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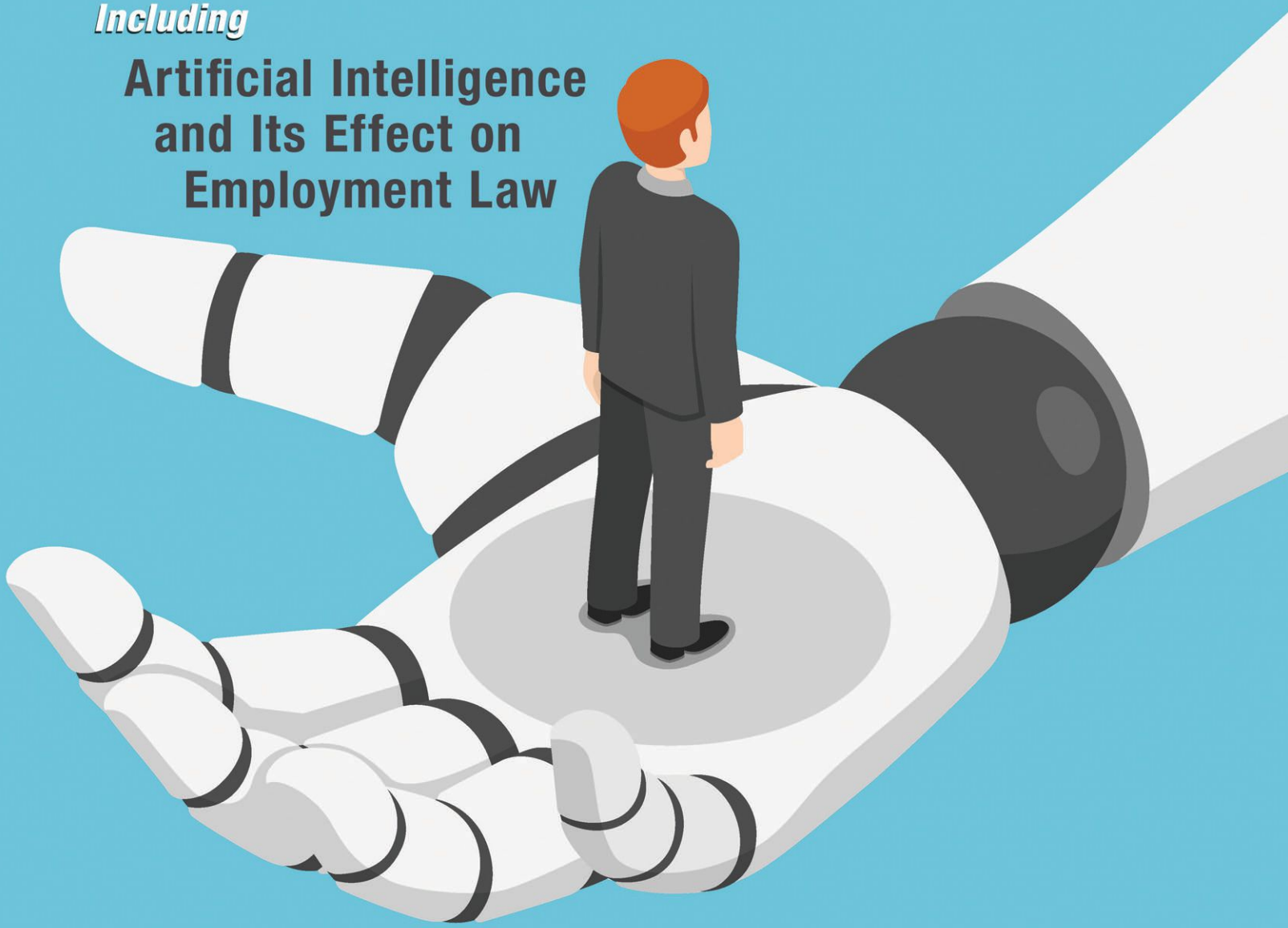

Also in this Issue

YOUNG LAWYERS

Meet the Native Nations Law Task Force *And More*

The Accommodation of Last Resort

Reassigning Disabled Employees as a Reasonable Accommodation Under Disability-Neutral Workplace Rules

By Peter Langdon

Attorneys do have arguments that they can make to defend a disability-neutral workplace rule when disabled employees request reassignments as a reasonable accommodation.

