach of the Rehabilitation Act because of its applicability solely to the federal government).
12. 42 U.S.C. § 12112 (a).
13. *Id.*; *Cooper*, *supra* note 5, at 1426.
14. 42 U.S.C. § 12112 (a).
15. *Id.* § 12112 (b).

One of these examples deals specifically with an employer's failure to make "reasonable accommodation[s] to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[16] The ADA even suggests "reassignment to a vacant position" as an example of a reasonable accommodation.[17]

The ADA does, however, provide an exception to its reasonable accommodation rule; an employer does not have to make a reasonable accommodation if they can prove that doing so would "impose an undue hardship on the operation of [their] business."[18]

3. Varying Interpretations of the ADA: Two Factions

The section of the ADA regarding reasonable accommodation—and reassignment in particular—is at the core of the circuit split analyzed here. Courts and legal scholars have developed diverging interpretations of Congress' intent behind this section of the ADA and how it should be enforced. Two factions have emerged. The first, views mandatory reassignment as an unacceptable interpretation of "reasonable accommodation", while the other finds the provision meaningless without such an interpretation. These are the Anti-Mandatory Reassignment and Pro-Mandatory Reassignment factions respectively. The following sections will provide a brief overview of the core of each sides argument before delving into the methods by which they advance these points.

The first view, as espoused by the Eighth Circuit, held against mandatory reassignment.[19] The Court has merged the concept of undue hardship with a non-discriminatory, best-qualified hiring policy when interpreting mandatory reassignment under the ADA.[20] This results in the interpretation of the ADA as nothing more than an equal opportunity statute intended to give disabled individuals the opportunity to compete with non-disabled applicants for a vacant position on equal footing.[21] This approach does not give a disabled employee preferential treatment on the basis of their disabled status.[22]

There are several courts, however, which have opposed this interpretation, reading the ADA as only mandating equal competition creates no obligation for employers not to discriminate and, consequently, makes the relevant section of the statute meaningless.[23] Put

16. *Id.* § 12112 (b)(5)(A).
17. *Id.* § 12111 (9)(B).
18. *Id.* § 12112 (b)(5)(A)
19. Huber v. Walmart Stores, Inc., 486 F.3d 480, 483–84 (8th Cir. 2007).
20. *Id.*
21. *Id.*
22. *See id.*
23. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164–65 (10th Cir. 1999) ("[I]f the reassignment language merely requires employers to consider on an equal basis

another way, because the ADA already bars discrimination against applicants to vacant positions, the reassignment provision would be redundant if it did not create a right for disabled employees beyond equal competition.[24]

a. Anti-Mandatory Reassignment

The Anti-Mandatory Reassignment view espoused by the Eighth Circuit is not without its supporters. This view has been supported by some scholars who have argued based on the legislative history of the ADA, that congressional intent was against mandatory reassignment as a reasonable accommodation.[25] House reports and the statements of several members of Congress tacitly support this interpretation of congressional intent, asserting that the ADA creates no obligation to prefer disabled applicants over non-disabled applicants in the hiring process.[26] For example, based on the ADA's legislative history, Congress arguably did not intend to restrict an employer's ability "to choose and maintain" its workforce.[27] It has also been argued that the ADA's legislative history could indicate an employer's obligation should be nothing more than to consider an applicant without regard to disability or an applicant's need for a reasonable accommodation.[28]

Another congressional intent argument against mandatory reassignment revolves around specific portions of the ADA's language. If Congress had intended for mandatory reassignment, then the ADA would not use language such as "may include" when referencing the possibility.[29] In *Smith v. Midland Brake, Inc.*, a case which will be discussed in greater detail later in this Article, the dissent argued that

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with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant.").

24. *See id.*

25. *See* Thomas F. O'Neil, III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 359 (2001); *see also* Edward Hood Dawson, III, Note, *Mandated Reassignment for the Minimally Qualified*, 117 W. VA. L. REV. 735, 760–61 (2014) (providing specific examples of legislative history that seem to show intent against mandatory reassignment).

26. *See* H.R. REP. NO. 101-485, pt. 3 (1990); Dawson, *supra* note 25.

27. Donna L. Mack, *Former Employees' Right to Relief Under the Americans with Disabilities Act*, 74 WASH. L. REV. 425, 429 (1999); H.R. REP. NO. 101-485, pt. 3, at 35–36.

28. H.R. REP. NO. 101-485, pt. 2, at 56.

29. *See* Jennifer Beale, *Affirmative Action and Violation of Union Contracts: The EEOC's New Requirements Under the Americans with Disabilities Act*, 29 CAP. U. L. REV. 811, 824 (2002) (arguing that if Congress had intended for reassignment to be mandatory, the ADA would directly say so by using language such as, "will include," "must include," or "is required to be considered".); Dawson, *supra* note 25, at 761.

while the ADA did categorize failure to make a reasonable accommodation as potential discrimination, the provisions given as potential reasonable accommodations were nonetheless not mandatory in every instance.[30] According to the dissent in *Smith*, holding these provisions—including reassignment—to be mandatory would effectively "read out the words 'may include' that precede the nonexclusive list of examples of reasonable accommodation."[31] In essence, the dissent in *Smith* narrowly interpreted the meaning of the word "may" in the ADA's reasonable accommodation provision.[32] This interpretation justified the holding that—because the presence of "may" implies an option to be chosen at the discretion of the employer—neither reassignment nor any other accommodation can be mandatory under the ADA.[33]

The Fifth Circuit in *Daugherty v. City of El Paso* also adopted a method of statutory interpretation for the ADA which resulted in a holding against mandatory reassignment. This reasoning was based on a broad interpretation of the undue hardship provision of the statute, rather than the meaning of select language from it.[34] In *Daugherty*, the plaintiff was a bus driver for the city of El Paso who was diagnosed with insulin-dependent diabetes, and was subsequently placed on leave without pay and relieved of his bus driver position.[35] The plaintiff filed suit against the city of El Paso, arguing the city had violated the ADA, in part, by failing to reassign him to another position.[36] Though the plaintiff achieved a favorable verdict on his claim at the end of the initial jury trial, the city appealed, arguing the ADA did not obligate them to reassign the plaintiff because such reassignment would have violated their preexisting employment policies, and thus be an undue hardship.[37]

