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MANDATORY REASSIGNMENT AND THE ADA: THE “REASSIGNMENT TO A VACANT POSITION” CLAUSE AND THE SCOPE OF DUTY IT IMPOSES ON EMPLOYERS

BY ERICA GELFAND

In 2007, Pam Huber worked at a Wal-Mart distribution center in Clarksville, Arkansas, where she earned thirteen dollars an hour. While working in her position as an order filler, Huber permanently injured her right arm in an on-the-job accident, making her unable to continue her duties in the position that she held. In an effort to keep a job, Huber reapplied to a vacant router position within the company. The router position’s duties were such that Huber’s disability would not impede her performance, and since the pay was twelve dollars an hour, the position was relatively comparable enough to that of an order filler, thus providing the most smooth and fair reassignment prospect. In the end, however, Huber’s reassignment did not go as smoothly as she had hoped. Instead of reassigning Huber to the router position, Wal-Mart made their disabled employee

1 Erica Gelfand is a member of the Class of 2011 at DePaul University College of Law. She would like to thank the 2010-2011 J4SJ Board for their backing and for their support over the past year. She would also like to thank Jill Ausdenmoore for her encouragement and for being there for her throughout the editing process. She would like to thank Professor Steven Seliger and Professor Mark Weber for their input on this article. Finally, she would like to thank her family for their unwavering confidence in her and for their constant support.


3 Id.

4 Id.

5 Id.
restart the whole application process anew, pointing to their policy of hiring the “most qualified” candidate as justification. Put otherwise, Huber was made to compete for a position within the company with which she had already been employed, when the only reason she sought the reassignment was her disability. Huber did not receive the reassignment she sought, with the position going to a more qualified, non-disabled applicant. She did eventually receive a reassignment and was transferred to a janitorial position—a janitorial position that paid six dollars and twenty cents an hour.

Unfortunately, Huber is not the only person to have faced such a disability related dilemma in the workplace. And while the issue of accommodating a disabled employee is one of utmost importance—implicating, among other things, a person’s livelihood—courts have thus far failed to reach any sort of workable solution.

I. INTRODUCTION

In May of 2007, Huber brought suit against Wal-Mart, forcing the Eighth Circuit Court of Appeals to consider whether the reasonable accommodations provision of the American with Disabilities Act (“ADA”) required employers to automatically reassign a disabled employee to a vacant spot within the company. In Huber v. Wal-Mart Stores, Inc, the beleaguered and disabled employee alleged discrimination under the ADA, resulting from Wal-Mart’s refusal to automatically reassign her to a vacant position when her disability rendered her unable to perform the duties of her currently held position. The Eighth

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6 Id.
7 Id.
8 Id.
9 Id.
10 See infra Part III.
11 See Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007).
12 Id. at 481.
Circuit Court of Appeals ultimately found that the ADA’s “reassignment” clause did not contemplate mandatory transfer as a reasonable accommodation, as this would reform the ADA into a mandatory preference statute, which the Court stated it was never meant to be.\(^\text{13}\)

Huber’s case brought the Court face to face with the issue that has sparked a decade’s long debate among the nation’s circuit courts. While the Supreme Court granted certiorari in this case, the writ was subsequently dismissed, due to settlement among the parties.\(^\text{14}\) Thus, the circuit split continues to exist with no real solution in sight.

To provide context, this article will briefly examine the origins of the ADA and the specific rules it puts forth. It will then examine the various decisions regarding the issue of mandatory reassignment and the reasons behind the split in opinion. This article will then argue that the ADA does, in fact, require mandatory reassignment to vacant positions, unless an employer can show that providing automatic transfer would result in an undue burden or that a requested accommodation is unreasonable. And, finally, this article will apply this reasoning to the facts in Huber to provide a hypothetical glance into how the Supreme Court should have analyzed, and ultimately decided, the case had it not been dismissed.