Congress enacted the Americans with Disabilities Act (ADA) to "provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities…." 42 U.S.C. §12101(b)(1)–(2). Generally, the ADA protects qualified individuals with a disability from discrimination in the context of (1) employment; (2) services, programs, or activities that public entities offer to the general public; and (3) goods, services, facilities, privileges, advantages, or accommodations in any place of public accommodation. 42 U.S.C. §12112(a); 42 U.S.C. §12132(a); 42 U.S.C. §12182(a).

This article will address Title I of the ADA, which applies to the employment relationship, as it relates to reasonable accommodations, and the circuit split that currently exists regarding the interpretation of reassignment to a vacant position, often known as the accommodation of last

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resort. Specifically, this article will address whether an employer is required to disregard a disability-neutral workplace rule, such as hiring the most qualified candidate, in reassigning a disabled employee as a reasonable accommodation.

Americans with Disabilities Act: Overview

In the employment context, the ADA prohibits discrimination against a qualified individual with a disability regarding job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a).

The hallmark of the ADA as it applies to the employment relationship is that it prohibits discriminating against a qualified individual with a disability. An individual is qualified if such person can perform the essential functions of a job that the individual holds or desires, with or without a reasonable accommodation. 42 U.S.C. §12111(8). Three different prongs form the definition of a "disability." 42 U.S.C. §12102(1)(A)–(C).

The first prong defines "disability" as a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(1)(A). A physical or mental impairment includes (1) a physiological disorder or condition, cosmetic disfigurement, or an anatomical loss affecting a body system, or (2) a mental or psychological disorder, such as an intellectual disability. 29 C.F.R. §1630.2(h)(1)–(2). Major life activities include, but are not limited to, caring for oneself, seeing, hearing, sleeping, eating, lifting, walking, learning, thinking, communicating, working, and major bodily functions.

The second prong of the definition of disability is invoked where an individual has a record of having a disability. 42 U.S.C. §12102(1)(A). A record of a disability simply means that the individual has a history of, or has been classified as having, a mental or physical impairment that substantially limits a major life activity. 29 C.F.R. §1630.2(k)(1).

The third prong of the definition of a disability arises when an individual is "regarded as" having a physical or mental impairment that substantially limits one or more major life activities, and it is referred to as the "regarded as" prong. 29 C.F.R. §1630.2(l). An individual is regarded as having a disability for ADA purposes when that individual is subjected to a prohibited action because of an actual or perceived disability, regardless of whether that disability substantially limits, or is perceived to substantially limit, a major life activity. 29 C.F.R. §1630.2(l)(1).

What actions constitute discrimination under the ADA? The statutory definition of discrimination is exhaustive. It includes limiting, segregating, or classifying an employee in a way that adversely affects the employee's opportunities or status because of the employee's disability. *See* 42 U.S.C. §12112(b)(1). Employment discrimination also includes "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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]" 42 U.S.C. §12112(5)(A). Reasonable accommodation includes, among other things, "job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification 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." 42 U.S.C. §12111(9)(B) (emphasis added).

Americans with Disabilities Act: Legislative History

The legislative history of the ADA provides insight into how courts approach the statutory construction of its provisions. At the time of passage in 1990, Congress explained that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem…." H.R. Rep. No. 101-485, pt. II, at 3 (1990). Moreover, the continuing existence of unfair and unnecessary discrimination denies disabled individuals "the opportunity to compete on an equal basis…" with other individuals. *Id.* The legislative history covers numerous topics, including the definition of a "qualified individual with a disability." *Id.* at 50 (1990). Congress specifically noted:

> [T]he Committee [on Education and Labor] intends to reaffirm that this legislation does not undermine an employers [sic] ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

In the employment context, the ADA prohibits discrimination against a qualified individual with a disability regarding job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Thus, under this legislation an employer is still free to select applicants for reasons unrelated to the existence or consequence of a disability. For example, suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute. The employer is permitted to choose the applicant with the higher typing speed, if typing speed is

necessary for successful performance on the job.