The Fifth Circuit agreed with the city's interpretation that reassignment in the face of its full-time hiring policies would constitute an undue hardship.[38] This agreement, however, is based on a flawed statutory analysis. The Fifth Circuit seems to base the majority of

30. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1181 (10th Cir. 1999) (Kelly, J., dissenting).
31. *Id.*
32. *See id.* at 1184 ("[T]he phrase 'may include reassignment to a vacant position' cannot mean 'shall include reassignment to a vacant position.'").
33. *Id.*
34. *See* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).
35. *Id.* at 696.
36. *See id.*
37. *See id.* at 696, 699–700 (the city determined that to reassign the plaintiff to an equal position would mean they needed to reassign him to a full-time position. Because they did not believe the plaintiff had a qualifying disability such a reassignment would have violated their policies.)
38. *See id.* at 700.

its reasoning on a prior case dealing with undue hardship under the Rehabilitation Act—*Chiari v. City of League City*.[39]

In *Chiari*, the Fifth Circuit determined that requiring an employer to find a new job for a disabled employee would violate the undue burden provision of the Rehabilitation Act.[40] The Fifth Circuit then applied its determination regarding undue hardship in *Chiari* to its analysis in *Daugherty*, holding that "[s]uch an approach is equally applicable to the ADA, which recognizes that an employer is not required to endure undue hardship in accommodating the disability."[41] This is problematic because in using *Chiari* to guide its decision in *Daugherty*, the Fifth Circuit applied the Rehabilitation Act's standard to the ADA; this ignores the fact that the two are separate statutes with separate purposes, and that the ADA fixes many of the Rehabilitation Act's deficiencies.[42]

Furthermore, in *Daugherty* the Fifth Circuit held that the statutory language of the ADA did not require priority for disabled individuals over non-disabled individuals in reassignment or hiring, with or without the presence of an undue hardship.[43] The Fifth Circuit justified this holding based on its determination that the plaintiff failed to prove that the city treated him differently than any other part-time employee denied a full-time position based on the city's hiring policies.[44] Because the plaintiff failed to prove the city had discriminated against him by not providing a reassignment, the Fifth Circuit determined the plaintiff had no remedy under the ADA.[45] The court reasoned that the statute "prohibits employment discrimination against qualified individuals with disabilities, no more and no less."[46]

b. Pro-Mandatory Reassignment

The above arguments using legislative history and a shallow analysis of specific components of the ADA's language fits well with the larger narrative developed by some legal scholars and courts such as the Eight Circuit who insist that the ADA does not mandate reassignment because doing so would create preferential treatment for disabled individuals.[47] Other courts and legal scholars, however, have made

39. *Id.*; Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991).
40. *See Chiari*, 920 F.2d at 318 ("[T]he City is not required to fundamentally alter its program . . . Nor is the City required to find or create a new job for [the plaintiff].").
41. *Daugherty*, 56 F.3d at 700.
42. *See supra* notes 5–14 and accompanying text.
43. *See Daugherty*, 56 F.3d at 700 ("[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.").
44. *Id.*
45. *Id.*
46. *Id.*
47. *See, e.g.*, Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2007).

strong arguments in favor of mandatory reassignment using a deeper analysis of intent and statutory interpretation of the ADA.

For example, the D.C. Circuit has interpreted the language of the ADA in a manner that strongly supports mandatory reassignment.[48] The D.C. Circuit in *Aka v. Washington Hospital Center* determined that:

> The word "reassign" must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer.[49]

The D.C. Circuit's analysis of the meaning behind the word "reassign"—and its determination that to reassign means more than just allowing an employee to compete with everyone else—is an effective counter to the previously discussed argument put forward by those in the Anti-Mandatory Reassignment camp, where language such as "may include" makes reassignment optional.[50]

It is also worth noting that the D.C. Circuit took into account the legislative history of the ADA that disavowed preferences for the disabled, noting that while the legislative history indicated that the ADA disallows preferences "for disabled *applicants* . . . it also makes clear that reasonable accommodations for existing *employees* who become disabled on the job do not fall within that ban."[51] This analysis likewise serves as an effective counter to the Anti-Mandatory Reassignment arguments using select reports and statements from Congress that assert the ADA creates no mandate to reassign a disabled employee without making them compete; it also evokes the holding that reassignment to a vacant position is one of last resort and only available to existing employees over applicants to a position.[52]

4. Judicial Deference

The Equal Employment Opportunity Commission's (EEOC) own guidance on the interpretation of the ADA requires reassignment, but it is subject to certain limitations.[53] For example, the EEOC used legislative history to determine that reassignment is only mandatory for current employees, not outside applicants to a position.[54] Furthermore,

48. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304–05 (D.C. Cir. 1998).
49. *Id.*
50. *See* Beale, *supra* note 29, at 824; Dawson, *supra* note 25, at 761.
51. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998).
52. *See* Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1060 (2000); Dawson, *supra* note 25, at 760–61.
53. *Id.* at 1059–61 (explaining several important aids and guidelines the EEOC has issued or promoted on the interpretation of reassignment under the ADA).
54. *See id.* at 1060; H.R. REP. NO. 101–485, pt. 2, at 56 (1990).

the EEOC determined that reassignment to a vacant position is an accommodation that should only be used when all other reasonable accommodations would not allow an employee to maintain their current position or those accommodations would impose an undue hardship.[55] An employer is also not required to reassign an employee to a position that is not truly vacant; the EEOC defines a vacant position as one that "is either available when the employee requests a reasonable accommodation or one that the employer is aware will become available within a reasonable time."[56] An employer is under no obligation to promote a disabled employee to a greater position, to remove another employee from their position, or create a new position for a disabled employee's reassignment.[57]

The EEOC has also stated that a disabled employee must be qualified for the vacant position to be eligible for reassignment to it, meaning that the employee must be able to satisfy the requirements for the job and perform its necessary obligations with or without an accommodation.[58] These limitations on the scope of reassignment under the ADA drastically reduce the potential burden the reassignment provision can place on an employer,[59] which weakens the argument that requiring reassignment would limit an employer's right to choose its employees and discriminate against the non-disabled by mandating preferences for disabled employees.