\section{II. Background to the ADA}

It is difficult to fully understand the Americans with Disabilities Act without considering it in light of its connection to the major pieces of civil rights legislation, passed as a result of the Civil Rights Movement.\(^\text{15}\) The Civil Rights Act of 1964, the Vot-

\begin{footnotesize}
13 \textit{Id.} at 483.
15 \textit{See} Mandatory Reassignment Under the ADA: The Circuit Split and Need for a Socio-Political Understanding of Disability, 94 C\textsc{ornell} L. R\textsc{ev.} 443, 450-51 (2009).
\end{footnotesize}
ing Rights Act of 1965 and the Civil Rights Act of 1968 resulted in the expansion of civil rights for African-Americans, as well as other marginalized groups, and will forever serve as testaments to the efforts of civil rights activists whose fight for equality never faltered.\textsuperscript{16} As broad as these pieces of legislation were, however, they failed to include protection for the rights of those afflicted with disabilities.\textsuperscript{17} Nevertheless, “disability activists of the 1960s and early 1970s used [these] symbols and rhetoric of the African-American Civil Rights movement to portray access for disabled people to societal institutions as a basic civil right.”\textsuperscript{18}

By the early 1970s, the idea that those afflicted with mental or physical disabilities have an equal right to social and economic participation and that this right must be fervently protected began to resonate within Congress.\textsuperscript{19} Ultimately, Congress “passed the Rehabilitation Act of 1974 to promote and expand employment opportunities... for handicapped individuals,” though Congress limited coverage to institutions that received federal funding.\textsuperscript{20}

The protection of the rights of the disabled was then further expanded upon by the Americans with Disabilities Act, which was passed in 1990.\textsuperscript{21} The ADA was designed to “open up all aspects of American life” to disabled people.\textsuperscript{22} Put otherwise, “lawmakers designed the ADA to integrate disabled individuals into society, striving for equality in employment opportunities,

\textsuperscript{16} See \textit{Id.}.
\textsuperscript{17} See \textit{Id.}
\textsuperscript{18} \textit{Id.} at 450 (citing \textsc{Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy} 24 (1984)).
\textsuperscript{19} \textit{Id.} at 451.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textsc{Americans With Disabilities Act, 42 U.S.C. § 12112 (1990)}.
\textsuperscript{22} \textit{Mandatory Reassignment, supra} note 14, at 452 (referring to \textsc{George H.W. Bush, U.S. President, Statement on Signing the Americans with Disabilities Act of 1990, 26 Wkly. Comp. Pres. Doc. 1165 (July 26, 1990)}).
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government services, public accommodations, transportation, and telecommunications.”

The ADA generally proscribes that “no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” Relevant to this paper, in particular, are the ADA’s provisions regarding reasonable accommodations in the employment context. Under the ADA, disability discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” Reasonable accommodations include, but are not limited to, “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters.” To “make a prima facie case in a reasonable accommodation claim, the plaintiff must show that she (1) has a disability within the meaning of the ADA, (2) is a qualified individual, and (3) suffered an adverse employment action as a result of the disability.” A qualified individual within the meaning of the ADA “(1) possesses the requisite skill, education, experience, and training for her position; and (2) is able to perform the essential job functions, with or without a reasonable accommodation.” An employer will be excused from providing a requested accommodation if it can prove that providing such

23 Id.
24 42 U.S.C § 12112(a).
25 42 U.S.C § 12112(b)(5)(A).
26 42 U.S.C § 12111(9)(B).
27 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 482 (8th Cir. 2007).
28 Id.
III. DECISIONS REGARDING THE “REASSIGNMENT” CLAUSE

The Eighth Circuit was not alone in deciding the issue of mandatory reassignment when it heard *Huber v. Wal-Mart Stores, Inc.* The issue of reassignment under the ADA has come up in many other circuits, resulting in a circuit split. Some courts have found that the “reassignment” clause should constitute mandatory transfer, while other courts found that the “reassignment” clause only contemplated that a disabled employee must be given an equal opportunity to compete for an open spot. Further elaborating upon the issue of mandatory transfer is a case decided by the Supreme Court. In *U.S. Airways, Inc. v. Barnett*, the Court decided what it meant for an accommodation to be “reasonable,” thus adding a relevant angle from which to analyze the issue of mandatory transfer.

