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I. Introduction

One of Congress's principal motivations for enacting the Americans with Disabilities Act (ADA)[1] was to help disabled individuals enter into and remain in the American workplace. In the ADA's "findings and purposes" section, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[2] The legislative history is filled with the statements of senators and representatives supporting the Act as a vehicle for bringing individuals with disabilities "into the economic and social mainstream of American life."[3] Legislators viewed the ADA as a win/win situation: Decreased federal government expenditures for supporting unemployed, disabled citizens and increased opportunities for

1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

2. *Id.* § 12101a(8).

3. S. REP. NO. 101-116, at 20 (1989); *see* 136 CONG. REC. 10,860 (1990) (statement of Sen. Conte) ("The investment [the ADA] represents will yield tremendous outcomes by allowing millions of American citizens to work, compete, and contribute to our country in ways they never have before.").

the disabled to enter the workforce and to acquire the independence, self-sufficiency, and dignity they rightly deserve.[4]

To effectuate this clearly articulated goal, Congress adopted a theory of discrimination that requires employers to assess the qualifications of disabled workers only after making reasonable accommodations for the known physical and mental impairments of individuals with disabilities.[5] The concept of reasonable accommodation, although a familiar part of the ADA's older statutory sibling, the Rehabilitation Act of 1973,[6] departs from other anti-discrimination statutes like Title VII[7] and the Age Discrimination in Employment Act (ADEA).[8] Both Title VII and the ADEA prohibit employers from making adverse employment decisions "because of" race, color, religion, sex, national origin, or age.[9] These statutes, however, do not impose any affirmative obligation on employers to assist employees in satisfactorily performing the essential functions of the job.[10] While the ADA also bans discrimination

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4. *See* 135 CONG. REC. 8998 (1989) (statement of Sen. Graham) (explaining rationale underlying ADA); *id.* at 19,891 (statement of Sen. Riegle) ("Since the days of its inception, this Nation has encouraged and valued independence and self-sufficiency. Their [sic] is no better expression of these values than the Americans With Disabilities Act."); *id.* at 19,803 (statement of Sen. Harkin) (stating that ADA empowers individuals with disabilities "to decide for themselves what kind of life they want to lead, and provides a meaningful and effective opportunity to become independent and productive members our of society").

5. *See* 42 U.S.C. § 12111(9) (1994) (defining reasonable accommodation); *id.* § 12112(b)(5)(A) (defining discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee").

6. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 791-96 (1994) (prohibiting federal employees, contractors, and recipients of federal aid from engaging in disability-based discrimination).

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).

8. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994).

9. *See* 29 U.S.C. § 623(a)(1) (1994) (making it unlawful employment practice for employer "to fail or refuse to hire or . . . otherwise discriminate against any individual . . . because of such individual's age"); 42 U.S.C. § 2000e-2(a)(1) (1994) (making it unlawful employment practice for employer "to fail or refuse to hire or . . . otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

10. A limited duty of reasonable accommodation arises under these two statutes only with respect to religion, which is a protected trait under Title VII. *See* 42 U.S.C. § 2000e(j) (1994) (providing, similar to ADA, that employer must reasonably accommodate religious observances and practices of its employees up to point of undue hardship). The reasonable accommodation duty for religious observances, however, is much more limited than the ADA's requirement of reasonable accommodation. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (ruling that employer need not incur more than de minimis hardship in providing accommodation for religious purposes).

"because of" disability,[11] it goes beyond traditional anti-discrimination laws with its requirement that employers must make favorable "reasonable accommodation" adjustments for the disabled.[12]

The presence of the reasonable accommodation provision has led some commentators to characterize the ADA as imposing an affirmative action requirement.[13] One recent article, for example, described the ADA as "one of the most radical affirmative action laws in recent United States history."[14] Certainly, the requirement that employers take certain steps, short of undue hardship, to assist qualified individuals with disabilities in obtaining or retaining gainful employment is a form of affirmative action. Nevertheless, it is evident from the legislative record and the bipartisan support for the statute's passage that Congress believed that the reasonable accommodation requirement was necessary to effectuate its goal of providing viable employment opportunities for the disabled.[15] Many commentators find this strong Congressional support puzzling because Congress adopted the ADA at a time when affirmative action in the race and gender contexts was under tremendous attack.[16]

Despite Congress's support for reasonable accommodation as a necessary tool for providing disabled individuals with tangible employment opportunities, recent case law has begun to question the "perceived fairness" of requiring accommodations for individuals with disabilities.[17] Negative affirmative

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11. *See* 42 U.S.C. § 12112(a) (1994) (prohibiting discrimination "against a qualified individual with a disability because of the disability of such individual").

12. *See id.* § 12112(b)(5)(A) (defining discrimination to include failure of "making reasonable accommodation[s] to the known physical or mental limitations of an otherwise qualified individual with a disability").

13. *See* CHARLES LAWRENCE III & MARI MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 108 (1997) (referring to ADA as "the most radical affirmative action program in the nation's history"); Sandra R. Levitsky, *Reasonably Accommodating Race: Lessons from the ADA for Race-Targeted Affirmative Action*, 18 LAW & INEQ. 85, 85 (1999) (recognizing ADA's affirmative action requirement).

14. *See* Levitsky, *supra* note 13, at 85 (commenting upon ADA affirmative action requirement).

15. The ADA passed both houses of Congress by wide margins. The House of Representatives passed the ADA with a vote of 403-20. 136 CONG. REC. 11,466-67 (1990). The Senate voted to approve the ADA with a margin of 76-8. 135 CONG. REC. 19,903 (1989).

16. *See* LAWRENCE & MATSUDA, *supra* note 13, at 108 (concluding that American public harbors divergent attitudes concerning race and disability); Levitsky, *supra* note 13, at 85-86 (commenting that although Americans generally oppose affirmative action measures designed to achieve principles of racial equality, Congress passed ADA with overwhelming bipartisan support during rise of affirmative action backlash).

17. *See* Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337, 1344 (1998)

action rhetoric has begun to creep into recent ADA decisions,[18] particularly when the accommodation at issue is reassignment to a vacant position.[19] These cases call into question an employer's duty to reassign disabled individuals when doing so would either trump the rights of other better-qualified workers or require an employer to deviate from facially neutral assignment and transfer policies.

Whatever the reason for the recent attack on reasonable accommodation in general and reassignment in particular, this Article will demonstrate that challenging the ADA on affirmative action grounds is misplaced. Despite some similarities with conventional forms of affirmative action, the concept of reasonable accommodation as embodied in the ADA is significantly different from affirmative action in other contexts. Accordingly, we believe that the debate should move away from the politically charged label of affirmative action and towards establishing workable boundaries for determining when an employer is required to reassign an employee with a qualifying disability as a reasonable accommodation. This shift in focus is necessary if the ADA is to fulfill its fundamental goal of assuring that individuals with disabilities are enabled to participate fully in the American workplace.[20]

Part II of this Article provides an overview of reasonable accommodation under the ADA with particular reference to the scope of an employer's duty to reassign disabled employees.[21] Part III discusses two specific issues currently splitting the federal courts: (1) when, if ever, must an employer choose a qualified individual with a disability over a better qualified applicant or employee in filling a vacant position; and (2) when, if ever, may an employer rely on its existing, non-discriminatory employment policies as a basis for failing to reassign a disabled employee to a vacant position.[22] Part IV then

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(concluding that reasonable accommodation under ADA is "non-problematic" because of its "perceived fairness"); *see also* LAWRENCE & MATSUDA, *supra* note 13, at 108 (noting American public's acceptance of affirmative action for disabled despite significant costs imposed on employers to reasonably accommodate disabled employees).

18. *See infra* Parts II.B.2 and II.C.2 (discussing cases that have excused employer from making reassignment accommodation because ADA does not permit preferential treatment in favor of disabled employees).

19. *See* Ruth Colker, *Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 222 (1997) ("The controversy surrounding whether or not the ADA is an 'affirmative action' statute has largely centered on [the reassignment to a vacant position] requirement.").

20. 42 U.S.C. § 12101(a)(8) (1994).

21. *See infra* Part II (providing overview of ADA's reasonable accommodation provision).

22. *See infra* Part III (analyzing two ADA issues currently creating division among federal courts).

considers whether reasonable accommodation is a form of affirmative action and, if so, whether preferential treatment in favor of the disabled nevertheless is justified in light of the statutory language and policies of the ADA.[23] Finally, Part V puts the affirmative action debate aside and suggests predictable guidelines for determining the appropriate scope of the reassignment accommodation grounded in the fundamental policies underlying the ADA.[24]

II. Overview of Reasonable Accommodation and Reassignment

A. Reasonable Accommodation

1. The Role of Reasonable Accommodation

The reasonable accommodation requirement is unique to disability law.[25] With the exception of persons claiming discrimination on the basis of religion,[26] neither Title VII[27] nor the ADEA[28] allows statutorily protected persons to demand accommodations in their favor.[29] At most, such persons can demand only equal treatment and an absence of discrimination.

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23. *See infra* Part IV (examining whether reasonable accommodation is form of affirmative action and whether preferential treatment favoring disabled employees is justified in light of statutory language and policies of ADA).

24. *See infra* Part V (suggesting predictable guidelines for determining appropriate scope of reassignment doctrine grounded in fundamental policies underlying ADA).

25. In addition to the ADA, the Rehabilitation Act of 1973, applicable only to federal employees, contractors, and grant recipients, included a similar reasonable accommodation requirement. 29 U.S.C. §§ 791-96 (1994). Congress modeled the ADA extensively after the Rehabilitation Act and incorporated into the ADA many of the same anti-discrimination principles. G. PHELAN & J. ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE § 1.06 (1997).

26. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1994) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); *see also* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (construing reasonable accommodation requirement for religion very narrowly and holding that employer need not incur more than de minimis hardship in providing employee accommodation for religious purposes).

27. 42 U.S.C. § 2000(e) (1994).

28. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994).

29. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996) (stating that "under the civil rights statutes that protect women, blacks, or older workers, plaintiffs . . . cannot insist upon discrimination in their favor; disabled individuals often can") (footnote omitted); *see also* Long, *supra* note 17, at 1343 (observing ADA is set apart from other anti-discrimination statutes because of reasonable accommodation concept).

Under the ADA, the reasonable accommodation requirement plays a role at several stages of the employment relationship.[30] Most significantly for our purposes, an individual has standing to assert an ADA claim only if the individual is both disabled and qualified.[31] The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[32] This definition requires employers to engage in a two-step inquiry: (1) identify the essential functions of the job in question and (2) determine whether the individual can perform those essential functions with or without reasonable accommodation.[33]

The Equal Employment Opportunity Commission (EEOC), the administrative agency charged with promulgating regulations to implement the statutory language of the ADA,[34] defines essential functions as the "fundamental job duties of the employment position," but not those functions that are merely "marginal" in nature.[35] The regulations state that a job function may be considered essential because the position exists to perform that function, only a limited number of employees are available to perform the job function,

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30. Reasonable accommodation may be required in the following situations: (1) determining whether an individual is a qualified individual with a disability, 42 U.S.C. §§ 12111(8), 12112(b)(5) (1994); (2) deciding whether the individual poses a direct threat to the health or safety of the individual or others, *id.* §§ 12111(3), 12113(b); and (3) making modifications or adjustments to the job application process or work environment such that a disabled employee can enjoy the benefits and privileges of employment as enjoyed by other similarly situated non-disabled employees, *id.* § 12112(b)(5).

31. *See* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 33 (1999) (noting that to make prima facie case under ADA, "an applicant or employee must establish that he or she is disabled, qualified, and has suffered an adverse employment action because of his or her disability"); *see also* 42 U.S.C. § 12102(2)(A) (1994) (delineating disability as first prong of prima facie case and defining disability as "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"). The focus of this Article is on the second and third prongs of the prima facie case – whether the individual was qualified and if so, whether the employer discriminated against the individual because of the employer's failure to provide reasonable accommodations to that qualified individual.

32. *See* 42 U.S.C. § 12111(8) (1994) (defining qualifications of individual with disability).

33. *See* Befort & Lindquist Thomas, *supra* note 31, at 35 (noting that inquiry is whether individual can perform "essential functions" of job in question with or without reasonable accommodation and defining "essential functions" as "fundamental job duties" of position not "marginal" in nature).

34. *See* 42 U.S.C. § 12111(1) (1994) (stating that "the Commission shall issue regulations in an accessible format to carry out [this title]").

35. 29 C.F.R. § 1630.2(n)(1) (1999).

and/or the function involves a high degree of specialization.[36] In this regard, the ADA provides that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[37]

Once the essential functions of the position are identified, the employer next must ask whether the disabled individual can perform these essential functions without reasonable accommodation. If the answer is in the affirmative, then the individual is "qualified" under the statute. If the answer is in the negative, then the employer has an affirmative obligation to provide the individual with a reasonable accommodation unless doing so would cause the employer to suffer an undue hardship.[38]

The ADA excuses an employer from accommodating an individual with a disability if the accommodation would impose an undue hardship on that employer.[39] The statute defines undue hardship as "an action requiring significant difficulty or expense"[40] and provides a list of factors to consider in determining whether the proposed accommodation would cause a particular employer to suffer an undue hardship.[41] Unless this defense is shown to exist,

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36. *Id.* at § 1630.2(n)(2).

37. 42 U.S.C. § 12111(8) (1994).

38. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (stating that "the plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions").