The amount of deference courts have given to the EEOC's guidance and interpretation of the ADA has varied.[60] Broadly speaking, the EEOC has extensive rulemaking authority under the ADA which has allowed it to issue regulations, interpretive guidance, and several forms of sub-regulatory guidance that cover application of the ADA.[61] Courts, however, usually apply deference to agency statutory interpretation based on one of three standards,[62] each of which is in turn derived from a specific case: *Chevron, U.S.A., Inc. v. Natural Resources*

55. Befort & Donesky, *supra* note 52, at 1060.
56. *Id.* (explaining that a position is still considered vacant even if an employer has sought other applicants for the position).
57. *Id.*
58. *Id.* at 1061.
59. *Id.*
60. *See* Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 32 ABA J. LAB. & EMP. L. 93, 94 (2016) (noting specifically that the Supreme Court's "deference to the EEOC's regulations and sub-regulatory guidance has varied" and relies on "complex analysis of statutory text, regulatory authority, administrative procedure, and history."); *see also* Theodore Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1549–50 (1999) (noting that between 1964 and 1998 the EEOC had a much lower rate of judicial deference afforded to it compared to other regulatory agencies).
61. *See* 42 U.S.C. § 12116; Dreiband & Pulliam, *supra* note 60, at 106.
62. Dreiband & Pulliam, *supra* note 60, at 95.

Defense Council, *Inc.*, [63] *Auer v. Robbins*,[64] and *Skidmore v. Swift & Co.65* Of these three standards, the *Chevron* standard of deference is the best known,[66] and requires a two-step process centering on a court's determination of whether the language of a statute is ambiguous.[67] If a court determines that the language of the statute is unambiguous, then no further analysis is needed and that literal, unambiguous meaning of the statute is controlling.[68] If the court finds the statutory language is ambiguous, then the court will initiate step two of the process and determine if the given agency's interpretation of the statute is reasonable.[69] This step further requires the court to determine if the agency provided a clear and reasonable explanation for its interpretation of the statute.[70] If the agency failed to do so, then its interpretation will not be afforded the *Chevron* standard of deference.[71] Otherwise, under the *Chevron* standard, a court is required to give deference to an agency's interpretation of the statute provided the interpretation is reasonable and reasonably explained.[72]

However, the Supreme Court in *Chevron* held that this standard of deference only applies if Congress has expressly given an agency the authority to issue legislative regulations in regard to the given issue.[73] This means the *Chevron* standard cannot apply to an agency's sub-regulatory guidance regarding a statute's interpretation,[74] as such guidance is not equivalent to Congressionally authorized legislative regulations.

Auer deference is somewhat similar to *Chevron* in that it can lead to strict deference to an agency's position, but where *Chevron* deference is concerned with interpretation of an ambiguous statute, *Auer* "calls for deference to an agency's interpretation of its own ambiguous regulation."[75] Thus, where the EEOC's sub-regulatory guidance

63. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).
64. Auer v. Robbins, 519 U.S. 452 (1997).
65. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
66. Dreiband & Pulliam, *supra* note 60, at 95.
67. *See Chevron*, 467 U.S. at 842–43.
68. *Id.*
69. *Id.*
70. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).
71. *See id.* at 2126.
72. *See Chevron*, 467 U.S. at 843–44.
73. *Id.*
74. *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (listing "interpretations contained in policy statements, agency manuals, and enforcement guidelines" as sub-regulatory guidance to which *Chevron* is inapplicable); *see also* Dreiband & Pulliam, *supra* note 60, at 94–98 (providing a detailed analysis of the *Chevron*, *Auer*, and *Skidmore* deference standards and how they relate to different forms of agency interpretations).
75. *See* Dreiband & Pulliam, *supra* note 60, at 96.

regarding the ADA is involved, by process of elimination, it is likely that only the *Skidmore* standard of deference could apply.[76]

The court in *Skidmore* determined that an agency's sub-regulatory guidance regarding a statute's interpretation may be relied upon by the courts to the extent that the guidance has the power to persuade.[77] However, this persuasive deference afforded by *Skidmore* is limited in scope, as courts are not bound to follow an agency's sub-regulatory guidance, but merely have the option to use it as a persuasive source of experience and judgement to guide the reasoning behind their decisions.[78]

The aforementioned limitations to the reassignment provision of the ADA promoted by the EEOC in its sub-regulatory guidance have been noted by Pro-Mandatory Reassignment courts and incorporated into their holdings.[79] For example, in *Smith, the case mentioned above,.*,[80] the Tenth Circuit adopted the limitations on reassignment espoused by the EEOC when it held reassignment to a vacant position was required under the ADA.[81] The Tenth Circuit did so, in part, because it found the EEOC's guidance persuasive enough to afford it *Skidmore* deference. It is worth noting, however, that the court was under no obligation to afford the EEOC's guidance any more binding deference than *Skidmore*, since it was sub-regulatory guidance.[82]

B. U.S. Airways Inc., v. Barnett

Despite the turmoil that has been generated on the interpretation of these ADA provisions, the only Supreme Court decision to substantially discuss reassignment as a reasonable accommodation under the ADA is *U.S. Airways Inc. v. Barnett*.[83] It should be noted, however, that *Barnett* did little to resolve any of the circuit splits. If anything, it may have deepened them.

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76. *Id.* at 97 (explaining the *Skidmore* standard of judicial deference, which applies to an agency's sub-regulatory guidance as opposed to the Congressionally empowered legislative regulations that *Chevron* applies to).
77. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also Christensen*, 529 U.S. at 587–88 (holding that *Skidmore* deference applies to agency interpretations of a statute found in opinion letters, policy statements, agency manuals and enforcement guidelines).
78. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); Young v. United Parcel Serv., Inc., 575 U.S 206, 225–27 (2015); *Skidmore*, 323 U.S. at 140.
79. *See* O'Neil III & Reiss, *supra* note 25, at 352–53 (noting, that at the time of publication, the Ninth, Tenth, and D.C. Circuits have embraced the EEOC's interpretations of reassignment under the ADA. The Seventh Circuit has since adopted a pro-mandatory reassignment stance).
80. Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).
81. *Id.* at 1171–78.
82. *See id.* at 1166 n.5.
83. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

In *Barnett*, a U.S. Airways employee was transferred from handling cargo to a less physically demanding mailroom position after he was injured.[84] Eventually that same mailroom position became open to bidding based on U.S. Airways' seniority system, and when U.S. Airways refused to allow Barnett to keep the position as a reasonable accommodation, he sued for discrimination based on the ADA.[85] U.S. Airways argued that allowing Barnett to permanently transfer to the mailroom position as a reasonable accommodation would have imposed an undue hardship on their business because it violated their established seniority bidding system.[86]