A. Decisions for mandatory transfer

The Tenth Circuit Court of Appeals decided, in *Smith v. Midland Brake, Inc.*, that the ADA’s “reassignment” clause contemplated mandatory transfer as a reasonable accommodation for disabled employees. The disabled employee in this case, Robert Smith, brought suit against his employer, alleging, among other things, a violation of the ADA for failure to reassign him

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29 42 U.S.C § 12112(b)(5)(A).
31 See Mandatory Reassignment, supra note 15, at 457.
32 See Aka, 156 F.3d at 1301-02; Smith, 180 F.3d at 1164.
33 See Humiston-Keeling, 227 F.3d at 1027.
35 Smith, 180 F.3d at 1165.
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as a reasonable accommodation. Smith had worked for Mid-
land brake for seven years, in a position that caused him to
“[come] into contact with various chemicals, solvents, and irri-
tants,” eventually causing him to develop “muscular injuries and
chronic dermatitis on his hands.” Smith’s physicians “restricted
his work activities by recommending that he avoid exposure to
potential irritants.” Unlike the case for Huber, however, Smith
was subsequently fired, as a result of his employer’s admitted
inability to find an assignment within his department and the
company’s belief that it was not required to look outside of
Smith’s department for available positions. The Court ulti-
mately found that the ADA’s “reassignment” clause required
mandatory transfer, basing its holding on an analysis of the stat-
utory language. The Court found that the ADA’s explicit use
of the word “reassignment” indicated that an employer was to
take a more affirmative step than simply giving a disabled em-
ployee an opportunity to be considered as one of the many appli-
cants for a vacant position.

In Aka v. Washington Hospital Center, a similar case regard-
ing the “reassignment” clause, the District of Columbia Circuit
Court of Appeals found that the “reassignment” clause contem-
plates more than just allowing a disabled employee to submit his
application along with all of the other candidates for a posi-
tion. In Aka, Etim Aka was employed as an Operating Room
Orderly, a job that required him to transport patients and medi-
cal supplies and involved substantial amounts of heavy lifting
and pushing. After working in this position for nineteen years,

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36 Id. at 1160.
37 Id.
38 Id.
39 Id.
40 Id. at 1165.
41 Id. at 1162.
42 Aka v. Washington Hospital Center, 156 F.3d 1284, 1304 (D.C. Cir. 1998).
43 Id. at 1286.
he was hospitalized with heart and circulatory problems.\textsuperscript{44} As a result of his ailments, Aka was no longer permitted to hold positions that involved anything more than light or moderate level of exertion.\textsuperscript{45} The disabled employee asked his employer for a transfer to a position compatible with his medical restrictions.\textsuperscript{46} Aka’s employer refused to provide a transfer, however, and informed him “it was his responsibility to review [the employer’s] job postings and to apply for any vacant jobs that interested him.”\textsuperscript{47} Subsequently, Aka began searching for vacant jobs, but he was passed over for other applicants for all to which he applied.\textsuperscript{48} Eventually, Aka volunteered to do administrative work in various departments, failing, ultimately, to obtain a permanent position.\textsuperscript{49} In reaching its conclusion that the ADA’s “reassignment” clause contemplated mandatory transfer to a vacant position, the Court relied on an analysis of the statutory language and found that interpreting the statute to mean that a disabled employee must only be allowed an equal opportunity to compete for an open position would render the “reassignment” clause a nullity.\textsuperscript{50} The Court went on to find that the legislative history of the “reassignment” clause showed that sufficient safeguards existed to prevent an employer from suffering any burdens from the transfer of a disabled employee.\textsuperscript{51}

\textbf{B. Decision against “reassignment” clause constituting mandatory transfer}