On the other hand, if the two applicants are an individual with a hearing impairment who requires a telephone headset with an amplifier and an individual without a disability, both of whom have the same typing speed, the employer is not permitted to choose the individual without a disability because of the need to provide the needed reasonable accommodation to the person with the disability.

In the above example, the employer would be permitted to reject the applicant with a disability and choose the other applicant for reasons not related to the disability or to the accommodation or otherwise not prohibited by this legislation. In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.

Id.

When courts undertake a statutory construction analysis to glean the meaning of the reassignment accommodation, they may assess the relevant legislative history to inform the analysis. As will be seen, courts do, in fact, take the legislative history into account in determining whether a reassignment accommodation trumps an employer's disability-neutral workplace policy, such as hiring the most qualified candidate for a vacant position.

How Courts Evaluate Reassignment Accommodation Requests

Courts evaluate the interaction between an employer's disability-neutral workplace rule and reassignment as a reasonable accommodation to determine whether a reassignment accommodation would win over an employer's disability-neutral workplace policy.

The Lead Case: *US Airways v. Barnett*

In *US Airways v. Barnett*, the United States Supreme Court crafted the analytical framework that guides the analysis to determine whether the ADA requires an employer to reassign a disabled employee to a vacant position as a reasonable accommodation that would otherwise violate an employer's disability-neutral workplace rule.

US Airways used a seniority system, which provided that internal candidates could periodically bid on certain job positions, even currently occupied positions, with more senior employees given preference for those jobs. *US Airways v. Barnett*, 535 U.S. 391, 394–95 (2002). In this case, plaintiff Robert Barnett injured his back while working in a cargo-handling position and transferred to a mailroom position. *Id*. at 394. The mailroom position was one that periodically became available for bidding. *Id*. Other, more senior employees bid on Barnett's mailroom position. *Id*. Barnett requested that US Airways make an exception to its seniority policy and allow him to remain in the mailroom because of his disability-related limitations. *Id*. US Airways refused to make the exception, and Barnett lost his position in the mailroom. *Id*. He claimed that US Airways unlawfully discriminated against him by refusing to continue to assign him to the mailroom job. *Id*. The Supreme Court found that the reassignment Barnett requested, to remain in the mailroom position, was not reasonable because it conflicted with US Airways seniority policy. *Id*. at 394. Under the analytical framework the Court created, the plaintiff employee initially bears the burden to show that the requested accommodation, i.e., reassignment, is reasonable on its face. *Id*. at 401. If the plaintiff is unsuccessful in proving that reassignment is reasonable on its face, he or she remains free to show that special circumstances warrant a finding that the requested accommodation is reasonable. *Id*. at 405. However, if the plaintiff is successful in demonstrating that the reassignment is reasonable on its face, the burden then shifts to the defendant to show that special circumstances create an undue hardship. *Id*. at 402.

Cases following *Barnett* applied the analytical framework established by the Court to determine the disability-neutral workplace rules, other than a seniority system, that would render a reassignment unreasonable. Not surprisingly, the courts have attempted to define those limits, specifically regarding whether an employer is required reassign a disabled individual in violation of an employer's policy of hiring the most qualified candidate, among others.

Circuit Courts Are Divided in Their Application of *Barnett*

Some courts permit employers to consider other, prospective employees for a vacant position that a disabled employee has sought as a reasonable accommodation, while other courts have viewed honoring such a reassignment request as mandatory.

One Position: Employers May Consider Other Candidates

Several federal courts interpret the reasonable accommodation of reassignment to permit an employer to consider other, prospective employees for a vacant position. In other words, the ADA does not require an employer to reassign a disabled employee as a reasonable accommodation to a position that would violate an employer's disability-neutral workplace practice, such as a policy that provides for hiring the most qualified candidate.