In *Barnett*, the Supreme Court held that an employee must prove their desired accommodation is reasonable in that it is ordinarily feasible for the employer.[87] If the employee does so, then the burden shifts to the employer to demonstrate the existence of an undue hardship in their particular circumstance.[88] The Supreme Court ultimately held that Barnett's request for reassignment would be reasonable under the ADA if U.S. Airways did not already have an established seniority system.[89] Such systems provided a number of critical benefits to both employees and employers, and violating those established systems through accommodation would inflict difficulties upon each group.[90] Therefore, U.S. Airways' seniority system was akin to an undue hardship under the standards of the ADA.[91]

The Supreme Court in *Barnett* established that a unilaterally created seniority bidding system was the standard for what can constitute an undue hardship to an employer under the ADA.[92] The Supreme Court, however, failed to provide a firm answer regarding the question of whether the ADA requires an employer to mandatorily transfer a qualified disabled employee to a vacant position, even if another employee or applicant for the position has better qualifications.[93] In fact, since *Barnett* was decided, the circuit split on the issue of mandatory reassignment in the face of an employer's best-qualified hiring policy, has only been exacerbated as courts have interpreted *Barnett's* framework for a seniority system in opposing ways.[94]

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 401–02.
88. *Id.*
89. *Id.*
90. *Id.* at 403–04.
91. *Id.*
92. Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 973 (2003).
93. *Id.* at 974.
94. *See* Lawrence D. Rosenthal, *Most-Qualified-Applicant Hiring Policies or Automatic Reassignment for Employees with Disabilities? Still a Conundrum Almost*

Criticism of the Supreme Court's handling of *Barnett* largely centers around the factors of the decision which have allowed the split on mandatory reassignment to widen.[95] For example, *Barnett* failed to analyze the fact that the reassignment provision of the ADA was intended for current employees, not outside applicants to a job; the reassignment provision was designed to benefit and protect all employees, any of whom might become disabled while employed and thus fall under the ADA's umbrella.[96] Accordingly, it is argued that the *Barnett* court should have examined the totality of the issue of reassignment in regard to public policy benefits for all employees, rather than focusing only on the employee expectations created by seniority systems that would be violated through reassignment.[97]

Further, *Barnett* ignores the interactive process mandated by the ADA, whereby an employer is obligated to work with its disabled employee to find a reasonable accommodation.[98] Instead, *Barnett* shifts the burden to the employee to show that special circumstances exist that would make reassignment reasonable in the face of a seniority system.[99] This "special circumstances" exception created by the Supreme Court leaves it up to the employee "to show, on case-specific facts, that an exception to the seniority plan is reasonable in that particular case."[100] These case specific facts are defined as either the somewhat frequent exercise of a right to change the seniority system, or an existing system with enough exceptions that another one would not make a significant difference.[101]

The "special circumstances" exception is problematic because these case specific facts are meant to be part of the employer's defense for not granting an accommodation.[102] An employer who maintains such a seniority policy and keeps adequate records would easily be able to access the information required to show they do or do not frequently change their policies, or that a policy would have sufficient exceptions so that adding another would or would not matter.[103] On the other hand, an employee would not have such easy access to the information

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Thirty Years After the Americans with Disabilities Act's Enactment, 70 BAYLOR L. REV. 715, 736 (2018).

95. *See* Sandy Andrikopoulous & Theo E. M. Gould, *Living In Harmony? Reasonable Accommodations, Employee Expectations and* US Airways Inc., v. Barnett, 20 HOFSTRA LAB. & EMP. L.J. 345, 372 (2003).
96. *Id.*
97. *Id.* at 372–73.
98. *Id.* at 376.
99. *Id.*
100. Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc., v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 27 (2002).
101. *See id.*
102. *Id.*
103. *Id.*

necessary to prove their desired reassignment as reasonable in the face of a seniority system; this information likely rests only with their employer, whose best interest may not be served by willingly providing such information to an employee whom they do not want to reassign in the first place.[104]

Based on a seniority system structured similarly to the one at issue in *Barnett*, this would allow an employer to make exceptions to their seniority policies as they please and still prevent reassignment from being enforced, as long as such exceptions are not continuous.[105] As a consequence, employers will be less willing to reassign employees at all because they might fear for future adherence to their seniority system, and less likely to engage in the ADA required interactive process for seeking an accommodation.[106]

The standard established for seniority systems in *Barnett* is also vague enough that, if interpreted liberally, it is easily applied to employment policies other than a seniority system[107]—such as a blanket best-qualified hiring policy that can prevent reassignment on a much wider basis than an established seniority system. Nonetheless, other circuits like, for example, the Seventh Circuit construed *Barnett's* focus on a specific form of seniority system and aspects of its decision, acknowledging the need for preferences to effectively use it to support a Pro-Mandatory Reassignment position[108]—especially compared to their previous stance on the issue.[109]

C. Analysis of Huber v. Wal-Mart Stores, Inc.

By the time this issue was placed before the Eighth Circuit, it had only *Barnett* and the similarly Anti-Mandatory Reassignment decision of a Seventh Circuit case to rely upon. It is then no surprise that *Huber*, likewise, came to an unfavorable decision. In *Huber*, a Wal-Mart employee named Pam Huber permanently injured her right arm and hand, and as a consequence was no longer able to perform her job as an order filler.[110] When Huber sought reassignment to an equivalent router position as a reasonable accommodation under the ADA, Wal-Mart refused on the basis that doing so would violate their policy of only hiring the most qualified applicant for a position.[111] Based on their policy, Wal-Mart only allowed Huber to compete for the router position

104. *Id.* at 27–28.
105. Andrikopoulous & Gould, *supra* note95, at 376.
106. *Id.*
107. Carrie L. Flores, *A Disability is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195, 217 (2008).
108. *See* EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012).
109. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000).
110. Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 481 (8th Cir. 2007).
111. *Id.*

she wanted alongside other applicants, and ultimately the position was denied to her on the basis that she was not the most qualified candidate for the position.[112] Huber later filed suit, claiming Wal-Mart had violated the ADA by not automatically reassigning her to the router position as a reasonable accommodation.[113] After the district court decided for Huber, Wal-Mart appealed the case to the Eighth Circuit.[114]