39. *See* 42 U.S.C. § 12112(b)(5)(A) (1994) (stating that employer does not violate ADA for failing to provide reasonable accommodation if employer can "demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

40. *Id.* § 12111(10)(A).

41. Section 12111(10)(B) provides:

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

Id. § 12111(10)(B); *see also* Befort & Lindquist Thomas, *supra* note 31, at 37 (describing undue hardship defense as "floating concept that varies with the nature and cost of the proposed

an employer's failure to provide an accommodation that is available and reasonable results in a violation of the statute.[42]

2. Types of Reasonable Accommodation

Reasonable accommodation is defined generally as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[43] The ADA provides an illustrative list of reasonable accommodations that encompasses four basic types of accommodations.[44]

(1) Making changes to existing facilities. An employer's duty to modify its facilities includes making both work and non-work employee areas accessible to a disabled employee.[45] Modifications to restrooms, break rooms, and lunchrooms thus may be required as reasonable accommodations.[46]

(2) Providing assistive devices or personnel. The statute lists the "acquisition or modification of equipment or devices" and "the provision of qualified readers or interpreters" as reasonable accommodations.[47] The *Interpre-*

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accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general").

42. *See* 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination under ADA to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee"). The federal courts of appeal are split as to the requisite burdens of proof in establishing a reasonable accommodation. *Compare* Barnett v. U.S. Air, Inc., 196 F.3d 979, 988-89 (9th Cir. 1999) (holding that plaintiff bears burden of persuasion to show both existence and reasonableness of proposed accommodation), *vacated and reh'g en banc granted*, 201 F.3d 1256 (9th Cir. 2000) *with* Stone v. City of Mount Vernon, 118 F.3d 92, 98 (2d Cir. 1997) (commenting that plaintiff need only establish existence of plausible accommodation with defendant then bearing burden of proving that proposed accommodation is unreasonable) (citing Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) and Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991)), *cert. denied*, 522 U.S. 1112 (1998).

43. 29 C.F.R. app. § 1630.2(o) (1999).

44. *See* 42 U.S.C. § 12111(9) (1994) (illustrating reasonable accommodations employer may undertake). The term "reasonable accommodation" may include:

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

Id. The EEOC's *Interpretive Guidance* states that "[t]his listing is not intended to be exhaustive of accommodation possibilities." 29 C.F.R. app. § 1630.2(o) (1999).

45. 29 C.F.R. app. § 1630.2(o) (1999).

46. *Id.*

47. 42 U.S.C. § 12111(9)(B) (1994).

tive Guidance suggests that an employer may be required to permit a disabled employee to utilize his or her own equipment or aids, such as a guide dog for an individual who is blind, even though the employer itself may not be required to provide such an accommodation.[48]

(3) Job restructuring. This type of accommodation entails making changes to an employee's current job.[49] While an employer is not required to reallocate essential job functions,[50] the employer may need to reallocate or redistribute nonessential, marginal job functions that a qualified individual with a disability is unable to perform.[51] An employer also may be required to change when and how a job function is performed, such as through the authorization of modified or part-time work schedules.[52]

(4) Reassignment to a vacant position. The reassignment accommodation involves placing the disabled employee in a new position. This type of accommodation goes a step beyond those listed above in that, instead of making adjustments to enable an employee to perform his or her current job, it transfers the disabled employee to an entirely different job. As a later section discusses in greater detail, the additional effort required of an employer to place a qualified employee with a disability in a vacant position combined with the greater impact on other employees' rights to fill that same position makes reassignment a more burdensome and controversial accommodation.[53]

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48. 29 C.F.R. app. § 1630.2(o) (1999).

49. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1314-15 (D.C. Cir. 1998) (Silberman, J., dissenting) (explaining how job restructuring involves making accommodations to disabled employee in disabled employee's current position).

50. *See* 29 C.F.R. app. § 1630.2(o) (1999) ("An employer or other covered entity is not required to reallocate essential functions.").

51. *See id.* (noting scope of employer reallocation duties). The *Interpretive Guidance* demonstrates this type of accommodation with the following illustration:

> [An] employer may have two jobs, each of which entails the performance of a number of marginal functions. The employer hires a qualified individual with a disability who is able to perform some of the marginal functions of each job but not all of the marginal functions of either job. As an accommodation, the employer may redistribute the marginal functions so that all of the marginal functions that the qualified individual with a disability can perform are made a part of the position to be filled by the qualified individual with a disability. The remaining marginal functions that the individual with a disability cannot perform would then be transferred to the other position.

Id.

52. *See id.* ("For example, an essential function customarily performed in the early morning hours may be rescheduled until later in the day as a reasonable accommodation to a disability that precludes performance of the function at the customary hour.").

53. *See infra* Part I.B.1 (analyzing employer burden and controversy surrounding accommodation through reassignment).

3. The Interactive Process

EEOC regulations state that once an individual with a disability requests an accommodation, the employer may need to consult with that employee in ascertaining an appropriate reasonable accommodation.[54] The regulations provide that the employer may initiate an "informal, interactive process" with a qualified applicant or employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[55]

The EEOC's *Interpretive Guidance* provides more detail regarding the suggested structure of this process. The *Guidance* states that the process should be "flexible," involving "the individual assessment of both the particular job at issue, and the particular physical or mental limitations of the particular individual in need of reasonable accommodation."[56] The *Guidance* further recommends that the parties jointly engage in a four-step "problem solving approach" leading to the selection of "the accommodation that is most appropriate for both the employee and the employer."[57]

Some appellate court decisions suggest that a party who fails to participate in the interactive process may be independently liable under the ADA.[58]

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54. 29 C.F.R. § 1630.2(o)(3) (1999).

55. *Id.*

56. 29 C.F.R. app. § 1630.9 (1999).

57. *See id.* (suggesting employer and employee employ certain problem solving methods leading to selection of most appropriate accommodation for both parties). Specifically, the EEOC's *Interpretive Guidance* provides:

> When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:
> (1) Analyze the particular job involved and determine its purpose and essential functions;
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Id.

58. *See, e.g.*, Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 162-63 (3d Cir. 1999) (stating that employers cannot escape their duty to engage in interactive process with employees requiring employers to make good faith attempt to seek accommodations), *vacated and reh'g granted*, No. 98-1273, 1999 U.S. App. LEXIS 19572 (3d Cir. Aug. 18, 1999); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135-36 (7th Cir. 1996) (concluding employer has "at

Most courts, however, reject this position and hold that liability will arise only when an employer has failed as a matter of substance to identify and implement a reasonable accommodation that would enable a disabled employee to perform adequately in the workplace.[59] A recent Eighth Circuit decision stakes out something of a middle position in its finding that an employer's failure to engage in the interactive process constitutes prima facie evidence of bad faith sufficient to deny an employer's motion for summary judgment.[60]

B. Reassignment to a Vacant Position

1. The Most Controversial Accommodation

Of all the accommodations listed in the ADA,[61] the reassignment accommodation has generated the most litigation and fueled the greatest amount of controversy. For example, the federal courts have split on at least four issues concerning the scope of an employer's reassignment duty: (1) whether the reassignment accommodation is available only to disabled employees who are qualified to perform their current job,[62] (2) whether an applicable collective

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least some responsibility" to participate in interactive process and that courts must consider whether bad faith is present in any hampering of interactive process and "assign responsibility" accordingly).

59. *See, e.g.*, Rehling v. City of Chicago, 207 F.3d 1009, 1016 (7th Cir. 2000) (noting that no liability arises from failure of interactive process alone because interactive process is merely means of accomplishing accommodation of disabled people in workplace and not end in and of itself); Barnett v. U.S. Air, Inc., 196 F.3d 979, 993-94 (9th Cir. 1999) (commenting that employer's decision not to participate in interactive process may place employer at peril, but does not expose employer to liability independent of failure to accommodate individual employee's disability); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (opining that purpose of ADA is not to punish employers who fail to participate in interactive process if employers could in fact make no reasonable accommodation for individual employee's disability).

60. *See* Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999) (finding prima facie evidence of employer bad faith in employer's refusal to engage in interactive process).

61. *See supra* note 39 and accompanying text (illustrating concept of reasonable accommodation).

62. A majority of circuit courts addressing this issue have held that an employer must consider reassigning an employee to a vacant position provided the disabled employee can show that the disabled employee is qualified for that position even though the employee is no longer able to perform the essential functions of the current job. *See* Feliciano v. Rhode Island, 160 F.3d 780, 786 (1st Cir. 1998) ("The determination that appellant cannot perform the essential functions of her job . . . does not end the analysis."); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc) (stating that employee seeking reassignment is within ADA if employee can perform functions of position to which employee seeks reassignment); Gaul v. Lucent Techs., Inc., 134 F.3d 576, 580 (3d Cir. 1998) (same); Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996) ("[T]he ADA may require an employer to reassign a disabled employee to a different position as reasonable accommodation where the employee can no

bargaining agreement (CBA) trumps the ADA when the reassignment of a disabled employee violates the seniority rights of another employee under a CBA provision,[63] (3) whether the ADA requires that an employer transfer a disabled employee to a vacant position despite the superior qualifications of another applicant or employee who also desires that position,[64] and (4) whether the reassignment provision compels employers to set aside or make exceptions to its nondiscriminatory transfer and assignment policies.[65] While the federal courts now appear to be nearing consensus on the first two issues, the division of opinion with respect to the latter two issues – the subject of this Article – appears to be widening.

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longer perform the essential functions of their [sic] current position."), *aff'd in relevant part, rev'd in part*, 213 F.3d 365 (7th Cir. 2000); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112, 1114 (8th Cir. 1995) (same). *But see* Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (holding that employee was not qualified individual with disability because employee was no longer qualified to perform essential functions of employee's current job); Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) (holding that employer is not obligated to reassign disabled employee "when the employee is unable to meet the demands of his present position"); Martin v. Lockheed Martin Missiles & Space, No. C96-4620 FMS, 1998 WL 303089 at *7 (N.D. Cal. Apr. 1, 1998) (holding that employee was not qualified individual with disability because employee was no longer qualified to perform essential functions of employee's current job); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538 (D. Ala. 1995) (same). For a more detailed discussion of this issue, see Befort & Lindquist Thomas, *supra* note 31, at 55-59 (discussing reassignment to vacant position when employee cannot perform functions of current position even with reasonable accommodation).

63. The majority of courts addressing this issue have adopted a per se rule that employers are not required to violate an applicable seniority provision in a CBA in order to comply with the reassignment accommodation under the ADA. *See* Lujan v. Pac. Mar. Assoc., 165 F.3d 738, 743 (9th Cir. 1999) (noting that plaintiff's proposed accommodation would be barred if it violated bona fide seniority system); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997) ("[A]n accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable."); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (holding "that the ADA does not require employers to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996) (same); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995) (same); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995) (stating that plaintiffs' collective bargaining agreement prohibits transfer to another job because plaintiffs lack requisite seniority). *But see* Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 894-95 (D.C. Cir. 1997) (rejecting per se approach and adopting balancing approach to resolve conflict between CBA and ADA), *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997); Emrick v. Libbey Owens-Ford Co., 875 F. Supp. 393, 396 (E.D. Tex. 1995) (finding that per se rule does not apply to ADA cases). For a more detailed discussion of this issue, see Befort & Lindquist Thomas, *supra* note 31, at 59-61 (discussing transfers in violation of collective bargaining agreements).

64. *See infra* notes 108-79 and accompanying text (discussing relevant case law on this issue).

65. *See infra* notes 184-224 and accompanying text (discussing relevant case law on this issue).

Several reasons may account for the additional scrutiny given to the reassignment accommodation. First, the reassignment obligation is a duty that was not recognized prior to the adoption of the ADA. Although the ADA closely tracks the statutory language of the Rehabilitation Act of 1973[66] and its interpretive case law,[67] the ADA departs from its older statutory sibling by expressly including "reassignment to a vacant position" in its list of reasonable accommodations.[68] The Rehabilitation Act required reassignment only if it was available under an employer's existing policies.[69] Otherwise, reassignment was a permissible, not a required, accommodation.[70] The lack of clearly delineated standards for reassigning qualified individuals with disabilities under the Rehabilitation Act may explain some of the current struggle that the federal courts are experiencing in defining the scope of this new accommodation under the ADA.[71]

Second, reassignment has a greater impact on the rights of non-disabled employees than other accommodations listed in the ADA. For example, an employer's obligation to make existing facilities accessible to a disabled employee imposes obligations on the employer but it "has no immediate impact on non-disabled employees."[72] Likewise, job restructuring involves

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66. 29 U.S.C. § 701-96 (1994).

67. *See supra* note 25 and accompanying text (indicating that ADA was closely modeled on Rehabilitation Act of 1973).

68. *See* 42 U.S.C. § 12111(9)(B) (1994) (listing "reassignment to a vacant position" as reasonable accommodation).

69. *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.9 (1987) (summarizing reassignment duty under Rehabilitation Act). In its *Arline* decision, the Supreme Court stated:

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

Id.; *see also* Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (summarizing reassignment duty under Rehabilitation Act); 45 C.F.R. §1614.704 (1991).

70. *See* Jeffrey S. Berenholz, Note, *The Development of Reassignment to a Vacant Position in the Americans with Disabilities Act*, 15 HOFSTRA LAB. & EMP. L.J. 635, 639 (1998) (collecting cases).