For example, in *US Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc*., a post-*Barnett* case, the United States Court of Appeals for the Eleventh Circuit held:

> [T]the ADA only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position… [and] that "the intent of the ADA is that an employer needs only to provide meaningful equal employment opportunities," and that "[t]he ADA was never intended to turn nondiscrimination into discrimination" against the non-disabled.

842 F.3d 1333, 1346 (11th Cir. 2019) (quoting *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998)) (emphasis omitted)). In *St Joseph's*, Leokadia Bryk worked as a nurse at St. Joseph's Hospital. *Id*. at 1337. Bryk suffered from spinal stenosis. *Id*. at 1338. As such, she used a cane to alleviate her pain. *Id*. Susan Wright, the director of Behavioral Health Operations, was concerned that patients would somehow obtain the cane and use it as a weapon. *Id*. Wright raised this concern, and Bryk provided a doctor's note recommending use of the cane. *Id*. Eventually, the hospital prohibited the use of the cane, based on safety

concerns, and invited Bryk to apply for other, open positions at the hospital within a thirty-day period. *Id*. Bryk was unable to secure an available position based on the hospital's best-qualified applicant policy. *Id*. at 1346. After the expiration of the thirty-day period, Byrk was terminated. *Id*. at 1340. The US Equal Employment Opportunity Commission (EEOC) then sued the hospital. *Id*. at 1340.

The EEOC asserted that the hospital violated the ADA by not reassigning Bryk to a vacant position because she had to compete with other qualified candidates. *St. Joseph's Hosp., Inc*., 842 F.3d at 1340. On appeal, the Eleventh Circuit agreed with the trial court that the ADA does not mandate reassignment without competition for, or preferential treatment of, a disabled individual. *Id*. at 1345. The Eleventh Circuit stated that the ADA provides that reassignment to a vacant position "may" constitute a reasonable accommodation. *Id*. at 1345. *See* 42 U.S.C. §12111(9)(B). The statutory use of the word "may," however, implies that reassignment is reasonable in some situations, but not others. *Id*. The court reasoned that "[h]ad Congress understood the ADA to mandate reassignment, it could easily have used mandatory language." *Id*. at 1345 n.5. Rather, employers are only required to provide other employment that is reasonably available under the employer's existing policies. *Id*. at 1345. Under the analytical framework established in *Barnett*, requiring an employer to violate its best-qualified candidate policy is not reasonable. *Id*. at 1346. The Eleventh circuit found that Bryk's requested reassignment was one that was not ordinarily reasonable on its face.

> [E]mployers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of Hospitals… the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer-policy imposes substantial costs on the hospital and potentially on patients.

Id. The court did concede that "a merit-based selection policy can leave more room for subjectivity… and be more susceptible to abuse for discriminatory purposes." *Id*. at 1346 n.5. Nonetheless, "[t]he subjective aspects of a best-qualified applicant policy do not prevent an employer from relying on such a policy when choosing between a disabled applicant and a non-disabled one." *Id*.