The Eighth Circuit reiterated that the issue in *Huber* was whether or not the ADA required an employer to automatically fill a vacant position with a disabled employee—even when said employee is not the most qualified candidate available.[115] After reviewing the then-current status of the circuit split on the issue, the Eighth Circuit largely adopted the reasoning of the Seventh Circuit in *EEOC v. Humiston-Keeling* and held that requiring mandatory reassignment under the ADA would convert the act from one designed to prevent discrimination, to one which creates mandatory preferences in hiring policies.[116] The Eighth Circuit found *Humiston* persuasive because, in its reasoning, reassignment under the ADA does not require an employer to turn away a superior applicant to a position in violation of a "most-qualified applicant" hiring policy, which the Eighth Circuit found to be aligned with the purpose of the ADA.[117] The Eighth Circuit's support for *Humiston's* analysis is evident in its adoption of the stance that to rule in favor of mandatory reassignment would "convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[118]

In *EEOC v. Humiston-Keeling*, the Seventh Circuit rejected the argument that failing to automatically reassign a disabled employee to a vacant position would constitute a violation of the ADA, determining that such an argument would essentially be "affirmative action with a vengeance," which was not intended by the ADA.[119] According to the Seventh Circuit, the EEOC interpreted reassignment to require "that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job."[120] The Seventh Circuit did not agree with this

112. *Id.* (noting that the position was ultimately filled by a non-disabled candidate and Huber was moved to a janitorial position that paid a little over six dollars an hour, compared to the thirteen dollars an hour she earned previously).
113. *Id.* at 482.
114. *Id.*
115. *Id.*
116. *Id.* at 483.
117. *Id.*
118. *Id.* (quoting EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000)).
119. *Humiston-Keeling*, 227 F.3d at 1028–29.
120. *Id.* at 1027.

interpretation of reassignment under the ADA because it "requires employers to give bonus points to people with disabilities, much as veterans' preference statutes do. Houser's disability, we repeat, had nothing to do with the office jobs for which she applied."[121] The Seventh Circuit in *Humiston-Keeling* also asserted that following the EEOC's interpretation would violate their own precedent of holding that the ADA was not a "mandatory preference act."[122]

The Seventh Circuit's holding in *Humiston-Keeling* has been heavily criticized by certain Pro-Mandatory Reassignment courts, one of which declared it was "judicial gloss, unwarranted by the statutory language or its legislative history."[123] Along with the common argument that the reassignment provision of the ADA is equivalent to affirmative action, the approach used in *Humiston-Keeling* was ultimately abandoned by the Seventh Circuit.[124]

In following the reasoning of these previous cases, the Eighth Circuit in *Huber* concluded that "the ADA is not an affirmative action statute,"[125] and accordingly equated the seniority system analysis applied in *Barnett* to the "most-qualified applicant" policy used by Wal-Mart.[126] By applying the seniority system exception from *Barnett* to a "most-qualified applicant" hiring policy, the Eighth Circuit in *Huber* also ignored the detailed analysis the district court had used to distinguish Huber's case from the situation in *Barnett*.[127]

The district court noted that a "best-qualified applicant" hiring policy was not the same thing as a seniority system in the context of *Barnett*.[128] A *Barnett*-style seniority system provided several critical benefits to employees, such as set expectations of fair treatment and due process, that a "best-qualified applicant" policy does not.[129] The district court also noted that in *Barnett*, the Supreme Court actually rejected the use of any per se rule that always favored employers,

121. *Id.* This is despite the fact that the disabled employee in *Humiston-Keeling* was applying for the office jobs because she contracted a disability—tennis elbow—at work and was then transferred to a temporary position that ultimately resulted in her being let go. *See id.* at 1026–27.
122. *Id.* at 1028.
123. Anderson, *supra* note100, at 9 (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1168 (10th Cir. 1999)).
124. *See* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).
125. Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007).
126. *Id.* at 483–84. Recall from the previous analysis of *Barnett* that a liberal interpretation of *Barnett's* framework makes it easy to apply the exception to reassignment set out by the Supreme Court regarding a seniority system to other employer policies, such as the most qualified applicant hiring policy in *Huber*. *See* Flores, *supra* note107.
127. Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 218 (2009).
128. *See* Huber v. Wal-Mart Stores, Inc., No. 04-2145, 2005 WL 3690679, at *4–5 (W.D. Ark. Dec. 7, 2005).
129. *See* Hickox, *supra* note 127, at 218.

instead only holding that a seniority system would *ordinarily* bar automatic reassignment.[130] Nonetheless, by deciding the way it did in *Huber*, the Eighth Circuit essentially created a per se rule which allows an employer to avoid reassigning a disabled employee as long as the employer can prove the employee is not the most qualified for the position.[131]

Ultimately, the Eighth Circuit's holding in *Huber* reduces to an interpretation of the ADA where mandatory reassignment corrupts the statute, changing it from one which prevents discrimination against disabled individuals, to one which instead elevates those individuals above others solely based upon their disabled status. To the Eighth Circuit, this seems to constitute a form of "affirmative action," equal to discrimination itself.[132]

III. ANALYSIS

A. The Arguments Against Mandatory Reassignment

1. EEOC v. St. Joseph's Hospital, Inc.

Since *Huber* was decided, the Eleventh Circuit has also taken a position against mandatory reassignment. In *EEOC v. St. Joseph's Hospital, Inc.*, a nurse who was a longtime employee of St. Joseph's Hospital was diagnosed with spinal stenosis and arthritis, and ultimately underwent hip replacement surgery.[133] To support herself and alleviate her pain, the nurse began to use a cane, without which she could not walk long distances and had to take periodic breaks.[134] Eventually, the hospital informed the nurse that she could no longer use the cane in the psychiatric ward where she worked because it posed a safety risk.[135] The hospital allowed the nurse to apply for a new position within a thirty-day period.[136] Ultimately, the nurse was not hired for any of the positions she applied for and her employment with St. Joseph's Hospital was terminated.[137] The EEOC subsequently filed suit against St. Joseph's on the nurse's behalf, alleging that the hospital violated the ADA by failing to reassigning the nurse to a vacant position and instead only allowing her to compete with other applicants for a position.[138]