71. Nevertheless, Congress clearly intended to go beyond the Rehabilitation Act by expressly providing in the text of the ADA that reasonable accommodation may include "reassignment to a vacant position." 42 U.S.C. § 12111(9) (1994). Congress's commitment to reassignment as an accommodation for the disabled was further evidenced when Congress amended the Rehabilitation Act in 1992 to expressly include reassignment as an accommodation. *See* 29 U.S.C. §§ 791(g), 794(d) (1994), *amended by* Pub. L. No. 102-569, tit. V, § 506 (1992) (recognizing reassignment accommodation).

72. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1314 (D.C. Cir. 1998) (en banc)

making adjustments for a disabled employee in his current position that, again, would have little impact upon the rights of other employees.[73] Although an employer's reallocation of non-essential, marginal functions may alter some of the tasks other employees perform in the workplace, such an accommodation does not necessarily result in a net increase of work duties for the non-disabled employee.[74] In contrast, reassignment may impose tangible losses on other employees because an employer's placement of a disabled employee into a vacant position necessarily deprives other employees of the possibility of filling that position. Viewed in this light, the reassignment accommodation has the effect of providing a preference to the rights of the disabled over those of the non-disabled.[75]

2. EEOC Guidelines on Reassignment

As with any part of the ADA, comprehension of a particular provision is not complete without reference to the EEOC's interpretive gloss. In addition to its formal regulations,[76] the EEOC has promulgated several interpretive aids that provide substantial guidance on the scope of the reassignment accommodation. These aids include the *Interpretive Guidance of Title I*,[77] *Technical Assistance Manual*,[78] and *Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, recently promulgated in March 1999.[79] Taken together, these guidelines establish a number of basic principles that the courts

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(Silberman, J., dissenting) (analyzing impact of employer's ADA obligations on non-disabled employees).

73. *See id.* at 1315 (observing that job restructuring and part time and modified work schedules involve accommodations of employee's current position and "have no direct effect on non-disabled employees or applicants").

74. The reallocation is a trade-off of marginal job functions between the disabled and non-disabled employee: The non-disabled employee picks up those marginal functions that the disabled employee cannot perform and the disabled employee picks up those functions that he or she can perform from the non-disabled employee. *See supra* note 51 and accompanying text (illustrating this reallocation).

75. *See Aka*, 156 F.3d at 1315 (Silberman, J., dissenting) (noting that in contrast to other types of accommodations listed in ADA, reassignment infringes on rights of non-disabled employees).

76. *See* 29 C.F.R. §§ 1630.1-1630.16 (1999) (providing for implementation of ADA).

77. 29 C.F.R. app. §§ 1630.1-16 (1999) [hereinafter Interpretive Guidance].

78. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992).

79. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, EEOC Compliance Manual (CCH) ¶ 6908, at 5435 (Mar. 1, 1999) [hereinafter ENFORCEMENT GUIDANCE].

generally have accepted as delimiting the parameters of the reassignment accommodation.[80]

First, reassignment is required only for current employees, not applicants.[81] Although the language of the statute makes no distinction between employees and applicants in this regard, the EEOC follows the legislative history[82] in concluding that "reassignment is not available to applicants."[83]

Second, "[r]eassignment is the reasonable accommodation of last resort."[84] The *Enforcement Guidance*, for example, provides that reassignment "is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodation would impose an undue hardship."[85]

Third, an employer is under no obligation to reassign a disabled employee unless a position is truly vacant.[86] The *Enforcement Guidance* defines a vacancy as a position 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.[87] The regulations further explain that a position is considered vacant "even if an employer has posted a notice or announcement seeking applications for that position."[88] An employer is not required to "bump" another employee in order to create a vacancy,[89] nor is an employer required either to create a new position for a disabled employee or to promote a disabled employee to a higher graded position.[90]

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80. *See* John E. Murray & Christopher J. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQ. L. REV. 721, 731-32 (2000) (noting consensus among federal courts concerning certain steps that employers are not obligated to take in order to comply with reassignment requirement).

81. *See* 29 C.F.R. app. § 1630.2(o) (1999) ("Reassignment is not available to applicants.").

82. *See* H.R. REP. NO. 485 (II), at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338 (referring to reassignment for employees, but not applicants).

83. 29 C.F.R. app. § 1630.2(o) (1999) ("Reassignment is not available to applicants.").

84. ENFORCEMENT GUIDANCE, *supra* note 79, at 5453; *see* 29 C.F.R. app. § 1630.2(o) (1999) (providing employer reassignment duties under ADA reasonable accommodation provision).

85. ENFORCEMENT GUIDANCE, *supra* note 79, at 5453; *see* 29 C.F.R. app. § 1630.2(o) (1999) (stating that "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship").

86. *See* ENFORCEMENT GUIDANCE, *supra* note 79, at 5453 (defining "vacant").

87. *See id.* (defining "vacant"); *see also* 29 C.F.R. app. §1630.2(o) (1999) (suggesting that what constitutes reasonable amount of time should be determined in light of totality of circumstances).

88. ENFORCEMENT GUIDANCE, *supra* note 79, at 5453.

89. *Id.* at 5453-54.

90. *Id.* An employer, however, may have a duty to reassign a disabled employee to a

Fourth, even if a position "vacancy" exists, an employer need not reassign a disabled individual unless he or she is "qualified" for the new position.[91] Stated otherwise, the disabled employee must demonstrate that he or she satisfies the requisite job requirements and is capable of performing the position's essential functions with or without reasonable accommodation.[92]

Finally, as with all the accommodations listed in the ADA, an employer has no obligation to reassign a disabled employee if doing so would result in an undue hardship.[93] Taken together, these measures limit the potential reach of the reassignment accommodation and cushion its potential negative impact on both the employer and other employees.

III. Conflicting Case Law Concerning the Scope of the Reassignment Accommodation

A. The Disputed Issues and the EEOC's Position

Despite EEOC efforts to delineate the contours of the reassignment accommodation, a number of courts have gone beyond the guidelines to interpret the reassignment obligation in a more narrow fashion. This Article focuses on two of the more recent court-imposed limitations. Several courts have held that the reassignment accommodation does not require employers to pass over better-qualified applicants or co-workers in filling vacant positions,[94] nor does it require employers to violate their non-discriminatory transfer and assignment policies.[95]

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lower graded position as a reasonable accommodation. *See* 29 C.F.R. app. § 1630.2(o) (1999) ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without a reasonable accommodation.").

91. *See* ENFORCEMENT GUIDANCE, *supra* note 79, at 5452 (exploring employer reassignment duty when employment vacancy occurs); *see also supra* note 62 and accompanying text (discussing circuit split on issue of whether disabled employee qualifies for reassignment even though employee can no longer perform essential functions of employee's current position).

92. *See* ENFORCEMENT GUIDANCE, *supra* note 79, at 5452-53 (defining "qualified"); *see also* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998) (stating that in determining those positions for which disabled employee may be qualified, "[t]he employer must first identify the full range of alternate positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites, and then determine whether the employee's own knowledge, skills, and abilities would enable her to perform the essential functions of those alternate positions, with or without reasonable accommodations").

93. *See infra* notes 286-90 and accompanying text (discussing undue hardship defense).

94. *See infra* Part III.B.2 (discussing cases which do not require employers to give preference to disabled employees in filling vacant positions).

95. *See infra* Part III.C.2 (discussing cases which do not require employers to violate transfer and assignment policies).

These decisions prompted the EEOC to weigh in on the matter in its March 1999 *Enforcement Guidance*.[96] In this *Guidance*, the EEOC responded directly to this developing case law, affirmatively stating that the ADA's reassignment mandate means that a disabled employee is entitled to placement in a vacant position provided that the disabled employee is qualified for the job.[97] The *Enforcement Guidance*, structured in a question and answer format, provides the following exchange:

> Q: Does reassignment mean that the employee is permitted to compete for a vacant position?
> A: No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[98]

The *Enforcement Guidance* also addresses the issue of employer policies:

> Q: Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?
> A: Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[99]

Unfortunately, the degree to which courts will defer[100] to EEOC guidelines has become less clear as a result of the Supreme Court's recent decision in *Sutton v. United Airlines, Inc.*[101] In *Sutton*, the Court declined to follow the EEOC's position on the issue of whether mitigating measures should be taken into account when determining an individual's disability under the

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96. *See* ENFORCEMENT GUIDANCE, *supra* note 79, at 5454 (exploring employer reassignment duties under ADA).

97. *See id.* (exploring employer reassignment duties under ADA).

98. *Id.* at 5455-56.

99. *Id.* at 5454.

100. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (noting that viewpoint of administrative agency charged with statutory enforcement is generally entitled to great deference). In an oft-cited decision, the Supreme Court held that when a statute is silent or ambiguous, a reviewing court should adhere to an agency's regulatory interpretation if based on a permissible construction of the statute. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (outlining lower court review of agency regulatory interpretations).

101. 527 U.S. 471 (1999).

ADA.[102] The Court, holding that disability status should be assessed only after considering the impact of mitigating measures, rejected the EEOC's opposite reading "as an impermissible interpretation of the ADA."[103] The Supreme Court's lack of deference to the EEOC's interpretation, expressed in the *Interpretive Guidance*,[104] could seriously undermine effective application of the ADA and diminish predictability if lower courts follow the Supreme Court's lead.[105]

Some courts have followed the EEOC's recent directives concerning reassignment, agreeing that for the reassignment accommodation to have any viability, a disabled employee should not be required to compete for the vacant position and that some modification of facially neutral transfer and assignment policies may be necessary.[106] Other courts, however, refuse to defer to the EEOC on these issues, remaining unpersuaded that the scope of reassignment requires employers to abandon their legitimate business interests in hiring the best-qualified workers and maintaining uniform employer policies.[107] For these courts, the EEOC's interpretation inappropriately turns the ADA into an engine for affirmative action.

This Part summarizes the case law addressing the two reassignment issues currently splitting the federal courts: (1) when, if ever, must an employer choose a qualified individual with a disability over a better qualified applicant or co-employee; and (2) when, if ever, may an employer rely on its non-discriminatory employer policies as a basis for declining to reassign a disabled employee to a vacant position. It is clear from the numerous en banc reviews and impassioned dissents that these issues inspired divisiveness among the courts.

B. Disabled Employee vs. Better-Qualified Applicant/Employee

1. Disabled Employee Prevails

Federal courts currently are split regarding the issue of whether an employer must reassign a disabled employee to a vacant position despite the

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102. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999) (holding that employee disability status should be assessed only after consideration of impact of mitigating measures).

103. *Id.*

104. *See* 29 C.F.R. app. § 1630.2(j) (1999) (suggesting that mitigating measures should not be considered in determining disability status under ADA).

105. *See* Befort & Lindquist Thomas, *supra* note 31, at 94-97 (discussing impact of *Sutton* on issue of agency deference).

106. *See infra* Part III.B.1 (exploring cases favoring disabled employees in reassignment context).

107. *See infra* Part III.B.2 (exploring cases favoring employer's legitimate business interests in hiring best-qualified employees and maintaining uniform employment policies).

superior qualifications of another applicant or employee. Only the Court of Appeals for the Tenth Circuit has answered this question directly in the affirmative,[108] but in reaching its decision, that court relied heavily on an earlier decision of the District of Columbia Circuit Court of Appeals that, although not expressly deciding the issue, indicated strong support for an interpretation of the reassignment accommodation similar to the EEOC's recommendation.[109]

a. Aka v. Washington Hospital Center

In an en banc decision, the D.C. Circuit Court of Appeals expressed the view that reassignment under the ADA requires something more of an employer than simply allowing a disabled employee to compete equally with other job applicants for a vacant position.[110] The plaintiff, Etim Aka, a 56-year-old Nigerian immigrant, had worked as an operating room orderly at Washington Hospital Center (WHC) for nineteen years before undergoing bypass surgery as a result of heart and circulatory problems.[111] After Aka spent six months in rehabilitation, Aka's doctor told him he could return to work provided that his job involved only a "light or moderate level of exertion."[112] The physical demands of Aka's job as an orderly did not meet this limitation, so Aka requested a transfer to a job that satisfied his medical restrictions.[113] The hospital declined Aka's transfer request and placed him on an eighteen-month job search leave, informing him "it was his responsibility to review WHC's job postings and to apply for any vacant jobs that interested him."[114] Aka applied and interviewed for numerous positions within the hospital and, although he met the minimal qualifications for these positions, WHC rejected him each time in favor of a more qualified non-disabled fellow employee.[115]

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108. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc) (interpreting ADA to mandate reassignment of disabled employee in spite of superior qualifications of non-disabled employees and applicants).

109. *See* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc) (opining that ADA reassignment provision requires more than merely giving disabled employee opportunity to compete equally with other job applicants for vacant positions).

110. *See id.* (noting that such minimal obligations on employers would render reasonable accommodation provision of ADA "a nullity").