Siding with the Eighth Circuit Court of Appeals, which held in \textit{Huber} that the “reassignment” clause did not contemplate

\begin{itemize}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id. at 1287.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id. at 1304.
\item \textsuperscript{51} Id. at 1305.
\end{itemize}
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mandatory transfer, is the Seventh Circuit Court of Appeals. In *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*, the EEOC filed a claim on behalf of Nancy Cook Houser, alleging that her employer failed to reasonably accommodate the injury she sustained while performing the duties of her position. Houser “worked as a picker in a warehouse, where her duty was to carry pharmaceutical products from a shelf to a conveyor belt.” Following a workplace accident, Houser suffered an injury in her right arm, subsequently rendering her unable to perform the lifting and carrying duties of her position. Houser’s employer made several attempts to accommodate her injury, by way of modifying the characteristics of her presently held position. These efforts proved unsuccessful, and as a result, Houser sought transfer to a different position within the company in order to prevent further exacerbation of her injury. After the position to which she was initially transferred disappeared, Houser did not receive another transfer. Instead, she was allowed to apply for open positions within the company. And with every application attempt, she was passed over in favor of another, apparently more qualified, applicant. The disabled employee was subsequently let go from the company. The Court found that the ADA did not require the employer to automatically transfer her to a different position, as this constituted “affirmative action with a vengeance” by requiring the

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53 *Id.* at 1026.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 The position to which she was initially transferred was that of a “greeter.” This position eventually became obsolete. *Id.*
59 *Id.* at 1026-27.
60 *Id.* at 1027.
employer to award bonus points to people with disabilities when considering applicants for open positions.\textsuperscript{62}

\textbf{C. The Supreme Court Weighs In}

In \textit{U.S. Airways, Inc. v. Barnett}, the Supreme Court held that the ADA's "reassignment" clause must give way to an employer's policy of hiring according to a seniority system.\textsuperscript{63} In this case, Robert Barnett brought suit against his employer, alleging a violation of the ADA for failure to provide an accommodation.\textsuperscript{64} After injuring his back while working as a cargo holder, Barnett invoked his seniority rights and transferred to a "less physically demanding mailroom position."\textsuperscript{65} After having been transferred, his position became open to "seniority-based employee bidding... under [defendant's] seniority system."\textsuperscript{66} After a more senior employee made known that he planned to bid for the mailroom position, Barnett requested the employer to "accommodate his disability by allowing him to remain [in the position]."\textsuperscript{67} The employer refused to grant his request, and the disabled employee lost his job.\textsuperscript{68} In analyzing the claim, the Supreme Court never directly held whether the reasonable accommodation clause required mandatory transfer.\textsuperscript{69} Instead, the Court decided only whether "a proposed accommodation that would normally be reasonable is rendered unreasonable because the assignment would violate a seniority system's rules."\textsuperscript{70} The Court held that, \emph{generally}, an assignment that seeks to trump an employer's seniority system will be found to be "unreasona-

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} at 1029.
\item \textsuperscript{64} \textit{Id.} at 394.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{Id.}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{69} \textit{See Id.} at 406.
\item \textsuperscript{70} \textit{Id.} at 392.
\end{itemize}
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In holding that the requested accommodation was to be trumped by the seniority system, the Court made clear that, while this was true for the "run of cases," it was incorrect for employers to believe that "the simple fact that accommodation would . . . permit the worker with a disability to violate a rule that others must obey . . . cannot, in and of itself, automatically show that the accommodation is not 'reasonable.'" 72 Thus, a disabled employee remains free "to show that special circumstances warrant a finding that, despite the presence of a seniority system, the required 'accommodation' is 'reasonable' on the particular facts." 73 The Court makes clear that there may be "special circumstances" showing that an accommodation that would be "unreasonable for most members of an industry might nevertheless be required of an individual defendant in light of that employer's particular circumstances." 74

IV. The ADA's "Reassignment" Clause Requires Mandatory Transfer

Those courts finding that the "reassignment" clause does not require mandatory transfer have reached an ultimately erroneous conclusion, as such a holding bypasses the purposes of the statute, ignores the statutory language and, ultimately, discounts the realities upon which the statute was based. In finding that the ADA does not contemplate mandatory transfer under the "reassignment" clause, courts are quick to point out that holding as such transforms the ADA into a "mandatory preference" or an aggressive affirmative action statute. 75 Such reasoning, how-