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130. *Id.*
131. *See id.* at 219.
132. *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007).
133. EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1337–38 (11th Cir. 2016).
134. *Id.* at 1338.
135. *Id.*
136. *Id.*
137. *Id.* at 1340.
138. *Id.*; *see also Filing a Lawsuit*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/3QPP-E4LH] (last visited

In *St. Joseph's*, the Eleventh Circuit held that "the ADA only requires an employer to allow a disabled person to compete equally with the rest of the world for a vacant position."[139] The Eleventh Circuit in *St. Joseph's*, like the Eighth Circuit in *Huber*, held that the *Barnett* seniority system framework is applicable to an employer's "best-qualified applicant" hiring policy, and further argued that the ADA was never meant to discriminate against the non-disabled by requiring mandatory reassignment.[140]

The Eleventh Circuit in *St. Joseph's* noted that their case did not involve a seniority system, but a "best-qualified applicant" policy.[141] Still, the Eleventh Circuit found "*Barnett's* framework is instructive in this context. Requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable 'in the run of cases.'"[142] The Eleventh Circuit noted further that an employer's main goal in the operation of a business was profit, which "requires efficiency and good performance.[143] Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance."[144]

Finally, the Eleventh Circuit echoed the Eighth Circuit's reasoning in *Huber* in determining that the ADA was not "an affirmative action statute."[145] In essence, *St. Joseph's* is the most recent major case to come out against mandatory reassignment under the ADA, and it consolidates much of the previously discussed arguments from similarly aligned courts and scholars to reinforce the position that the ADA is an equal competition statute, nothing more.

2. The ADA Is Not an "Affirmative Action" Statute

As has been mentioned above, another common argument against mandatory reassignment is that the ADA is not meant to be an affirmative action statute, and reasonable accommodations, like reassignment, create preferences for the disabled akin to affirmative action.[146] Affirmative action is defined as:

> The practice of selecting people for jobs, college sports, and other important posts in part because some of their characteristics are consistent with those

Oct. 10, 2021) (explaining the process by which the EEOC itself can, and will, litigate a suit on behalf of another individual).

139. *See St. Joseph's*, 842 F.3d at 1346. The district court had previously ruled in St. Joseph's favor as well, holding that the hospital was not under an obligation to reassign the nurse without competition. *Id.* at 1340–41.
140. *Id.* at 1345–47; *see* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).
141. *St. Joseph's*, 842 F.3d at 1346.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*; *citing Huber*, 486 F.3d at 483.
146. *St. Joseph's*, 842 F.3d at 1346; *Huber*, 486 F.3d at 483.

> of a group that has historically been treated unfairly by reason of race, sex, etc.; specifically a preference or decision-making advantage given to members of a racial minority that has historically been subjected to systemic discrimination.[147]

In the context of the ADA, there are some similarities between the traditional meaning of affirmative action and the reasonable accommodation of reassignment.[148] For example, like affirmative action, reassignment revolves around status as a member of a protected class, which in turn gives the status member preference in selection for a given position.[149] Furthermore, reassignment and affirmative action are similar in that both serve as a remedy for past discrimination.[150]

Key differences exist between affirmative action and reassignment under the ADA, however, weakening the argument taken that one equates to the other.[151] One primary difference is that most statutes which prohibit discrimination based on protected class status do so based on an equal treatment regime; this prohibits an employer from not hiring an employee based on a certain characteristic.[152] The ADA, however, contrasts with an *equal* treatment statute in that it is essentially a *different* treatment statute;[153] an employer risks discriminating against a disabled employee simply bynot treating them differently from non-disabled employees.[154] Treating a disabled employee *differently* by allowing them an exception to a given policy might be required under the ADA in order for the disabled individual to be given *equal*

147. *Affirmative Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).
148. Befort & Donesky, *supra* note 52, at 1082; *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 14 (1996) ("Reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").
149. Befort & Donesky, *supra* note 52, at 1082.
150. *Id.*
151. *Id.*; *see also supra* note 140 (both *Huber* and *St. Joseph's* equate the reassignment provision with affirmative action).
152. Befort & Donesky, *supra* note 52, at 1082–83; *see also* Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 515 (1998) (describing, for example, the Civil Rights Act as requiring "that all workers be treated without regard to race, gender, national origin, and religion.").
153. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 40–44 (2000) (analyzing how the ADA relies upon a "different treatment vision of equality" to address the impact of a disability on one's ability to work); Miller, *supra* note 152, at 514 ("By virtue of the ADA's requirement to provide reasonable accommodations to qualified individuals with disabilities, employers must treat disabled employees differently in order to provide equal access to employment.").
154. *See* Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 146 (1998) ("For disability, if for no other characteristic, perfectly equal treatment can constitute discrimination. For example, a rule that all persons, whether blind or not, must take a written admissions test for law school is discriminatory.").

opportunities in the workplace compared to non-disabled employees.[155] These key differences between reassignment and the concept of traditional affirmative action highlight the fact that reassignment as a reasonable accommodation under the ADA necessarily creates preferences for disabled individuals to achieve equality.[156]

B. Reviewing the Arguments for Mandatory Reassignment

Several courts have presented strong arguments in favor of mandatory reassignment under the ADA. One prime example is the Tenth Circuit in *Smith v. Midland Brake, Inc.*[157] In *Smith*, the Tenth Circuit determined that if the ADA required nothing more than equal competition between disabled and non-disabled employees, then the ADA would create no obligation in employers not to discriminate, which is counter to the overarching purpose of the statute.[158] The Tenth Circuit made use of both legislative history and statutory interpretation of the ADA's language when making this decision.[159] For example, the employer in *Smith* argued that the term "reassignment" in the statutory language of the ADA "must refer only to job applicants and not to existing employees."[160] The Tenth Circuit rejected this argument because it was not textually sound when the language of the ADA was properly interpreted, explaining that "the 're' in 'reassignment' implies the presence of an existing assignment, i.e., an existing job, that the person holds, such that the person must therefore be an existing employee, not a job applicant."[161]

Smith also affirms the limitations on mandatory reassignment that lessen its potential burden on employers and employees.[162] For example, in *Smith* the Tenth Circuit defined the scope of the ADA's reassignment duty by outlining a number of important limitations, such as reassignment only being used if accommodation within an existing position is not possible, and reassignment being limited by the modifier of