111. *See id.* at 1286 (explaining background of case).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1287. Aka applied for a Financial Manager position but WHC did not grant him an interview. *Id.* After taking the advice of a personnel employee to apply for "less elevated positions," Aka applied for a position as a Central Pharmacy Technician and four File Clerk

Aka filed suit in the United States District Court for the District of Columbia alleging, among other things, that the hospital's failure to reassign him to one of the vacant positions violated the ADA.[116] The district court granted summary judgment for the defendant, but a panel of the D.C. Circuit later reversed and remanded Aka's reasonable accommodation claim.[117] The appellate court then granted the hospital's request to rehear the case en banc.[118]

The court addressed the question of whether a seniority provision in a collective bargaining agreement precluded Aka's reassignment request.[119] The court remanded that issue to the district court to determine whether a different provision in the CBA pertaining to the reassignment of employees who become "handicapped" operates as an exception to the seniority clause.[120] The majority then addressed the dissent's position that, irrespective of the CBA, the hospital did not violate the ADA because Aka's only right in applying for the vacant positions was to be treated equally with all the other applicants.[121] Otherwise stated, the dissent contended "a disabled employee is never entitled to any more consideration for a vacant position than an ordinary applicant, because according the disabled employee any kind of help would be a prohibited preference."[122]

The majority rejected the dissent's position on several fronts.[123] First, the court looked at the ADA's statutory text and concluded that the natural meaning of the word "reassign" necessarily means something more than simply allowing an employee to apply for a job like anyone else.[124] The court reasoned that an employee who applies for and obtains a job elsewhere in the company would not be described as having been "reassigned."[125] Instead, "the core word 'assign' implies some active effort on the part of the employer."[126]

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position openings. *Id.* WHC interviewed Aka for the Central Pharmacy Technician position, but the hospital hired another employee within the hospital. *Id.* Aka also interviewed for all four File Clerk positions, but in each case, the hospital hired less senior but more qualified employees for the positions. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1288.

119. *Id.* at 1301-03.

120. *See id.* (discussing potential conflict between collective bargaining agreement and ADA).

121. *Id.* at 1304.

122. *See id.* at 1314-15 (Silberman, J., dissenting) (arguing that Congress never intended ADA to create preference for disabled employees).

123. *Id.* at 1304.

124. *See id.* (discussing text of ADA).

125. *Id.*

126. *Id.*

The majority also rejected the dissent's position that placing a disabled employee in a vacant position despite the superior qualifications of other applicants amounts to a prohibited preference.[127] The majority's review of the legislative history revealed that Congress intended disabled employees to be treated differently than other job applicants.[128] Summarizing its findings, the majority opinion stated: "Although the ADA's legislative history does warn against preferences for disabled *applicants*, . . . it also makes clear that reasonable accommodations for existing *employees* who became disabled on the job do not fall within that ban."[129] The majority then noted that the recognized limitations already placed on the reassignment accommodation adequately limit the disruption associated with that accommodation.[130]

The D.C. Circuit's decision in *Aka*, while lending support to EEOC policy perspectives, fell short of formally endorsing the agency's conclusion that the ADA automatically compels the reinstatement of a disabled employee who at least minimally meets the requirements of a vacant position. While soundly disagreeing with the dissent's claim that the ADA only requires an employer to permit a disabled employee to compete equally with other applicants for a vacant position, the *Aka* majority failed to explain precisely what additional "active effort" employers must undertake in order to comply with the ADA's reassignment duty.[131]

b. Smith v. Midland Brake, Inc.

The Tenth Circuit's en banc decision in *Smith v. Midland Brake, Inc.*[132] is the leading case in favor of reading the ADA as mandating the reassignment of a disabled employee in spite of the superior qualifications of another appli-

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127. *See id.* (discussing Congressional intent and cases dealing with treatment of disabled employees); *see also id.* at 1315 (Silberman, J., dissenting) ("If the Congress had intended to grant a preference to the disabled – a rather controversial notion – it would certainly not have done so by slipping the phrase 'reassignment to a vacant position' in the middle of this list of reasonable accommodations.").

128. *See id.* at 1304 (examining legislative history of ADA).

129. *Id.* at 1305 (citing to H.R. REP. No. 485 (II), at 56, 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 338, 345) (emphasis in original).

130. *See Aka*, 156 F.3d at 1305 (noting several circumstances in which employer is not required to reassign disabled employee). Some of these circumstances include: (1) when the employee is not "otherwise qualified" for the reassigned position; (2) the reassignment poses an undue hardship on the employer; (3) if no "vacant" position exists; (4) when bumping of another employee would result; and (5) when a transfer would violate a legitimate non-discriminatory policy. *Id.*

131. *See id.* at 1304 (stating that core word "assign" implies some active effort on part of employer).

132. 180 F.3d 1154 (10th Cir. 1999).

cant or employee.[133] Borrowing extensively from the D.C. Circuit's reasoning in *Aka*, the Court of Appeals for the Tenth Circuit concluded that the ADA requires employers to accommodate a qualified disabled employee through placement of the disabled employee in a vacant position, even though a better qualified applicant or employee also is available and interested in that position.[134]

Robert Smith developed muscular injuries and chronic dermatitis as a result of seven years of exposure to chemicals and solvents while working in the defendant's light assembly department.[135] The defendant terminated Smith because his disability rendered him unfit to work in his regular position and his work restrictions disqualified him from any other position in his department.[136] Smith filed suit in the United States District Court for the District of Kansas, but the court granted the defendant's motion for summary judgment on all claims.[137] The Court of Appeals for the Tenth Circuit initially affirmed the district court's grant of summary judgment in favor of the defendant, but then agreed to rehear Smith's ADA claim en banc for the purpose of interpreting the scope of the ADA's reassignment accommodation.[138]

After rejecting the logic of the vacated panel decision and joining the majority of courts in holding that an employee is eligible for reassignment so long as the employee is "qualified" for the vacant position,[139] the court spent the rest of its opinion defining the scope of the reassignment duty under the ADA.[140] The court agreed with the D.C. Circuit in *Aka* that both the statutory

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133. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc) (concluding that ADA requires employers to place qualified disabled employee in vacant position notwithstanding availability of better qualified non-disabled employees and applicants).

134. *Id.*

135. *Id.* at 1160.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1160-64. Midland Brake argued that Smith was not an otherwise "qualified individual with a disability" because he could not perform the essential functions of his current job in the light assembly department regardless of the accommodations provided for him. *Id.* at 1161. The earlier panel decision had accepted this argument in affirming summary judgment for the employer. *See* Smith v. Midland Brake, Inc., 158 F.3d 1304, 1313 (10th Cir. 1998) (providing opinion of earlier panel affirming summary judgment in favor of employer). The great majority of cases now agree that whether a disabled individual qualifies for reassignment is to be gauged, not with respect to his or her current position, but with respect to his or her ability to perform the essential functions of the *vacant position* with or without reasonable accommodation. *See supra* note 62 and accompanying text (citing to other court decisions addressing this issue).

140. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164-80 (10th Cir. 1999) (defining scope of ADA reassignment duty).

text and legislative history of the ADA support the conclusion that reassignment requires employers to do "something more" than merely allowing disabled employees to compete equally with other job applicants.[141] The *Smith* court, however, went beyond *Aka* to define more precisely what "something more" entails when it stated that the "disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[142] To eliminate any doubt as to the majority's interpretation of the statute, the opinion summarized an employer's reassignment obligation as follows:

> The unvarnished obligation derived from the statute is this: an employer discriminates against a qualified individual with a disability if the employer fails to offer a reasonable accommodation. If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.[143]

In reaching its conclusion that the ADA requires employers to place disabled employees in a vacant position despite the superior qualifications of other applicants for the same position, the majority focused on the dissent's contention that reassignment only requires that an employer afford "equal consideration" to disabled employees in filling a vacant position.[144] The majority rejected this contention on several grounds. First, the majority noted that the text of the ADA provides for "reassignment to a vacant position," a duty not tempered by any limiting language.[145] Second, from a practical standpoint, requiring an employer merely to consider a disabled employee in filling a vacancy amounts to little more than a "hollow promise" because:

> The employer could merely go through the meaningless process of consideration of a disabled employee's application for reassignment and refuse it in every instance. It would be cold comfort for a disabled employee to know that his or her application was "considered" but that he or she was neverthe-

141. *See id.* at 1164 ("[T]he word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else." (quoting Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1995) (en banc))).

142. *Id.* at 1166.

143. *Id.* at 1169.

144. *Id.* at 1181 (Kelly, J., dissenting) ("So long as a person with a disability can perform the essential functions of the vacant job with or without reasonable accommodation, that person, like all others, should be afforded equal consideration without regard to disability, perceived or otherwise.").

145. *Id.* at 1164.

> less still out of a job – a job to which he or she was otherwise qualified and as to which he or she had a reasonable claim to reassignment.[146]

Finally, the majority pointed to the promulgation of the EEOC's recent *Enforcement Guidance* and the ADA's legislative history as providing additional support for its decision that reassignment means that a disabled employee has a right in fact to the accommodation so long as the employee is qualified for that position.[147]

2. No Preference Required

The dissenting opinions in *Aka* and *Smith* are representative of the opposing position in this debate.[148] The dissenters view the scope of the reassignment accommodation as only requiring employers to allow disabled employees to compete on an equal basis with other applicants in bidding for vacant positions. An employer who provides such "equal consideration" to disabled employees is deemed to have complied with the ADA's prohibition against discrimination.[149] But, according to these dissents, any reading of the ADA that would compel employers to provide any further assistance would amount to a prohibited preference in favor of the disabled.[150]

The impact that the reassignment accommodation may have on the rights of non-disabled employees particularly troubled Judge Silberman in his *Aka* dissent.[151] In reviewing the ADA authorized list of reasonable accommodations,[152] Judge Silberman found it significant that the other types of accommo-

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146. *Id.* at 1167.

147. *Id.* at 1166-69.

148. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1180-85 (10th Cir. 1999) (Kelly, J., dissenting) (same); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1306-12 (Henderson, J., dissenting) (stating that employers do not have duty to give hiring preferences to disabled applicants); *id.* at 1312-15 (Silberman, J., dissenting) (same).

149. *See Smith*, 180 F.3d at 1181 (Kelly, J., dissenting) ("So long as a person with a disability can perform the essential functions of the vacant job with or without reasonable accommodation, that person, like all others, should be afforded equal consideration without regard to disability, perceived or otherwise."); *see also Aka*, 156 F.3d at 1315 (Silberman, J., dissenting) ("If 'reassignment to a vacant position' is read in context, therefore, it must mean that an employer is obligated . . . to allow a disabled employee to compete (on equal terms with non-disabled employees) for vacant positions.").

150. *See Smith*, 180 F.3d at 1185 (Kelly, J., dissenting) (noting that "a level playing field is what Congress and the President envisioned when the ADA was enacted, not a preference"); *Aka*, 156 F.3d at 1311 (Henderson, J., dissenting) ("Congress made clear when the ADA was enacted that employers were not expected or required to extend such preferences.").

151. *See Aka*, 156 F.3d at 1314-15 (Silberman, J., dissenting) (exploring impact of ADA reassignment accommodation on rights of non-disabled employees).

152. *See supra* note 44 and accompanying text (listing reasonable accommodations provided in ADA).

dations focus solely on the relationship between the employer and disabled employee and do not infringe the rights of non-disabled employees.[153] Accordingly, he concluded that Congress similarly did not intend to infringe the rights of other employees by giving disabled employees a preference in reassignment.[154]

Two Illinois federal district court decisions recently have addressed this issue and sided with the *Aka* and *Smith* dissenters.[155] Both courts concluded that an employer faced with two applicants, one disabled and one better qualified, does not violate the ADA when the employer chooses the more qualified person for the job. The Court of Appeals for the Seventh Circuit recently has affirmed one of these decisions, thereby creating a clear circuit split on this issue.[156]

a. Thompson v. Dot Foods, Inc.

In *Thompson v. Dot Foods, Inc.*,[157] the plaintiff, an over-the-road truck driver, injured his back in a non-work related accident.[158] After spending time on light duty to recover from his injury, Thompson returned to his full-time position only to re-injure his lower back shortly thereafter.[159] While still recuperating from this second injury, a physician recommended that Thompson be placed in a more sedentary environment.[160] Thompson applied for a vacant dispatcher position and, according to the court, "performed well on the

153. *See Aka*, 156 F.3d at 1315 (Silberman, J., dissenting) ("In short, all of these sorts of reasonable accommodation deal with the relationship between the disabled employee and the employer, and have no direct impact on the situation of non-disabled employees or applicants.").

154. *See id.* ("If the Congress had intended to grant a preference to the disabled – a rather controversial notion – it would certainly not have done so by slipping the phrase 'reassignment to a vacant position' in the middle of this list of reasonable accommodations.").

155. *See* EEOC v. Humiston-Keeling, Inc., 54 F. Supp. 2d 798, 814-15 (N.D. Ill. 1999) (construing scope of employer reassignment duty to consist merely of obligation to afford equal treatment to disabled employees in filling vacant positions); Thompson v. Dot Foods, Inc., 5 F. Supp. 2d 622, 628 (C.D. Ill. 1998) (holding that employer satisfied ADA-imposed obligations when employer considered disabled employee with other applicants for vacant position).

156. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (concluding that ADA does not require employer to reassign disabled employee to job for which there is better applicant, provided that employer follows consistent and honest policy to hire best applicant for particular job in question rather than first qualified applicant).

157. 5 F. Supp. 2d 622 (C.D. Ill. 1998).

158. *See* Thompson v. Dot Foods, Inc., 5 F. Supp. 2d 622, 628 (C.D. Ill. 1998) (holding that employer satisfied ADA-imposed obligations when employer considered disabled employee with other applicants for vacant position).

159. *Id.* at 623.