71 Id. at 403.
72 Id. at 398.
73 Id. at 405.
74 Id. at 405 (quoting Borkowski v. Valley Cent. School Dist., 63 F. 3d 131, 137 (2d Cir. 1995)).
ever, superficially ignores the fact that a disability, by its very nature, “requires both neutral decision making and affirmative efforts by the nondisabled community.”76 In fact, in Barnett, the Supreme Court explicitly substantiates this line of thinking, finding that “the Act specifies... that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.”77 Thus, the principal question in deciding a case regarding mandatory transfer—the ignorance of which has caused the inconsistent decisions among circuits—must consider, instead, the scope of duty imposed by the ADA’s “reassignment” clause. This much is clear from an analysis of the language of the statute, its legislative history and the fact that sufficient safeguards exist to protect employers faced with accommodating a disabled employee.

A. The language and the legislative history of the statute make clear that mandatory transfer was intended by the “reassignment” clause

A closer look at the statutory language and the statute’s legislative history reveals much about how the statute should be applied. In construing the prohibition against discrimination on the basis of disability under the ADA, Congress specifically included “reassignment to a vacant position” as an option for providing a reasonable accommodation.78

The Supreme Court has noted that “[j]udges should hesitate’ to read statutory provisions as ‘surplusage’” and thus, an analysis into the plain meaning of the words used to construct the statute is relevant to a determination of their intended meaning.79 On a simplistic level, “reassign” must mean more than allowing an employee to apply for a job on the same basis as

76 Mandatory Reassignment, supra note 15, at 452-53.
77 Barnett, 535 U.S. at 397.
78 42 U.S.C § 12111(9)(B).
everyone else. In particular, use of the core word “assign” takes whatever action is intended by the statute a step further, implying that the employer must make some sort of active effort in accommodating a disabled employee. In fact, the dictionary defines the word “assign” as meaning “to transfer (property) or to appoint to a post or duty.” Thus, the plain meaning of the statute indicates that the ADA contemplates an employer’s obligation to constitute more than just allowing an employee an equal opportunity to compete for vacant spots as a reasonable accommodation.

The ADA’s legislative history further provides insight into the fact that the “reassignment” clause contemplates mandatory transfer as a reasonable accommodation. Particularly relevant is a House Report discussing reassignment, which says

> reasonable accommodation may also include reassignment to a vacant position. 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. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.

Congress, thus, intended reassignment to be the option considered “only after other efforts at accommodation have failed.” By treating the “reassignment” clause as a last resort, Congress clarifies its belief that reassignment is one of the more drastic
actions an employer might be obligated to take in order to accommodate a disabled employee. If the “reassignment” clause was meant only to confer a disabled employee the same opportunity to compete for a vacant spot as a nondisabled employee, Congress would not have had to specify that reassignment was to be a last resort, as equal consideration for a vacant spot would constitute much smaller of a burden for the employer and could, in some cases, be the most simple accommodation an employer would make.

B. There are sufficient safeguards in place to protect an employer who is faced with reassigning a disabled employee

In holding that the ADA’s “reassignment” clause does not contemplate mandatory transfer, the Seventh and Eighth Circuits point out that finding otherwise would unreasonably force an employer to “give bonus points to people with disabilities.”84 Finding this to be too impermissibly heavy of a burden, these courts have held that the “reassignment” clause means nothing more than that a disabled employee should be afforded the same opportunity to compete for a vacant spot as any nondisabled employee.85 This reasoning is fundamentally flawed, however, as it impermissibly oversteps the purpose of the statute by allowing for an employer’s interests to overshadow the very protection the ADA is meant to provide. Such reasoning, furthermore, ignores the safeguards already afforded to employers by the statutory language and its various interpretations.

The ADA explicitly provides that an employer is obligated to provide a “reasonable accommodation...unless [the employer] can demonstrate that the accommodation would impose an un-

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85 Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2007); Humiston-Keeling, 227 F.3d at 1037.
due burden on the operation of its business.” Thus, the ADA, on its face, provides several separate forms of protection for an employer faced with accommodating a disabled employee, making the refusal to mandatorily transfer a disabled employer that much more irrational.