155. *See* Befort & Donesky, *supra* note 52, at 1084; *see also* Miller, *supra* note 152, at 514 (noting that wholly equal treatment between disabled and non-disabled employees would only be a barrier to disabled employees who need reasonable accommodations in order to perform a job).
156. U.S. Airways Inc. v. Barnett, 535 U.S. 391, 397 (2002) ("Preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal.").
157. Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).
158. *Id.* at 1164–65.
159. *Id.* at 1161, 1162–63 (quoting Congressional reports and the direct language of the statute). The Tenth Circuit also seemed to give some form of judicial deference to the EEOC's guidance on the ADA—likely *Skidmore* deference—because it also made use of the guidance to form and explain its interpretation of the statute. *Id.* at 1164–67.
160. *Id.* at 1163.
161. *Id.* at 1163–64.
162. *See id.* at 1171–78.

reasonableness.[163] The Tenth Circuit also outlined a number of factors that restrict the employer's duty to reassign, such as the requirement for an interactive process between employee and employer before reassignment becomes a requirement.[164]

The Tenth Circuit returned to the issue of mandatory reassignment in 2018.[165] In *Lincoln v. BNSF Railway Company*, BNSF argued that "post-*Barnett*, an employer's policy in favor of hiring the most qualified applicant prevents a disabled employee from relying on reassignment to a vacant position to satisfy the reasonable accommodation element of the employee's prima facie case."[166] The Tenth Circuit stated that the EEOC countered BNSF's argument by asserting that, "*Barnett* created a limited exception to an employee's ability to rely on reassignment to a vacant position where reassignment would conflict with an established seniority system but that *Barnett's* general discussion of reassignment as a reasonable accommodation strengthens our decision in *Smith*."[167]

The Tenth Circuit agreed with the EEOC, holding that their previous decision in *Smith* and the Supreme Court's decision in *Barnett* were aligned.[168] Synthesizing *Smith* and *Barnett*, the Tenth Circuit in *Lincoln* determined BNSF's argument that a best-qualified hiring policy was comparable to a seniority policy was faulty, serving only to eliminate reassignment to a vacant position as a possible reasonable accommodation.[169] If the Tenth Circuit allowed BNSF's argument to prevail, it would be improperly doing so against both the EEOC guidance, which the court in *Smith* found persuasive, and the Supreme Court's holding in *Barnett*.[170] Thus, the Tenth Circuit in *Lincoln* constructed a holding favorable to mandatory reassignment under the ADA by combining a detailed analysis of prior court precedent and statutory interpretation with agency deference to the EEOC's guidance. [171]

The D.C. Circuit is another which has adopted a Pro-Mandatory Reassignment stance. In *Aka v. Washington Hospital Center*, the D.C. Circuit analyzed the meaning of "reassign" in the ADA, holding that reassignment means more than allowing for equal competition for a vacant position.[172] The D.C. Circuit also examined the legislative history

163. *Id.* at 1170–71.
164. *Id.* at 1171.
165. Lincoln v. BNSF Ry. Co., 900 F.3d 1166 (10th Cir. 2018).
166. *Id.* at 1204.
167. *Id.*
168. *Id.*
169. *Id.* at 1205 ("Such a result would effectively and improperly read 'reassignment to a vacant position' out of the ADA's definition of 'reasonable accommodation.'").
170. *Id.* ("BNSF's argument runs contrary to both the EEOC guidance we quoted in *Smith* and the Supreme Court's statement in *Barnett* that the ADA sometimes requires an employer to give preference to a disabled employee.").
171. *See id.*
172. *See* Aka v. Wash. Hosp. Ctr, 156 F.3d 1284, 1304 (D.C. Cir. 1998).

of the ADA, noting that the ADA's legislative history is compatible with the concept, espoused by the EEOC and other courts, that reassignment is meant for already existing disabled employees, not applicants.[173]

While the Tenth and D.C. Circuits are standard bearers for the Pro-Mandatory Reassignment side of the split, and a more detailed discussion of both is presented in earlier sections of this Article, the Seventh Circuit's decision in *EEOC v. United Airlines, Inc.*, has perhaps the greatest impact on the Eighth Circuit's analysis in *Huber*.[174]

In light of *Barnett*, in *EEOC v. United Airlines, Inc.*, the EEOC asked the Seventh Circuit to grant a rehearing en banc for the purposes of overturning it's precedent in *Humiston-Keeling* .[175] After granting the EEOC's request, the Seventh Circuit overturned Humiston-Keeling's precedent against mandatory reassignment. Accordingly, the court interpreted the *Barnett* framework against the idea that a best-qualified policy was synonymous with a seniority system.[176] The Seventh Circuit held that to make a best-qualified policy equal to a seniority system, like the one discussed by the Supreme Court in *Barnett,* would "so enlarge[] the narrow, fact-specific exception set out in *Barnett* as to swallow the rule."[177] Essentially, *United Airlines* determined that *Barnett* established seniority systems as a small exception to the rule set out in the ADA, the existence of which did not automatically create an undue hardship, but instead required the analysis of case specific facts to determine if such a hardship exists.[178]

C. The Argument for Reassessing Huber

The impact of the Seventh Circuit's holding in *United Airlines* on *Huber* cannot be understated. The analysis and outcome of *United Airlines* undermines the entire reasoning of the Eighth Circuit in *Huber*.[179] Part of United Airlines' argument in the case was that the Seventh Circuit should not abandon their ruling in *Humiston-Keeling* precisely because the Eighth Circuit in *Huber* clearly adopted the reasoning of *Humiston-Keeling*.[180] The Seventh Circuit rejected this argument, saying that the "Eighth Circuit's wholesale adoption of *Humiston-Keeling* has little import. The opinion adopts *Humiston-Keeling* without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*."[181]

173. *Id.* (quoting house reports that affirm reassignment is intended for disabled employees rather than applicants, as they only refer to employees in describing the intent of the reassignment provision).
174. *See* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).
175. *Id.* at 760–61.
176. *Id.* at 761–64.
177. *Id.* at 764.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

the Eighth Circuit adopted the reasoning of *Humiston-Keeling* as a matter of first impression, without detailed analysis into why or how *Humiston-Keeling* reached the conclusion it did.[182] Given the fact the court did so without regard to *Barnett's* potential impact on the issue of mandatory reassignment, creates a strong argument for reevaluation of this precedent[183]