160. *Id.*

tests given by Dot Foods to the dispatcher applicants."[161] The company, however, hired one of the other thirty-one applicants for the position.[162]

Thompson sued, claiming that the employer violated the ADA when the employer failed to reassign him to the vacant dispatcher position.[163] The district court granted the defendant's motion for summary judgment, finding no evidence that the employer discriminated against the plaintiff when it considered him for the dispatcher position.[164] Agreeing with the dissent's position in *Smith*, the court held that the employer satisfied its responsibilities under the ADA when it "considered" Thompson along with the other applicants for the vacant position.[165] The court clearly signaled its view that the reassignment accommodation duty imposes a non-discrimination obligation rather than a preferential obligation in the following passage:

> In the Court's opinion, the ADA did not require Dot Foods to give Thompson its dispatcher position simply because he was disabled. Congress enacted the ADA to eliminate discrimination against the disabled. 42 U.S.C. § 12101(b)(1). Dot Foods considered all of the applications, interviewed some, and hired the person which it believed was the most qualified for the job and best met the company's needs, without regard to any applicant's disability. Federal courts are not to be sitting as super-personnel departments approving and disapproving every new hire, promotion, transfer, demotion, or termination.[166]

Because Thompson was unable to show any evidence that Dot Foods discriminated against him in the application process for the dispatcher position, the court ruled that the employer had satisfied its reasonable accommodation duty under the ADA.[167]

b. EEOC v. Humiston-Keeling, Inc.

In *EEOC v. Humiston-Keeling, Inc.*,[168] another federal district court similarly construed the scope of an employer's reassignment duty as consisting only of an obligation to afford equal treatment to disabled employees in filling a vacant position.[169] Nancy Houser started work for the employer as a picker,

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 627-28.

165. *Id.* at 628.

166. *See id.* at 627 (citing Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 678 (7th Cir. 1997)).

167. *Id.* at 627-28.

168. 54 F. Supp. 2d 798 (N.D. Ill. 1999).

169. *See* EEOC v. Humiston-Keeling, Inc., 54 F. Supp. 2d 798, 814-15 (N.D. Ill. 1999)

a warehouse position that required employees to pick health and pharmaceutical products off of an assembly line.[170] She subsequently injured her right arm and was diagnosed later with tennis elbow.[171] Despite her employer's numerous accommodations, Houser became unable to perform the essential functions of the picker position.[172] Houser then applied and interviewed for a total of eight office jobs within the company, but in each case the employer selected another employee to transfer into the position.[173]

Although the Court of Appeals for the Seventh Circuit at that time had not yet ruled on whether the ADA requires employers to reassign disabled employees despite the superior qualifications of other applicants, the Seventh Circuit decisions holding that the reassignment obligation does not require employers to violate legitimate, non-discriminatory transfer and assignment policies influenced the district court.[174] Following the Seventh Circuit's position on these policies, the court concluded that an employer may choose a better-qualified applicant over a disabled employee:

> Given this indication from the Seventh Circuit [on employer policies], the court can only rule that [the employer] was not required to place Houser in the switchboard/receptionist position when it viewed another employee as more qualified. This would require it to have given Houser priority in reassignment over her more-qualified coworkers. . . . [I]t seems that [the employer's] hiring the most qualified employee for the job is permissible as it resulted from a legitimate, nondiscriminatory policy.[175]

Interestingly, the district court's treatment of the *Humiston-Keeling* case may be more significant for the court's post-judgment rulings than for its initial decision. After the district court granted summary judgment for the employer, the EEOC moved the court to reconsider and to alter or amend the judgment in light of the EEOC's *Enforcement Guidance* that the EEOC promulgated shortly before the court issued its opinion in the case.[176] The EEOC

(construing scope of employer's ADA reassignment duties limited to providing equal treatment to disabled employees in filling occupational vacancies).

170. *Id.* at 801.

171. *Id.* at 802.

172. *Id.* at 803-05.

173. *Id.* at 804-06.

174. *See id.* at 811-13 (analyzing relevant case law); *see infra* notes 184-224 and accompanying text (discussing cases highlighting tension between reassignment duty and employer transfer and assignment policies).

175. *See Humiston-Keeling*, 54 F. Supp. 2d at 813 (concluding employer conduct permissible under ADA when employer followed employer's legitimate, nondiscriminatory policy in hiring better-qualified applicant over disabled employee).

176. *Id.* at 815. The EEOC released its *Enforcement Guidance*, *supra* note 79, on March 1, 1999, but apparently the district court did not consider the EEOC's *Enforcement Guidance*

argued that the court should reconsider its holding in light of this EEOC regulatory pronouncement stating that employers must reassign disabled employees to vacant positions for which they are minimally qualified despite the superior qualifications of other applicants.[177] Because the court's decision was now in direct conflict with EEOC guidelines, the federal agency urged the court to give deference to the EEOC and overrule its initial decision.[178] The court, however, denied the EEOC's motion, stating that the EEOC *Enforcement Guidance* "does not trump . . . the Seventh Circuit's own indication that the ADA is not a 'mandatory preference' statute."[179]

The Court of Appeals for the Seventh Circuit, in affirming the district court's decision, concurred with the district court that it did "not agree with the Commission's interpretation of the statutory provision on reassignment."[180] Judge Posner, writing the opinion for the court, criticized the EEOC's position as giving "bonus points" to individuals with disabilities even where an employee's disability puts him or her at no disadvantage in bidding for an open position.[181] Such a result, according to Judge Posner, would constitute "affirmative action with a vengeance."[182] Instead, the court ruled that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question."[183] Accordingly, the Seventh Circuit's decision in *Humiston-Keeling* is diametrically opposed to the position of the Tenth Circuit in its *Smith* decision.

C. Non-Discriminatory Transfer and Assignment Policies

Similar issues arise when the reassignment of a disabled employee would conflict with a well established, non-discriminatory employer policy. The

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in the district court's March 29, 1999 opinion. *See Humiston-Keeling*, 54 F. Supp. 2d at 816 (following Seventh Circuit to conclude that ADA is not mandatory preference statute).

177. *See Humiston-Keeling*, 54 F. Supp. 2d at 816 ("The new EEOC Guidance states that 'the employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.'").

178. *Id.*

179. *Id.*; *see supra* notes 100-05 and accompanying text (discussing EEOC deference). Although it is unclear from the court's memorandum, it is possible that the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, in which the Supreme Court declined to defer to the EEOC's *Interpretive Guidance*, influenced the district court.

180. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027 (7th Cir. 2000) (expressing disagreement with EEOC's interpretation of ADA reassignment provisions).

181. *Id.*

182. *Id.* at 1029.

183. *Id.*

type of policy at issue here generally concerns an employer's protocol for filling vacant positions. Examples of such transfer and assignment policies are those that use either competitive bidding or seniority as a preferential mechanism for selecting a position's new occupant. On the one hand, interpreting the ADA as requiring employers to make exceptions to such policies and to treat disabled employees differently than non-disabled employees resembles a preference in favor of the disabled and cuts against the equal treatment model reflected in most anti-discrimination statutes. On the other hand, the text, history, and purpose of the ADA suggest that preferential treatment for the disabled may not only be appropriate, but required.

1. Disabled Employee Prevails

Several courts have held that certain employer policies cannot justify an employer's refusal to reassign an otherwise qualified disabled employee to a vacant position. For example, in *Davoll v. Webb*,[184] the Court of Appeals for the Tenth Circuit held that a municipal employer's no-transfer policy must give way to the ADA's reassignment obligation.[185] In *Davoll*, several police officers were forced into retirement after disabling conditions rendered them unable to perform their current jobs and a city-wide policy against employee transfers precluded their placement into other vacant positions.[186] The appeals court affirmed a jury verdict in favor of the officers and, relying heavily on its holding in *Smith*, ruled that a "disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."[187] Thus, because the city failed to reassign the plaintiffs, the court found the city's conduct to be discriminatory under the ADA irrespective of an otherwise valid no-transfer policy.[188]

The Tenth Circuit also affirmed the trial court's grant of plaintiffs' motion in limine prohibiting the defendant from using terms such as "affirmative action," "special rights," and "preferences" in addressing the jury.[189] The court charged the defendant with "erroneously conflat[ing] 'affirmative

184. 194 F.3d 1116 (10th Cir. 1999).

185. *See* Davoll v. Webb, 194 F.3d 1116, 1131-32 (10th Cir. 1999) (holding that ADA's reassignment obligation trumps municipal employer's no-transfer policies).

186. *See id.* at 1125 (discussing Denver's policies on reassignment). The policy prevented employees in the Classified System from transferring into the Career Service system and vice versa even though the two systems were both merit-based and city-operated. *Id.*

187. *Id.* at 1132 (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166 (10th Cir. 1999)).

188. *See Davoll*, 194 F.3d at 1132 (recognizing that failure to reassign disabled employees may constitute discrimination and provide basis for liability under ADA).

189. *Id.* at 1136.

action' with the statutory definition of discrimination."[190] The court noted that Congress, in enacting the ADA, expressly included reassignment to a vacant position in its listing of reasonable accommodations and specified that the type of discriminatory conduct banned under the statute included an employer's failure to reasonably accommodate the known physical and mental impairments of disabled individuals.[191] Therefore, "plaintiffs' request for reassignment [was] a reasonable accommodation, not 'affirmative action,'"[192] and the defendant's use of the term "provides a conclusory (and politically loaded) description of a requested accommodation."[193]

On the flip side of no-transfer policies are policies that permit transfers, but require that all employees compete equally for a position. In *Ransom v. Arizona Board of Regents*,[194] the federal district court of Arizona struck down such an employer policy.[195] Eileen Ransom worked for the University of Arizona as an administrative assistant in the College of Nursing.[196] When Ransom's carpal tunnel and myofascial pain syndrome worsened to the point where she was unable to perform her word processing duties, she requested a reassignment to a position with lighter word processing demands.[197] This request, however, ran afoul of a policy requiring that "all employees, including those with disabilities, must compete for job reassignments through the competitive hiring process."[198] Ransom was unable to secure another position through this process, and the university terminated her employment.[199]

The court held, as a matter of law, that the defendant's competitive reassignment policy violated the ADA.[200] The court rejected the university's contention that disabled employees are entitled to reassignment "only in the same way as an employer provides for reassignment of nondisabled employees."[201] Instead, the court found that the defendant's competitive transfer

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190. *Id.* at 1137 (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999)).

191. *See Davoll*, 194 F.3d 1116, 1137 (10th Cir. 1999) (examining legislative history of ADA).

192. *Id.*

193. *Id.* at 1137 n.14.

194. 983 F. Supp. 895, 899 (D. Ariz. 1997).

195. *See* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895, 899 (D. Ariz. 1997) (holding employer policy requiring qualified disabled employee seeking accommodation through reassignment to compete with all other applicants for vacant position violates ADA).

196. *Id.* at 898.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See id.* at 899 (holding employer competitive reassignment violates ADA).

201. *Id.* at 902.

policy effectively "prevents" the reassignment of disabled employees and, therefore, "discriminates against 'qualified individuals with disabilities.'"[202]

The *Ransom* court also rejected the university's affirmative action argument, observing that the undue hardship defense provides employers with adequate means to challenge particularly burdensome reassignment requests.[203] Looking at that defense in the context of the case, the court stated:

> Defendants have not explained, and the Court cannot imagine, how the reassignment of two or three disabled employees every couple of years to positions they are qualified to fill would cause the University to completely modify its personnel system's competitive hiring policy. In short, the Defendants offer no evidence... that accommodating such individuals [by reassignment] would cause it an undue hardship.[204]

2. *No Preference Required*

Other courts have held that the ADA's reassignment accommodation does not require employers to ignore, amend, or make exception to their legitimate, non-discriminatory transfer and assignment policies. The decision of the Court of Appeals for the Fifth Circuit in *Daugherty v. City of El Paso*[205] is representative of this position.[206] *Daugherty* involved a city charter that established priorities in filling vacant positions within the city's civil service system.[207] Carl Daugherty worked as a part-time city bus driver until he was diagnosed with insulin-dependent diabetes.[208] Because the diabetes rendered him unable to perform his job, Daugherty sought reassignment to another position.[209] Although the city charter governing reassignments gave him preference for his disability, Daugherty was unable to secure another position because that same policy gave full-time employees priority over part-time workers.[210] The city defended its policy on the ground that giving Daugherty, a part-time employee, a full-time job would elicit complaints from other full-time employees who had been waiting for that position and had more seniority than Daugherty.[211] The court agreed, concluding that the city was not required

202. *Id.* at 903.

203. *See id.* at 901-03 (noting availability of undue hardship defense).

204. *Id.* at 903.

205. 56 F.3d 695 (5th Cir. 1995).

206. *See* Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (holding ADA does not require employers to give disabled persons priority over non-disabled persons in hiring and reassignment employment decisions).

207. *Id.* at 699.

208. *Id.* at 696.

209. *Id.*

210. *Id.* at 699.

211. *Id.*

to make an exception for Daugherty under the policy.[212] The court further explained:

> [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. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.[213]

Since *Daugherty*, numerous courts have adopted the Fifth Circuit's equal treatment model in interpreting the reassignment accommodation and have sustained non-discriminatory employer policies. For example, in *Duckett v. Dunlop Tire Corp.*,[214] the Court of Appeals for the Eleventh Circuit held that the ADA does not require an employer to violate its "no roll back" policy, which prohibited employees from transferring from salaried positions to production positions within the bargaining unit.[215] Similarly, in *Barnett v. U.S. Air, Inc.*,[216] the Court of Appeals for the Ninth Circuit held that an employer did not have to make an exception to its decades-old seniority policy in order to reassign a disabled employee.[217] The *Barnett* court concluded that requiring employers to make exceptions to legitimate, non-discriminatory practices is tantamount to affirmative action in favor of the disabled.[218]

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212. *See id.* at 700 (concluding that plaintiff failed to show any discrimination based on plaintiff's disability).