1. Reasonableness

To begin with, an accommodation must only be “reasonable.” Useful, again, is a look at a dictionary, which defines reasonable as “not extreme or excessive; moderate and fair.” In characterizing the accommodation an employer is obligated to make as such, the ADA makes clear that an employer is not expected to suffer too much of a burden and is not required to step outside “the realm of the reasonable.” In framing the reasonable accommodation provision in such a way, Congress shows that an accommodation must, ultimately, be fair to both the employee and the employer.

The ADA’s examples of actions that qualify as reasonable accommodations further proves that the “reasonable accommodation” clause ultimately envisions a balance between the employer’s and the disabled employee’s interests. This illustrative list includes “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters.” By providing so many options, and making clear that actions not listed could also qualify, Congress affords employers a degree of flexibility when it comes to providing a reasonable accommodation,

86 42 U.S.C § 12112(b)(5)(A).
87 42 U.S.C § 12112(b)(5)(A).
90 42 U.S.C. § 12111(9).
permitting employers to determine which accommodation is the best fit for both its own and the disabled employee’s interests. The Court in *EEOC v. Humiston-Keeling, Inc.* makes this clear by implicitly referring to this degree of flexibility, recognizing that a reasonable accommodation is more like an “experiment...undertaken in good faith.”  

Further showing that the “reasonableness” requirement does not impose an undue burden is the recognition that an employer will not be “required to fundamentally alter its program.”  

The statute itself indicates that an accommodation should give way to an employer’s policy, saying that it may be a defense...that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen 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, and such performance cannot be accomplished by reasonable accommodation.

As discussed above, this is precisely the issue considered by the Supreme Court in *Barnett*, when it decided whether an employer’s seniority system trumps a disabled employee’s request for an accommodation. The Court made clear that the ADA does not require an employer to disrupt ordinary business policies in order to provide an accommodation, as this would be unreasonable. In general, an employer’s policies will prevail, and other accommodations will need to be implemented.

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92 Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).
93 42 U.S.C. § 12113(a).
95 See Id.
2. Undue Hardship

An employer is excused from providing a certain type of accommodation if such an accommodation presents an undue burden. In determining whether an employer will suffer an undue burden, a court must consider certain factors, such as the nature and cost of the accommodation, the number of persons employed by the company, the financial resources of the company, and the impact of the accommodation upon the operation of the company. In Barnett, the Supreme Court explicitly stated that an employer has an opportunity to show "special (typically case-specific) circumstances that demonstrate undue burden in the particular circumstances." Thus, by means of the "undue burden" clause, an employer is provided a built-in safeguard that protects it from having to provide an accommodation that would cause it to suffer too heavy of a burden. Further, consideration of "undue burden" is especially fair because it allows a court to consider circumstances on a "case-specific" basis. Put otherwise, the "undue burden" clause allows an employer to present his or her unique situation, without having to meet a specified burden.

V. How the Supreme Court Would Have Decided the Issue Had Huber Been Heard

Holding that the "reasonable accommodation" clause does not contemplate mandatory transfer ignores the Act's language and legislative history, disregards the built in safeguards provided by the statute's construction, and ultimately discounts the realities upon which the statute was based. For these reasons, had the Supreme Court considered Pam Huber's case, it would likely have held that the Eighth Circuit incorrectly found that the ADA's "reassignment" clause meant that she, and other dis-

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abled employees in similar situations, must only be given an equal opportunity to compete for a vacant position.

The crux of the Court’s argument would likely stem from a comparison of the qualifications standard utilized by the defendant in Huber to the seniority policy used by the employer in Barnett. In Barnett, the Court alluded to the seniority system being a legitimate policy because it provides for “predictable advancement” based on objective standards. This policy is unambiguous and prevents any sort of “unfairness in personnel decisions.” The qualification standard used by Wal-Mart in Huber, however, is not as transparent.