The Seventh Circuit's analysis in *United Airlines* also weakens the argument developed post-*Barnett* that the Supreme Court's analysis regarding seniority systems is equivalent to that for a best-qualified hiring policy, and therefore supports the Anti-Mandatory Reassignment argument. The analysis in *United Airlines* undermines the employer-friendly interpretations of *Barnett* by providing employees with several methods of interpretation for mandatory reassignment that align well with the Supreme Court's analysis in *Barnett*.[184] For example, *United Airlines* bolsters the idea that mandatory reassignment is ordinarily reasonable under the *Barnett* framework,[185] and it clarifies that the Supreme Court in *Barnett* likely meant for employment policies, like seniority systems, to be the exception instead of the norm.[186]

Aside from the Seventh Circuit, recent district court decisions have also issued decisions that synthesize many of the strongest arguments in favor of mandatory reassignment and would consequently prove influential in any reexamination of *Huber.*

In *EEOC v. Manufacturers and Traders Trust Company*, McCollin, a branch manager at a Maryland bank, had to undergo a surgical procedure to prepare for the birth of her child that would leave her unable to work until after the birth of her child.[187] McCollin's employer replaced her while she was on leave after her surgery and childbirth, and subsequently gave her the opportunity to search for and apply for a different, vacant position.[188] When McCollin was not hired for any of the vacant positions, and some of them were given to individuals the EEOC alleged were outside applicants or less qualified than McCollin, McCollin filed a charge of discrimination with the EEOC and a lawsuit followed.[189]

182. Michelle Letourneau, *Providing Plaintiffs with Tools: The Significance of* EEOC v. United Airlines, Inc., 90 NOTRE DAME L. REV. 1373, 1386 (2015).
183. *See* Eustace v. Springfield Pub. Schs, 463 F.Supp.3d 87, 106 (D. Mass. 2020) (noting the Eight Circuit's lack of in-depth analysis of *Barnett* in *Huber*).
184. Letourneau, *supra* note182, at 1374.
185. *Id.* at 1395.
186. *Id.* at 1401–02.
187. EEOC v. Mfrs. and Traders Tr. Co., 429 F.Supp.3d 89, 98 (D. Md. 2019).
188. *Id.* at 99.
189. *Id.* at 99–100.

In *Manufacturers*, the EEOC argued that McCollin's employer violated the ADA by forcing McCollin to compete for a vacant position.[190] The employer, on the other hand, argued that non-competitive reassignment was an unreasonable accommodation under the terms of the ADA.[191] In its holding, the court in *Manufacturers* made use of the analysis of both the Tenth Circuit in *Smith* and the D.C. Circuit in *Aka* regarding the meaning of the word "reassign" in the ADA, holding that it implied an active part on the employer to place an already existing disabled employee in a vacancy.[192] The court in *Manufacturers* adopted the analysis of *Smith* and *Aka* and synthesized it with a narrow interpretation of the *Barnett* framework that allows for preferential treatment to achieve the purposes of the ADA.[193]

Another recent ruling in favor of mandatory reassignment from the United States District Court for Massachusetts provides a similarly strong argument against the position that the ADA was not meant to create preferences for disabled individuals.[194] In *Eustace v. Springfield Public Schools*, the District Court for Massachusetts analyzed the reasoning of the Eleventh Circuit in *St. Joseph's*, and its Anti-Mandatory Reassignment logic,[195] The Massachusetts District Court found those arguments unconvincing, however, because they failed to address the Supreme Court's explicit holding in *Barnett* that preferential treatment for disabled employees could be necessary to make the ADA effective.[196] The court in *Eustace* also noted that *St. Joseph's* holding that mandatory reassignment in the face of a best-qualified policy was ordinarily unreasonable—which used the *Barnett* seniority system framework for a best-qualified policy—emphasized only general concerns and not the specific, superior rights of employees under a seniority system that made reassignment unreasonable in *Barnett*.[197]

This analysis questions the common reasoning of the Eighth and Eleventh Circuits' conclusions that the ADA is not a mandatory preference statute.[198] It does so by reinforcing the idea that *Barnett* should be read carefully and far more narrowly than these courts have tended to do, given that a best-qualified policy is a broad and far-reaching concept in comparison to a specific, well defined seniority system.[199] Thus, the Eighth Circuit has cause to reassess its holding in *Huber*

190. *Id.* at 109–10.
191. *Id.*
192. *Id.* at 111–12.
193. *Id.* at 112–16 (also drawing upon legislative history and interpretation of the ADA's statutory text).
194. Eustace v. Springfield Pub. Schs., 463 F.Supp.3d 87, 105–06 (D. Mass. 2020).
195. *Id.*
196. *Id.*
197. *Id.*
198. *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007); EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333, 1346 (11th Cir. 2016).
199. *See Eustace*, 463 F.Supp.3d at 105–06.

not only on the basis of the Seventh Circuit's developments regarding mandatory reassignment, which contradicts *Huber's* reasoning,[200] but also because there is strong support that *Huber* no longer holds up when applied to the Supreme Court's analysis in *Barnett*. This, combined with the previously described analyses by courts that make thorough use of legislative history, statutory interpretation, judicial precedent, and agency deference, creates a strong argument that the Eighth Circuit should—at the very least—reexamine *Huber* using a more comprehensive analysis, and incorporation of the available law.

IV. CONCLUSION

When the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, joined the ongoing circuit split regarding whether the ADA requires mandatory reassignment of a disabled employee as a reasonable accommodation, they based their decision against mandatory reassignment on analysis and reasoning that has since been overturned and negatively distinguished. If given the opportunity, the Eighth Circuit should strongly consider the soundness of upholding *Huber* in light of the fact that the Seventh Circuit, whose reasoning in *Humiston-Keeling* the Eighth Circuit adopted in *Huber*, has since overturned its precedent and adopted a stance favorable to mandatory reassignment. Despite the logic advanced by the Eight and Eleventh Circuits, the court should consider the strong arguments against reading Barnett to say that an employer's best-qualified hiring policy negates mandatory reassignment Thus, the Eighth Circuit should re-adopt the reasoning of the Seventh Circuit, this time based on their decision in *EEOC v. United Airlines*, and hold that ordinarily the ADA does require an employer to automatically reassign a disabled employee to a vacant position as a reasonable accommodation, even if the employee is not the best-qualified candidate.

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