213. *Id.* Many other court decisions agree with this viewpoint and have quoted this language from *Daugherty* favorably. *See, e.g.*, Malabarba v. Chicago Tribune Co., 149 F.3d 690, 700 (7th Cir. 1998) (quoting *Daugherty* and stating, "Congress enacted the ADA to establish a 'level playing field' for our nation's disabled workers, . . . it did not do so in the name of discriminating against persons free from disability"); Wernick v. Fed. Reserve Bank, 91 F.3d 379, 384-85 (2d Cir. 1996) (quoting *Daugherty* and stating, "Congress intended simply that disabled persons have the same opportunities available to them as are available to nondisabled persons").

214. 120 F.3d 1222 (11th Cir. 1997).

215. *See* Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (holding that ADA does not require employer to transfer employee from salaried position into production position against employer's business policy).

216. 196 F.3d 979 (9th Cir. 1999).

217. *See* Barnett v. U.S. Air, Inc., 196 F.3d 979, 991 (9th Cir. 1999) (concluding that ADA requires "no more than equality among disabled and nondisabled employees in hiring and reassignment decisions), *vacated by* 201 F.3d 1256 (9th Cir. 2000) (scheduling rehearing en banc).

218. *See Barnett*, 196 F.3d at 991 (concluding that requirement to force employers to make exceptions to legitimate, non-discriminatory employment practices in favor of disabled employees would be functionally equivalent to affirmative action program). Numerous courts have found that an employer does not have to violate a seniority provision in a collective bargaining agreement in order to reassign a disabled employee. *See supra* note 63 and accompanying text (explaining that majority of courts have adopted rule that employers are not required to violate applicable seniority provision of collective bargaining agreement in order to comply with ADA's reassignment accommodation). The *Barnett* decision extends this principle to seniority policies

The Court of Appeals for the Seventh Circuit, in *Dalton v. Subaru-Isuzu Automotive, Inc.*,[219] has provided the most extensive discussion of the tension between reassignment and employer policies.[220] In that case, the Seventh Circuit rejected the plaintiffs' request that they receive permanent positions within the employer's established temporary job placement program for employees with temporary disabilities.[221] The court, after reviewing the statute and existing case law, concluded that the ADA does not compel an employer "to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers."[222] The court expressed the belief that "the contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[223] The Seventh Circuit cautioned, however, that an employer's blanket "no transfer" policy might have to give way to the ADA's reassignment duty if such a policy unduly restricted the range of jobs available for reassignment.[224]

IV. Reassignment to a Vacant Position: Reasonable Accommodation or Affirmative Action?

A. The Growing Discomfort with Affirmative Action

The debate over affirmative action, at least in the context of race and gender, has been long and sustained.[225] Judicial and political receptiveness to

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that the employer unilaterally establishes without the benefit of collective negotiations. *See Barnett*, 196 F.3d at 990-91 (concluding ADA reassignment provision does not require employer to make exception to employer's established seniority policy to favor disabled employee); *see also* Foreman v. Babcock Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (agreeing in dicta).

219. 141 F.3d 667 (7th Cir. 1998).

220. *See* Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998) (holding that ADA does not require employer to abandon legitimate non-discriminatory company policies defining job qualifications).

221. *See id.* at 680 (rejecting plaintiffs' request for permanent reassignment to employer's program for employees with temporary disabilities).

222. *Id.* at 678. The Seventh Circuit later reaffirmed this holding, stating that an employer is not required to make exceptions to a consistently applied policy of hiring the best applicant for the job. *See* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000) (concluding that ADA does not require employer to reassign disabled employee to job for which there is better applicant where employer has consistent and honest policy to hire best applicant).

223. *Dalton*, 141 F.3d at 679.

224. *See id.* (finding that employer blanket no transfer may remain susceptible to challenge under ADA).

225. *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 44 (2000) (stating that "affirmative action has been controversial at every turn"); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (summarizing and critiquing ongoing affirmative action debate); Mark C.

affirmative action programs has decreased substantially during the last quarter-century to the point where such programs are permitted, if at all, in only the narrowest of circumstances.[226] In its first affirmative action case, *Regents of the University of California v. Bakke*,[227] the Supreme Court recognized the validity of affirmative action programs, provided that such programs did not use quotas and were justified through either a remedial or diversity rationale.[228] Since *Bakke*, one major lower court decision has rejected the diversity rationale,[229] and the Supreme Court has drawn it into serious question.[230] Today, federal, state, and local government affirmative action programs are subject to

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Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 145 (1998) ("Affirmative action on the basis of race has been the subject of immense controversy.").

226. *Compare* Johnson v. Transp. Agency, 480 U.S. 616, 642 (1987) (holding that appellee appropriately considered female employee's gender as one factor in promotion determination and that appellee's consideration of employee's gender was consistent with Title VII), United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (holding that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans), *and* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (holding Title VII proscribes only those racial classifications that would violate Equal Protection Clause or Eighth Amendment), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995) (holding both state and federal racial classifications subject to strict scrutiny and must serve compelling governmental interest and be narrowly tailored to further that interest), City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (concluding appellant's plan requiring general contractors awarded municipal construction projects to subcontract thirty percent of dollar amount of contracts to minority-owned businesses was not narrowly tailored to serve compelling governmental interest), Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding that appellee law school's admission policy giving "substantial racial preferences" to minority students violated Equal Protection Clause), *cert. denied*, 518 U.S. 1033 (1996), *and* Taxman v. Bd. of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996) (holding non-remedial affirmative action plan intended to promote "racial diversity" violated Title VII), *vacated as moot*, 522 U.S. 1010 (1997).

227. 438 U.S. 265 (1978).

228. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (holding Title VII proscribes only those racial classifications that would constitute violation of Equal Protection Clause or Eighth Amendment).

229. *See* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (holding that diversity is not sufficiently compelling governmental interest to withstand strict scrutiny review), *cert denied*, 518 U.S. 1033 (1996).

230. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221 (1995) ("The Court's failure in *Bakke* to produce a majority opinion . . . left unresolved the proper analysis for remedial, race-based government action"); *id.* at 241 (Thomas, J., concurring) ("In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (noting that "unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility").

strict scrutiny review, requiring the government to demonstrate a compelling governmental interest that is narrowly tailored to achieve that interest.[231]

The Supreme Court, in *United Steelworkers v. Weber*[232] and *Johnson v. Transportation Agency*,[233] has been somewhat more receptive to affirmative action programs in private employment, holding that voluntary affirmative action programs are valid if they meet three criteria: (1) the plan is designed to break a historic pattern of under-representation in traditionally segregated occupations; (2) the plan does not unnecessarily trammel the interests of white employees; and (3) the plan is temporary in duration and designed to eliminate a manifest racial imbalance in the workforce.[234] Even here, however, courts have refused to expand the scope of such programs beyond the narrow limits defined in the Supreme Court's early decisions.[235]

In addition to the heightened judicial scrutiny of affirmative action programs, the political and academic support for affirmative action has all but vanished.[236] Academic scholars question its legitimacy,[237] and states like California have garnered enough public support to pass Proposition 209 abolishing affirmative action.[238] The combined effect of such responses compels the

231. *See Adarand Constructors*, 515 U.S. at 204 (addressing federal affirmative action programs); *J.A. Croson Co.*, 488 U.S. at 511 (addressing state affirmative action programs).

232. 443 U.S. 193 (1979).

233. 480 U.S. 616 (1987).

234. *See* Johnson v. Transp. Agency, 480 U.S. 616, 628-30 (1987) (providing criteria necessary to validate voluntary affirmative action program); United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979) (outlining criteria validating defendant's affirmative action program); *see also* Barbara J. Fick, *The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159 (1997) (summarizing legal framework for testing validity of private sector affirmative action programs).

235. *See, e.g.*, Taxman v. Bd. of Educ., 91 F.3d 1547, 1565 (3d Cir. 1996) (rejecting school board's affirmative action plan designed to increase cultural diversity).

236. *See* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1463 ("Affirmative action programs have been under siege from every angle in recent years."); Levitsky, *supra* note 13, at 88 (noting that "[o]verall, there is little White support for affirmative action in any of its forms"); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 953 (1996) (describing "a broad-based assault on affirmative action – in the courts, the legislatures, and the media").

237. *See, e.g.*, William Bradford Reynolds, *An Experiment Gone Awry*, *in* THE AFFIRMATIVE ACTION DEBATE 130 (George Curry ed., 1996) (arguing that affirmative action is inherently discriminatory); Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 814 (1998) (questioning diversity rationale as adequate means for supporting affirmative action programs in higher education).

238. *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431, 1446 (9th Cir. 1997) (upholding validity of Proposition 209); *see also* Wash. Initiative Measure No. 200, WASH. REV. CODE § 49.60.400 (2000) (passed by popular vote on November 3, 1998). Polling data further suggests that a large majority of white Americans oppose affirmative action. *See, e.g.*,

conclusion that, at least in the context of race, affirmative action, even where voluntary, is standing on thin ice.

Around the same time that affirmative action was losing popularity, Congress enacted the ADA "with considerable fanfare and support."[239] Until recently, most Americans viewed the ADA's reasonable accommodation requirement with favor, even though this obligation is mandatory rather than voluntary in nature. The reasonable accommodation mandate was viewed as "non-problematic" because of its "perceived fairness."[240] But as the federal courts increasingly have used anti-affirmative action rhetoric in interpreting the ADA,[241] the question arises whether the generally negative reaction toward affirmative action has fueled such attacks or whether a backlash specifically against the ADA is underway.[242] Whatever the reason, the recent conflict over the scope of an employer's duty to reassign disabled employees raises two significant questions: (1) Are reasonable accommodation, in general, and reassignment, in particular, forms of affirmative action? (2) If so, are the needs of disabled individuals sufficiently different from considerations of race so as to justify these affirmative requirements?

B. Similarities Between Reasonable Accommodation and Affirmative Action

Reasonable accommodation certainly is a form of affirmative action to the extent that "[i]t requires employers to take certain steps, short of an undue hardship, to assist disabled applicants and employees who otherwise fall short

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Lawrence Bobo & Ryan Smith, *Antipoverty Policy, Affirmative Action, and Racial Attitudes, in* CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 365, 381 (Sheldon H. Danzieger et al. eds., 1994) (discussing polling data indicating that, in 1990, some 61.4% of surveyed whites were "strongly against" affirmative action for blacks with another 21.1% simply "against" such policies).

239. *See* Befort & Lindquist Thomas, *supra* note 31, at 27 (noting "considerable fanfare and support" for ADA).

240. *See* Long, supra note 17, at 1344 (concluding that reasonable accommodation under ADA is "non-problematic" because of its "perceived fairness"); *see also* LAWRENCE & MATSUDA, *supra* note 13, at 108 (noting American public's acceptance of affirmative action for disabled employees despite significant costs imposed on employers to reasonably accommodate disabled employees).

241. *See supra* Part II.B.2 and Part II.C.2 (discussing cases excusing employers from reassigning disabled employees on grounds that ADA does not require preferential treatment in favor of disabled employees).

242. *See* Diller, *supra* note 225, at 22 (suggesting that federal courts are currently engaged in "some kind of judicial backlash against the ADA."); *see also* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (employing empirical analysis of decided court decisions to find that defendants prevail in 92.7% of all ADA cases).

of required job performance capabilities."[243] With this requirement, the ADA goes beyond the equal treatment model of discrimination embodied in most anti-discrimination statutes[244] to further obligate employers to provide favorable workplace adjustments to the disabled regardless of whether those same adjustments are provided to the non-disabled.[245] The similarities between reasonable accommodation and affirmative action are most acute when the accommodation in question is reassignment. For reassignment, as with affirmative action, protected class status serves as a preferential basis for selecting someone to fill a job position. Finally, the affirmative action and reasonable accommodation concepts also bear some similarity in terms of serving as a remedy for past discrimination.[246]

C. Differences Between Reasonable Accommodation and Affirmative Action

Despite the similarities, reasonable accommodation under the ADA differs significantly from affirmative action in other contexts such that using the affirmative action analogy to justify an employer's failure to reassign a qualified individual with a disability is misplaced. The text, practicalities, and policies underlying the ADA's reasonable accommodation requirement illustrate that reasonable accommodation should not be equated with traditional forms of affirmative action.[247]

The first and most obvious difference between affirmative action in the race and disability contexts flows from the language of the respective statutes

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243. *See* Befort & Lindquist Thomas, *supra* note 31, at 75 (analyzing reasonable accommodation provision of ADA); *see also* Karlan & Rutherglen, *supra* note 29, at 14 ("Reasonable accommodation is affirmative action in the sense it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason.").

244. *See infra* notes 248-55 and accompanying text (comparing ADA's discrimination formula with equal treatment model of discrimination).

245. *See* Diller, *supra* note 225, at 43 (stating that affirmative action and reasonable accommodation concepts both "rely on visions of equality that call for differential treatment of the subordinated individual or group").

246. The ADA's mandate for employers to provide reasonable accommodations to the known physical and mental impairments of qualified individuals with disabilities is one means to remedy past discrimination toward the disabled, which, as discussed *supra* notes 231-35 and accompanying text, is perhaps the only acceptable rationale left to justify traditional affirmative action. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 943-44 (1993) (viewing ADA's reasonable accommodation as means to remedy subconscious and negligent discrimination).