Similarly, in *Huber v. Wal-Mart Stores, Inc*., another post-*Barnett* case, the United States Court of Appeals for the Eighth Circuit held that the ADA did not require Wal-Mart to turn away a superior applicant for a position to give the position to a disabled employee. 486 F.3d 480, 484 (8th Cir. 2007). In *Huber*, the plaintiff worked for Wal-Mart as a dry-grocery order filler. *Id*. at 481. While working, she incurred a permanent arm and hand injury. *Id*. As a result, she could not perform the essential functions of her job. *Id*. Huber requested a reassignment to the position of a router, but Wal-Mart decided to fill the position of router with a more qualified, nondisabled worker and assigned Huber to a janitorial position. *Id*. at 481. Huber sued Wal-Mart, asserting that she should have been reassigned to the router position as a reasonable accommodation. *Id*. at 482. The Eighth Circuit concluded that the ADA is not an affirmative action statute and does not require an employer to reassign a disabled employee to a vacant position when the reassignment violates a legitimate, nondiscriminatory policy of the employer of hiring the most qualified candidate. *Id*. at 483. The Eighth Circuit, relying on a prior Seventh Circuit decision, found that automatically reassigning a disabled employee over a more qualified candidate "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." *Id*. (citing *EEOC v. Humiston-Keeling, Inc*., 227 F.3d 1024, 1028 (7th Cir. 2000)). The Eighth Circuit further held that "[a] policy of giving the job to the best applicant is legitimate and nondiscriminatory," and "[d]ecisions on the merits are not discriminatory." *Id*. (quoting *EEOC v. Humiston-Keeling, Inc*., 227 F.3d 1024, 1028 (7th Cir. 2000)). The court further relied on *Barnett*, essentially equating Wal-Mart's legitimate nondiscriminatory policy of hiring the most qualified candidate to the seniority system involved in *Barnett*. *Id*. at 484–85. Notably, the Eighth Circuit stated that Wal-Mart did, in fact, reasonably accommodate Huber. *Id*. at 484. Wal-Mart placed her in a janitorial position, which may not have been a perfect substitute or preferred job, but an employer is only required to provide an accommodation that is reasonable. And "to conclude otherwise is 'affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group.'" *Id*. (citations omitted).

As will be seen, courts do, in fact, take the legislative history into account in determining whether a reassignment accommodation trumps an employer's disability-neutral workplace policy, such as hiring the most qualified candidate for a vacant position.

The Converse Position: Employers Must Honor Reassignment Requests

In *EEOC v. United Airlines, Inc*., the United States Court of Appeals for the Seventh Circuit distinguished *Barnett*, finding that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodation would be ordinarily reasonable and would not present an undue hardship to that employer." 693 F.3d 760, 761 (7th Cir. 2012). In that case, United Airlines released reasonable accommodation guidelines, stating that employees who

need an accommodation would not automatically be reassigned but would have to compete with other employees and applicants for the position. *Id*. at 761. The EEOC sued United Airlines, alleging that its reasonable accommodation policy violated the ADA. *Id*.

The Seventh Circuit applied the analytical framework set forth in *Barnett* by (1) determining if mandatory reassignment is reasonable, in the run of cases, and (2) if so, whether any fact-specific considerations particular to United Airline's employment practices would create an undue hardship rendering the mandatory reassignment unreasonable. *See EEOC v. United Airlines, Inc*., 693 F.3d at 764. The court concluded that unlike *Barnett*, where a disabled employee's mandatory reassignment would violated a seniority system, "the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy." *Id*. In other words, a disability-neutral workplace policy of hiring the most qualified candidate is distinguishable from the disability-neutral workplace rule of a seniority system. *Id*. at 764 n.3.

Under current law, several arguments have emerged that support the proposition that in reasonably accommodating disabled employees, employers are permitted to abide by their disability-neutral workplace rules, such as hiring the most qualified candidate.

In *Smith v. Midland Brake, Inc*., the United States Court of Appeals for the Tenth Circuit reversed the district court's decision granting summary judgment in favor of an employer who terminated an employee who could not perform the essential functions of the job due to his disability. 180 F.3d 1154, 1180 (10th Cir. 1999). In *Midland Brake*, plaintiff Robert Smith worked at Midland Brake in the light-assembly department. *Id*. at 1160. Eventually, Smith contracted muscular injuries and chronic dermatitis, due to exposure to certain chemicals. *Id*. Smith's physicians recommended that he avoid contact with such chemicals, and on several occasions, they ordered him not to work at all. *Id*. Midland Brake was unable to find an assignment within the light-assembly department and eventually terminated Smith because of its inability to accommodate his skin sensitivities. *Id*. Smith sued Midland Brake for, among other things, violating the ADA. *Id*.

The Tenth Circuit explained that a qualified individual, as that term is interpreted under the ADA, "include[s] individuals who can perform an appropriate reassignment job within the company, with or without reasonable accommodation, even though they cannot perform their existing job no matter how much accommodation is extended…." *Midland Brake, Inc*., 180 F.3d at 1162. As such, the court found that the reassignment duty under the ADA is "more than a duty to merely… consider without discrimination a disabled employee's request for reassignment along with all other applications the employer may receive from other employees or job applicants for a vacant position." *Id*. at 1164. The reassignment obligation must mean more than allowing a disabled person to compete equally with the rest of the world for a vacant position. *Id*. at 1165. The court explained that such a practice would render the reassignment language in the ADA a nullity because the word "assign" requires an active effort on the part of the employer, and the reassignment language "would add nothing to the obligation not to discriminate, [and] would thereby be redundant." *Id*. at 1164–65. The Tenth Circuit concluded that "requiring [a] reassigned employee to be the best qualified employee for [a] vacant job, is judicial gloss unwarranted by the statutory language or its legislative history." *Id*. at 1169.

Positions Employers Can Assert to Defend Disability-Neutral Workplace Rules

Under current law, several arguments have emerged that support the proposition that in reasonably accommodating disabled employees, employers are permitted to abide by their disability-neutral workplace rules, such as hiring the most qualified candidate. First, defense counsel can assert that the disabled employee is not qualified for the position sought. Second, defense counsel can argue that Congress intended the ADA to permit an employer discretion in enforcing its disability-neutral workplace rules, such as hiring the most qualified candidate. Third, defense counsel can argue that under *Barnett*, the accommodation is not reasonable. Finally, defense counsel can rely on the fallback argument: the requested reassignment constitutes an undue hardship. The contours of those arguments are discussed below.

The Unqualified Candidate Argument

An employer can eliminate the need to analyze whether it can select a more qualified candidate for a vacant position by arguing the disabled employee is not "qualified" for the vacant position under the statute. The determination of whether an individual is qualified is made at the time of the discriminatory action and does not consider whether the individual will be qualified in the future. *Curtis v. Costco Wholesale Corp*., 807 F.3d 215, 224–25 (7th Cir. 2015). A qualified individual is one who, with or without a reasonable accommodation, can perform the essential functions of the job that such an individual holds or desires. 42 U.S.C. §12111(8). Several circuit courts have found that employees were not entitled to reassignment where they were not qualified for the position to which they would have been reassigned. *See, e.g., Denson v. Steak 'n Shake, Inc*., 910 F.3d 368, 371 (8th Cir. 2018); *McBride v. BIC Consumer Products*, 583 F.3d 92, 98–99 (2d Cir. 2009); *Bratten v. SSI Servs., Inc*., 185 F.3d 625, 635 (6th Cir. 1999).

How does the defense attorney identify the essential functions of a particular position? Generally, functions are essential if

removal of such functions would fundamentally alter the position. *See Hostettler v. College of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018). Federal regulations define essential functions as "fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. §1630.2(n)(1). In determining if a function is essential, consideration is given to (1) the employer's judgment pertaining to the essential functions of a position and (2) the job description. 42 U.S.C. §12111(8). The regulations provide a list of factors to consider in determining whether a function is essential, including the following: (1) the reason the position exists is to perform a specific function; (2) a limited number of employees may be able to perform the function; and (3) a function is highly specialized, so the incumbent is hired to perform that function. 29 C.F.R. §1630.2(n)(2). In addition, the regulations provide examples of evidence demonstrating that a particular function is essential, including the amount of time spent performing the function, the consequences of not performing the function, the work experience of past incumbents in the job, and the current work experience of incumbents in similar jobs. 29 C.F.R. §1630.2(n)(3).

The Legislative History Argument

Alternatively, defense counsel could argue that the legislative history and statutory construction of the ADA provide employers the discretion to select the most qualified candidates for a vacant position. As previously noted, the legislative history in House Report No. 101-485 (1990) specified that the committee's intent was "to reaffirm" that the ADA was not to "undermine" employers' "ability to choose and maintain qualified workers." (See pages 49–50 of this article for a full, three-paragraph quote on this point, from H.R. Rep. No. 101-485 (1990)).