247. *See* Karlan & Rutherglen, *supra* note 29 at 14 (observing that "a number of key differences make reasonable accommodation under the ADA a distinct, and novel, form of special treatment").

themselves. Most anti-discrimination statutes embrace an *equal treatment* model of discrimination.[248] Title VII, for example, prohibits discrimination "because of" certain listed characteristics such as an employee's race or gender.[249] This language, implementing an equal treatment approach to discrimination, compels employers to make employment decisions without reference to the listed traits. Put another way, prohibited discrimination occurs whenever an employer decides not to hire someone because of a specific trait, or conversely, whenever an employer takes *favorable* account of a person's race or gender in making an employment decision. Thus, except for those narrowly tailored, voluntary affirmative action plans discussed above, most employer efforts at affirmative action are prohibited under statutes containing an *equal treatment* model of discrimination.[250]

The ADA uses a different formula in banning disability-based discrimination.[251] The ADA goes beyond the equal treatment model also to require *different treatment* in the form of requiring employers to provide reasonable accommodations to otherwise qualified individuals with a disability.[252] Under this different treatment model, an employer who merely refrains from treating disabled employees differently than non-disabled employees may be engaging

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248. For a discussion of the equal treatment model of anti-discrimination statutes, see generally Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (describing Title VII's "norm of color blindness") and 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 traditional civil rights paradigm as one requiring "equal playing field" for all workers).

249. 42 U.S.C. § 2000e-2(a) (1994). Title VII also protects against discrimination on the basis of color, religion, or national origin. *Id.* The ADEA similarly bans discrimination "because of" age. 29 U.S.C. § 623(a) (1994). For purposes of discussion, the authors have chosen to make reference only to race and gender.

250. *See supra* notes 232-36 and accompanying text (discussing three-prong test for private employment affirmative action programs).

251. *See* Befort & Lindquist Thomas, *supra* note 31, at 68-69 (paraphrasing ADA's more complicated anti-discrimination formula). Befort and Lindquist Thomas stated:

> No employer shall discriminate against a *qualified* individual with a *disability* because of the disability of such individual who, with or without *reasonable accommodation*, can perform the essential functions of the employment position, unless the accommodation would impose an *undue hardship* on the operation of the business of that employer, or unless such individual would pose a *direct threat* to the health or safety of others.

Id.

252. For a discussion of how the ADA adopts a different treatment model of anti-discrimination law, see generally Diller, *supra* note 225, at 40-44 (noting that "ADA relies on a different treatment vision of equality") and Miller, *supra* note 248, at 514, 516-21 (describing new civil rights paradigm as one that "recasts the notion of a 'level' playing field into one of an 'accessible' playing field").

in prohibited discrimination.[253] For example, an equal treatment approach would sustain an employer policy prohibiting all dogs from the workplace. Such a policy, however, would have an adverse effect on a blind person who uses a guide dog. Treating the blind person differently by making an exception to the policy may be required in order to provide equal opportunity for that person.[254] The concept of reasonable accommodation, accordingly, represents Congress's recognition that "in order to treat some persons equally, we must treat them differently."[255] Therefore, as a purely statutory matter, Congress's decision to define discrimination to include a failure to reasonably accommodate justifies the affirmative action taken in favor of disabled individuals.[256]

In addition to being statutorily authorized, the context in which reasonable accommodation occurs under the ADA differs significantly from traditional affirmative action plans. Conventional affirmative action programs consist of pre-designed policies through which employers seek to increase the proportion of a historically under-represented minority group in its overall workforce.[257] Employers typically establish target goals through a statistical comparison of their workforce with the relevant labor market.[258] Once a plan is established, an employer implements the plan throughout its recruitment and hiring processes until the numerical goals for the under-represented group are met.

In contrast, reasonable accommodation under the ADA occurs on a much more individualized basis.[259] The reasonable accommodation process does not involve the setting of pre-determined numerical goals or quotas. Rather,

253. *See* Weber, *supra* note 225, at 146 ("[I]t is impossible to deny that for disability, if for no other characteristic, perfectly equal treatment can constitute discrimination.").

254. *See* Miller, *supra* note 248, at 514 ("For disabled people who need reasonable accommodations in order to perform the essential functions of their jobs, 'equal' treatment is tantamount to a barrier to employment, not a gateway.").

255. *See* Karlan & Rutherglen, *supra* note 29, at 10 (exploring concept of reasonable accommodation).

256. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (noting that "although the dissent would prefer to view the reasonable accommodation of reassignment as 'affirmative action,' Congress chose to consider it otherwise when it defined the failure reasonably to accommodate (including reassignment) as a prohibited act of discrimination. It is the Congressional definition, of course, that must govern our analysis."); Colker, *supra* note 18, at 225 (criticizing courts for disingenuously "construing the ADA to erase the reassignment/reasonable accommodation rule" in name of avoiding affirmative action).

257. *See* Karlan & Rutherglen, *supra* note 29, at 17 (describing conventional affirmative action plans).

258. *Id.*

259. *See id.* at 14 (stating that "accommodation is far likelier to involve *personalized* special treatment").

reasonable accommodation, and thus the ADA's version of affirmative action, occurs only after the employer and disabled applicant or employee have engaged in an interactive process. This process is intended to identify both the essential functions of the position in question and the special needs of the disabled person.[260] Thus, the consideration of the individual's protected class status is not made in the shadows of the recruiting committee, as is the case with traditional affirmative action programs. The ADA's reasonable accommodation process, instead, requires an open dialogue between the parties in a mutual search for workable options.[261] This dialogue, moreover, does not guarantee an accommodation in favor of a disabled worker. Employers are required to accommodate the physical and mental impairments of an individual with a disability only if the individual is ultimately capable of performing the essential functions of the job[262] and the employer who provides the accommodation does not suffer an undue hardship.[263]

These differences also impact the frequency with which reasonable accommodations in favor of the disabled occur. This is particularly true when reassignment is at issue. The EEOC suggests that reassignment should be the accommodation of last resort, one that the employer should consider "only when accommodation within the individual's current position would pose an undue hardship."[264] The inapplicability of reassignment at the hiring stage, the point at which conventional affirmative action programs is most pervasive, further diminishes the frequency of reassignment.[265]

The inapplicability of reassignment at the application stage underscores another significant distinction when compared to traditional affirmative action programs. Reassignment operates only as a post-hire mechanism through which an employer may retain the services of a current employee with a disability. No other employee loses employment as a result of this job transfer. Affirmative action, in contrast, operates as a pre-hire formula that reserves employment opportunities for one group of applicants at the expense of another group of applicants.

Finally, from a policy standpoint, the "perceived fairness" of reasonably accommodating the known impairments of disabled individuals simply may be

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260. *See* C.F.R. app. § 1630.2(o)(3) (1999) (stating that determination of appropriate reasonable accommodation requires employer to engage in "informal, interactive process" with qualified disabled individual).

261. *See supra* notes 54-60 and accompanying text (discussing EEOC recommended interactive process).

262. *See* 42 U.S.C. § 12111(8) (1994) (defining "qualified individual with a disability").

263. *See id.* § 12111(10) (defining "undue hardship").

264. 29 C.F.R. app. § 1630.2(o) (1999).

265. *See supra* notes 81-83 and accompanying text (stating that reassignment is available to employees, not applicants).

greater than in other affirmative action contexts.[266] While consideration of a person's race and gender is inappropriate because neither characteristic bears any inherent relationship to an individual's abilities, consideration of a person's disability may be required because the individual's impairment often is directly related to the individual's ability to perform the job.[267] Reasonable accommodation thus ensures that disabled persons are not deprived of job opportunities to which they otherwise might not have access under a disability-blind statute. In other words, "[o]nce the need for different treatment is recognized, affirmative action for persons with disabilities emerges as one of many forms of different treatment that might be needed to achieve equality."[268]

Therefore, although similarities can be drawn between affirmative action and reasonable accommodation, significant differences justify keeping the two concepts separate. In the final analysis, it is best to determine the validity of reasonable accommodation on its own merits without the considerable baggage of the affirmative action debate.

V. Drawing Workable Boundaries for Reassigning Individuals with Disabilities

The affirmative action debate aside, some attempt to clarify the judicial dissonance in the federal courts is necessary if the ADA is to achieve the goals Congress intended. Predictability, rather than confusion, best charts that course. This Part of the Article attempts to draw policy-based boundaries for resolving the two difficult issues currently burdening the reassignment accommodation.

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266. *See* Long, *supra* note 17, at 1344 (concluding that "disability-based affirmative action is viewed as non-problematic . . . [because of] the perceived fairness of the reasonable accommodation requirement"). *But see* LAWRENCE & MATSUDA, *supra* note 13, at 108 ("How is it that the American public could accept affirmative action for the disabled, even given the significant expenditures that reasonable accommodation requires, but could not accept affirmative action for those burdened with racial discrimination? The answer: racism.").

267. *See* Diller, *supra* note 225, at 40 (observing that "unlike race, disability is frequently a legitimate consideration in employment decisions").

268. *See* Weber, *supra* note 225, at 146 (discussing affirmative action in ADA context); *see also* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895, 901 (D. Ariz. 1997) (stating that ADA's reasonable accommodation requirement serves "as a method of leveling the playing field between disabled and non-disabled employees, in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer"); Diller, *supra* note 225, at 41 (stating that "the reasonable accommodation requirement is not a means of giving people with disabilities a special benefit or advantage; rather, it is a means of equalizing the playing field so that people with disabilities are not disadvantaged by the fact that the workplace ignores their needs"); R. George Wright, *Persons with Disabilities and the Meaning of Constitutional Equal Protection*, 60 OHIO ST. L.J. 145, 162-73 (1999) (arguing that equality for individuals with severe disabilities requires treatment that takes these disabilities into account).

A. Disabled Employee vs. Better-Qualified Alternative Worker

An employer may be faced with the dilemma of filling a vacancy with a disabled individual or a more qualified individual in either of two situations: (1) a qualified employee with a disability and a better-qualified *applicant* who is not a current employee both desire to fill a vacant position, or (2) a qualified employee with a disability and a better-qualified *co-employee* both desire to transfer into a vacant position. Each of these contexts will be discussed below.[269]

1. Qualified Employee with a Disability vs. Better-Qualified Applicant

When the applicants for a vacant position include an employee who has become unable to perform his or her current job as a result of a disability and an applicant, who, although possessing superior qualifications for the position, has not worked previously for the employer, the ADA should be interpreted to require the employer to place the disabled employee in that vacant position so long as he or she is qualified for that position. Important policy considerations support this conclusion. First and foremost is the ADA's central purpose of helping disabled individuals to participate fully in the American workplace.[270] In enacting the ADA, Congress explicitly articulated the statute's goals to include assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[271] The ADA's legislative history further instructs employers that, when faced with the choice of terminating or retaining a disabled employee, an employer should choose the latter option:

> If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker.[272]

In addition to effectuating the purposes of the ADA, significant practical advantages also support preferring a disabled employee over a non-disabled applicant. For instance, placing the disabled employee in the vacant position

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269. The dilemma of selecting between a disabled *applicant* and a better-qualified alternative worker does not occur at the hiring stage because, as previously mentioned, reassignment is not required for disabled applicants. *See supra* notes 81-83 and accompanying text (stating that reassignment is available for employees, not applicants).

270. *See* 42 U.S.C. § 12101(a) (1994) (addressing purpose and goals of ADA); *see also supra* notes 1-4 and accompanying text (discussing principal motivation of Congress for enacting ADA).

271. 42 U.S.C. § 12101(a)(8) (1994).

272. H.R. REP. No. 485 (II), at 63 (1990), *reprinted in* 1990 U.S.S.C.A.N. 303, 345.

allows the employer to retain someone who is familiar with the intricacies and policies of the employer's business.[273] The employer also gains in terms of boosting the morale and productivity of other workers because the employer's action demonstrates that the employer values their work and continued employment.[274]

Finally, the ADA recognizes the principle, also acknowledged in many other labor and employment law contexts, that a current employee has a weightier interest in retaining employment than does an applicant in securing a job not currently held.[275] Thus, the ADA provides that employers may require pre-employment medical examinations for all applicants who have received a conditional job offer for a position.[276] However, an employer may require such an examination in a post-hire setting only if the conduct of the examination "is shown to be job-related and consistent with business necessity."[277] Similarly, and closer to the matter at issue, only current employees have a right to request reassignment to another position as a reasonable accommodation.[278] Applying that same logic to the issue at hand, the interest of a disabled employee in retaining employment through means of reassignment generally should trump the interest of an applicant, even a better-qualified one, in seeking to obtain a job not currently held.

2. *Qualified Employee with a Disability vs. Better-Qualified Employee*

Many of the reasons noted in the prior section for favoring the reassignment claim of a disabled employee disappear when the competing worker is a fellow current employee. Nevertheless, the general rule in this situation also should require that the employer place a qualified disabled employee in the vacant position. Otherwise, the ADA's central purpose of enabling individ-

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273. *See* Barth v. Gelb, 2 F.3d 1180, 1189 (D.C. Cir. 1993) ("A willingness to accommodate incumbent employees increases the likelihood that they – and their knowhow – will be retained by the employing agency.").

274. *See id.* (noting that retention of incumbent employee increases employee morale and productivity).

275. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 576-78 (1972) (distinguishing between employee's property interest in continued employment based upon terms of contractual arrangement, as opposed to unilateral expectation of being rehired after expiration of contract term); Loder v. City of Glendale, 927 P.2d 1200, 1222-26 (Cal. 1997) (recognizing that employer has greater constitutional leeway to require job applicants to submit to mandatory drug test than employer does for current employees).

276. *See* 42 U.S.C. § 12112(d)(3) (1994) (addressing employment entrance examinations).