Although the legislative history explicitly refers to applicants and not employees, such a reference is immaterial. Provided that an individual can perform the essential functions of a vacant job, with or without a reasonable accommodation, then that person, along with all others, should be provided equal consideration disregarding disability. *Smith v. Midland Brake, Inc.*, 180 F.3d at 1181 (Kelly, J. concurring). *Id* at n.1 ("Any approach that allows preferences for current disabled employees in reassignment situations conflicts with th[e] clear [legislative] statement."). Arguably, the legislative history, and the resulting statutes, stand for the proposition that an employer is free to abide by its disability-neutral workplace rules and is free to select a more qualified candidate for a position rather than reassigning a less qualified, disabled employee to such position.

The *Barnett* Reasonable Accommodation Argument

As previously discussed, in determining whether a disability-neutral workplace rule, such as a most qualified candidate policy, contravenes the ADA's reasonable accommodation of reassignment, the Supreme Court's decision in *Barnett* guides the analysis. *See* 535 U.S. at 391. First, the plaintiff employee must demonstrate that a reassignment in violation of an employer's disability-neutral workplace rule is ordinarily reasonable on its face. *Id*. at 401–02 (2002). In *Barnett*, US Airways successfully argued that the requested accommodation was not reasonable because it violated its seniority system. *Id*. at 406. This argument was also successful in *US Equal Opportunity Commission v. St. Joseph's Hospital, Inc.*, in which the Eleventh Circuit found that "[r]equiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable 'in the run of cases.'" 842 F.3d at 1346. Additionally, the United States Court of Appeals for the Tenth Circuit in *Lincoln v. BNSF Railway. Co.* explained in dicta that defense counsel could offer a slightly different argument when "the employer could point to its policy [of hiring the most qualified candidate] and argue that while the [disabled] employee was technically qualified for a given position, the [disabled] employee's qualifications fell significantly below the qualifications of other applicants such that reassignment is not reasonable…." 900 F.3d 1166, 1206 (10th Cir. 2018). In sum, employers can defend disability discrimination suits by arguing that the employer's disability-neutral workplace rule renders the requesting accommodation unreasonable and tailoring that argument to the facts of their case.

The Undue Hardship Argument

Finally, defense counsel can assert that reassignment constitutes an undue hardship. The undue hardship defense is fact specific. Some factors used to determine if reassignment creates an undue hardship include whether there is significant difficulty or expense, the cost of the accommodation, the employer's financial resources, and the financial and operational effects of the accommodation on the employer's business. *See* 42 U.S.C. §12111(10)(B). Defendants must evaluate whether the reassignment constitutes an undue hardship under these or similar factors, or else the defense will not succeed. For example, in *Ransom v. State of Arizona Board of Regents*, the United States District Court for the District of Arizona granted partial summary judgment to the plaintiff, who asserted that Arizona University discriminated against her by enforcing its reassignment policy that required qualified disabled employees seeking reassignment as an accommodation to apply for and compete with the other applicants. *See* 983 F. Supp. 895, 903 (D. Ariz. 1997). The court explained that "the Defendant offer[ed] no evidence that it has conducted an analysis to determine whether… [the proposed accommodation] actually presents an undue hardship." *Id*. at 903. Although the result was unfavorable, *Ransom* teaches that defendants must conduct a hardship analysis to succeed based on an undue hardship defense in court.

Conclusion

Whether an employer must reassign a disabled employee to a vacant position as a reasonable accommodation instead of following the employer's disability-neutral workplace rule, such as hiring a more qualified candidate, largely depends on the law of the circuit in which the employer resides. If an employer operates in a jurisdiction where the courts require the employer to reassign disabled individuals as a reasonable accommodation, even if a more qualified candidate is available, the defense attorney is not without recourse. The discussion in this article should provide bases for asserting meritorious arguments, even in unfavorable jurisdictions. FD

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IN THIS ISSUE

NATIVE NATIONS LAW

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