277. *Id.* § 12112(d)(4)(A).

278. *See* 29 C.F.R. app. § 1630.2(o) (1999) (stating that "reassignment is not available to applicants").

uals with disabilities to remain in "the economic and social mainstream of American life" would be defeated.[279]

To demonstrate how the ADA's purpose would be curtailed in the absence of such a rule, consider the fate of each employee if he or she does not obtain the vacant position. If the disabled employee is denied the requested transfer, the disabled employee is out of a job. Under the ADA's reasonable accommodation scheme, an employer's duty to reassign arises only if a disabled employee cannot be accommodated in the disabled employee's current position.[280] Because reassignment is the accommodation of last resort, the opportunity to be placed in this vacant position represents the disabled employee's "last chance" to remain employed with that particular employer.[281]

In contrast, the consequences suffered by a more qualified employee who does not obtain the desired transfer are less severe. That employee can still remain in the employee's current position. The non-disabled employee's excellent qualifications, moreover, make the non-disabled employee a strong candidate for a future transfer or promotion. In short, the non-disabled worker remains employed and opportunities to move into more desirable positions are deferred rather than lost. Given this significant disparity in consequences, as well as the purpose of helping disabled persons remain in the workplace, the scale generally should tip in favor of the disabled employee.

From the employer's standpoint, although the employer is not hiring the "most qualified" person for the position, the employer nonetheless gains in several other respects. First, the employer complies with the ADA's statutory mandate to reasonably accommodate the known physical or mental disabilities of individual employees, thus avoiding a violation of the ADA and any potential lawsuits that may result.[282] In contrast, the non-disabled employee cannot sue the employer because, unlike other non-discrimination statutes such as Title VII, a non-disabled individual has no standing under the ADA.[283] Second, because the employer likely will succeed in placing the other well-qualified employee in the next similar vacant position, the employer only suffers a delay in benefitting from the employee's qualifications. Third, the

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279. *See* S. REP. NO. 101-116, at 20 (1989) (discussing central purpose of ADA).

280. *See* 29 C.F.R. app. § 1630.2(o) (1999) (noting that, in general, reassignment should be considered "only when accommodation within individual's current position would pose undue hardship").

281. *See supra* note 84 and accompanying text (recognizing reassignment as reasonable accommodation of last resort).

282. *See* 42 U.S.C. § 12112(b)(5)(A) (1994) (defining discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee").

283. *See* Karlan & Rutherglen, *supra* note 29, at 21 (noting how reverse discrimination lawsuits are not available under ADA).

limitations on reassignment recognized in the EEOC guidelines minimize the number of occasions in which this situation will present itself.[284] As the District Court of Arizona aptly stated: "[T]he Court cannot imagine, how the reassignment of two or three disabled employees every couple of years to positions they are qualified to fill" would result in a significant hardship for most employers.[285]

Finally, the undue hardship defense provides an adequate escape valve for employers who are able to demonstrate that their business operations will suffer if they cannot place better-qualified employees into desired positions. Under the ADA, an employer is relieved of its duty to reasonably accommodate the known disabilities of an individual if it can demonstrate that doing so would require "significant difficulty or expense."[286] Whether a particular reasonable accommodation amounts to an undue hardship is considered in light of several factors listed in the statute.[287] Among these factors is a consideration of "the impact . . . of such accommodation upon the operation of the facility."[288] According to the EEOC's *Interpretive Guidance*, an employer need not undertake "any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[289] Therefore, in circumstances in which the better-qualified employee's skills are vital to the successful performance of the essential functions of the position in question, an employer may be able to demonstrate that not filling the vacancy with this employee would amount to an undue hardship.

The undue hardship defense represents Congress's attempt to balance the legitimate business interests of employers with the legitimate needs of the disabled. The undue hardship calculus is a more desirable means for testing an employer's decision to place a better-qualified person in a vacant position than the adoption of a contrary approach that would severely curtail the transfer rights of the disabled. Although the latter solution would avoid the "politically loaded" label of affirmative action, it also would serve to elevate an inapt rhetorical debate over the fundamental goals of the ADA.[290]

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284. *See supra* notes 76-92 and accompanying text (discussing reassignment under EEOC guidelines).

285. *See* Ransom v. Ariz. Bd. of Regents, 983 F. Supp. 895, 903 (D. Ariz. 1997) (analyzing impact of reassignment under ADA).

286. 42 U.S.C. § 12111(10)(A) (1994).

287. *Id.* §12111(10)(B); *see supra* note 41 (listing factors considered under § 12111(10)(B)).

288. 42 U.S.C. §12111(10)(B) (1994).

289. *See* 29 C.F.R. app. § 1630.2(p) (1999) (addressing scope of employer reassignment duties).

290. *See* Davoll v. Webb, 194 F.3d 1116, 1137 n.14 (10th Cir. 1999) (examining undue hardship standard of employer reassignment obligations under ADA); *see also Ransom*, 983 F.

B. Legitimate Non-Discriminatory Employer Policies

The Tenth Circuit's en banc decision in *Smith v. Midland Brake, Inc.*[291] provides a useful road map for resolving the issue of when employers must set aside or make exception to their legitimate, non-discriminatory employer policies.[292] In *Smith*, the court stated that employers should not be required to abandon neutral transfer and assignment policies in order to reassign a disabled employee, unless the policy in question would "essentially vitiate" the employer's express statutory obligation under the ADA to reassign qualifying employees as a form of reasonable accommodation.[293] Using reasonableness as the touchstone for determining the issue of employer policies, the *Smith* court noted that requiring employers to make exception to a long established policy would in many instances "constitute a fundamental and unreasonable alteration in the nature of the employer's business."[294] Otherwise stated, if the policy is "fundamental to the way an employer does business," the employer is not required to violate the policy in order to reassign a disabled individual.[295]

This general rule makes sense in several respects. First, it is consistent with the majority approach taken on the issue of whether a seniority provision in a collective bargaining agreement (CBA) should trump the ADA's reassignment accommodation.[296] Most courts have now adopted a bright line rule that employers are not required to violate a CBA provision in order to reassign a disabled individual under the ADA.[297] In balancing the interests of the concerned parties, which include the employer, the disabled employee, and other CBA-covered employees, most courts have decided that when the ADA conflicts with an applicable CBA, the greater right to the position belongs to the non-disabled employee who has a "vested priority right" to the position.[298]

Supp. at 899 (observing that undue hardship defense is better means of justifying employer's failure to reassign under ADA).

291. 180 F.3d 1154 (10th Cir. 1999).

292. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc) (concluding ADA requires employers to place qualified disabled employees in vacant positions regardless of availability of better-qualified non-disabled employees and applicants).

293. *Id.* at 1175-76.

294. *Id.* at 1176 (citations omitted).

295. *Id.*

296. *See supra* note 63 and accompanying text (listing courts that have adopted per se rule that CBA's seniority provision trumps ADA's reassignment accommodation).

297. *See supra* note 63 and accompanying text (listing courts that have adopted per se rule that CBA's seniority provision trumps ADA's reassignment accommodation).

298. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999) (en banc) (quoting Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995)).

A general rule in favor of neutral transfer and assignment policies similarly is justified because of the greater losses non-disabled employees sustain in this context as compared to the previously discussed situation in which an employer must choose between a disabled employee and a better-qualified applicant or employee. In the employer policy setting, other employees develop "legitimate expectations" in the policy's provisions.[299] An employer's consistent application of such policies promotes fairness and predictability, as well as creating genuine incentives for the workforce as a whole. In contrast, a non-disabled applicant or employee who simply applies for a vacant position for which other applicants also are applying does not have a similar guarantee or expectation that the non-disabled applicant or employee will get the job.

Finally, from the employer's standpoint, the general rule preserves an employer's ability to adopt facially neutral policies in the management of the employer's enterprise. Most anti-discrimination statutes, including the ADA, recognize the legitimacy of such non-discriminatory policies so long as the policies are shown to serve legitimate business needs.[300] As the Court of Appeals for the Seventh Circuit concluded in *Dalton*, a contrary rule voiding neutral employer policies would result in "an unreasonable imposition on [both] the employers and coworkers of disabled employees."[301]

Thus, transfer and assignment policies that serve a legitimate business purpose and do not unduly restrict an employer's ability otherwise to comply with the ADA's reassignment mandate generally should be upheld. A well-established seniority system, even if not rooted in a CBA, is an example of a policy that an employer should not be required to violate in order to comply with the ADA if doing so would unreasonably trammel on the "legitimate expectations" of more senior employees.[302] Similarly, the no-demotion policy

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299. *See Smith*, 180 F.3d at 1176 (recognizing that current employees might possess "well-established reasonable expectations of seniority rights").

300. In essence, a rule recognizing the validity of non-discriminatory transfer and assignment policies is similar to the business necessity defense recognized for cases of disparate impact under Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (providing defense to claim of disparate impact in which "the challenged practice is job related for the position in question and consistent with business necessity"). The ADA expressly incorporates the business necessity defense. *Id.* § 12113(a). Specifically, the ADA provides:

> It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity.

Id.

301. *See* Dalton v. Subaru-Isuzu Auto, Inc., 141 F.3d 667, 679 (7th Cir. 1998) (concluding employers not required to abandon legitimate, neutral employment practices and policies under ADA).

302. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999) (en banc) (noting industry may have "well entrenched" seniority system that gives rise to legitimate expec-

in *Duckett*[303] and the transfer preference for full-time workers in *Daugherty* also would appear to pass muster under the *Smith* rationale.[304]

Of course, the general rule favoring neutral employer policies should not be absolute. As the *Smith* court explained, this general rule should not apply to policies that wholly eviscerate the reassignment accommodation:

> On the other hand, other policies of an employer might have to be subordinated to an employer's reassignment obligation under the ADA because to do otherwise would essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation. An obvious example would be where an employer has a policy against ever reassigning an employee to other positions within the company. Such a policy, if allowed to trump the ADA, would read out of the act the provision that reassignment is one of the appropriate reasonable accommodations.[305]

In addition to a no-transfer policy,[306] a policy to hire only the most qualified applicant[307] or to require all employees to compete for vacant positions also would appear to "essentially vitiate" the ADA's reassignment obligation.[308] As such, an employer should be required to make an exception to such policies in order to reassign a qualified individual with a disability.

A further limitation should be recognized in order to ensure that the policy in question is a bona fide personnel practice of that employer. The employer, accordingly, should be required to demonstrate that the policy in

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tations of more senior employees to employment positions that disabled employees might desire); *see also* Barnett v. U.S. Air Lines, Inc., 196 F.3d 979, 983 (9th Cir. 1999) (concluding ADA requires "no more than equality among disabled and nondisabled employees in hiring and reassignment decisions").

303. *See supra* notes 214-15 and accompanying text (discussing "no rollback" policy).

304. *See supra* notes 205-13 and accompanying text (discussing legitimacy of discriminatory non-transfer and reassignment policies).

305. *See Smith*, 180 F.3d at 1176 (exploring scope of employer reassignment accommodation duties under ADA); *see also Dalton*, 141 F.3d at 679 ("An employer, cannot, of course, convert its responsibility to look to a 'broad range' of jobs into a 'narrow band' simply by adopting a 'no transfer' policy.").

306. *See* Davoll v. Webb, 194 F.3d 1116, 1131-32 (10th Cir. 1999) (holding municipal employer's no-transfer policy violated ADA reassignment obligations); *see also supra* notes 96-99 and accompanying text (discussing *Enforcement Guidance*'s position on no-transfer policies).

307. *See supra* note 217 and accompanying text (discussing scope of employer obligations under ADA). For all the reasons discussed in Part IV.A, reassignment truly would become a hollow promise for qualified individuals with disabilities if an employer could simply create a policy to choose the most qualified applicant for the position.

308. *See* Ransom v. Ariz. Bd. Of Regents, 983 F. Supp. 895, 899 (D. Ariz. 1997) (holding employer's policy requiring qualified disabled employees to compete with all other applicants for vacant positions violates ADA reassignment provision).

question is truly an established one.[309] An employer should not be able to avoid reassigning a disabled individual by simply pointing to a policy that the employer never uses or which is created spontaneously once a disabled individual requests reassignment. The general rule, finally, should not apply if evidence demonstrates that the employer has made previous exceptions to the policy for other, non-disabled employees.[310]

VI. Conclusion

The ADA has experienced a troubled infancy since its genesis less than a decade ago. The Act has spawned a deluge of litigation, and circuit splits exist on numerous issues. The recent conflict over whether reassignment is tantamount to a prohibited preference in favor of the disabled has created additional confusion in the federal courts. Although similarities can be drawn between affirmative action and reasonable accommodation, significant differences in the statutory text, practicalities, and policies of the ADA demonstrate that justifying an employer's failure to accommodate disabled individuals on affirmative action grounds is misplaced. The debate must move beyond the rhetorical debate and towards establishing workable boundaries for defining the scope of the reassignment accommodation. If reasonable lines can be drawn, employers will enjoy greater predictability and fewer lawsuits, and the ADA can better fulfill its promise of providing disabled individuals with meaningful protection in the American workplace.

309. *See, e.g.*, Adams v. Henderson, 45 F. Supp. 2d 968, 979-80 (M.D. Fla. 1999) (denying employer motion for summary judgment because plaintiff employee sufficiently raised material fact as to whether employer had business policy in place before plaintiff requested reassignment).

310. *See id.* (noting evidence suggesting employer had applied its policy in ad hoc fashion, providing exceptions to non-disabled employees).