A decision based on merits leaves more room for abuse, as an employer could “merely go through the process. . . of consideration of a disabled employee’s application for reassignment and refuse it in every instance,” simply by claiming the existence of a more “qualified candidate.” While a seniority system delivers consistent and impersonal decisions, a system based on “qualifications” alone arguably makes for a less objective decision-making process. As such, the Court would most likely hold that the qualifications standard simply did not merit contravention of the ADA’s ultimate purpose in protecting a disabled employee’s opportunity for equality—especially when considered in light of the fact that Huber was, concededly, qualified for the job.

In the alternative, if the Court did find that the qualification system constituted as legitimate of a business policy as a seniority system, it would nonetheless most likely find that the Eighth

98 See also Daugherty v. City of El Paso, 56 F.3d 695, 699 (5th Cir. 1995) (holding, in a challenge brought by a disabled employee whose request for transfer was not honored, that an employer’s policy of using “an order of priority for filling vacancies,” which differentiated between full-time and part-time employees, was valid).
100 Id.
101 See Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 481 (8th Cir. 2007).
102 Smith v. Midland Brake, Inc., 180 F.3d 1167 (10th Cir. 1999).
103 Huber, 486 F.3d at 481.
Circuit did not consider the matter as fully as the \textit{Barnett} Court had intended for it to be considered. In \textit{Barnett}, the Court found that “the simple fact that accommodation would... permit the worker with a disability to violate a rule that others must obey... cannot, \textit{in and of itself}, automatically show that the accommodation is not ‘reasonable.’”\textsuperscript{104} Thus, the Court provides an avenue for disabled employees to receive a transfer, despite the presence of a business policy that would ordinarily preclude them from doing so. To be permitted a bypass of the general exception to mandatory transfer provided by a business policy, a plaintiff “must present evidence of... special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.”\textsuperscript{105} The Eighth Circuit did not make any indication that it considered whether Huber’s particular circumstances warranted such an exception.\textsuperscript{106} As such, if the Supreme Court were to find the qualification standard comparable to a seniority system, it would likely rule similarly to how it did in \textit{Barnett}, requiring for the Circuit judgment to be vacated and ordering a remand for a more complete consideration of the plaintiff’s particular circumstances.\textsuperscript{107}

\section*{VI. Conclusion}

Ultimately, at the core of the ADA is the desire to “open up all aspects of American life” to disabled people.\textsuperscript{108} The passing of the statute was in recognition that the focus need no longer be on the paternalistic idea that disabled people should be rehabilitated into society.\textsuperscript{109} Instead, the ADA was “designed... to

\begin{footnotesize}
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\item \textsuperscript{104} \textit{Barnett}, 535 U.S. at 398.
\item \textsuperscript{105} \textit{Id}. at 406.
\item \textsuperscript{106} \textit{See Huber}, 486 F.3d 480.
\item \textsuperscript{107} \textit{Barnett}, 535 U.S. at 406.
\item \textsuperscript{108} \textit{Mandatory Reassignment, supra} note 15, at 452 (quoting George H.W. Bush, U.S. President, State on Signing the Americans with Disabilities Act of 1990, 26 \textit{Wkly. Comp. Pres. Doc.} 1165 (July 26, 1990)).
\item \textsuperscript{109} \textit{Id}.
\end{itemize}
\end{footnotesize}
integrate disabled individuals into society, striving for equality [in all areas of life].” 110

The ADA is “distinct from antidiscrimination laws, because the ADA not only bars discrimination but also requires affirmative steps in certain contexts.” 111 Unlike the case for discrimination based on personal characteristics, such as skin color, sex, and age, discrimination based on a person’s disability centers around a characteristic that legitimately places a physical barrier in someone’s life. 112 Because of this ultimate distinction, Congress intended the ADA to obligate employers to take extra steps to ensure that disabled employees will enjoy the same opportunities and comforts at work as their nondisabled coworkers. 113

As part of the obligation to ensure equality in the workplace, the ADA provides that an employer must afford a disabled employee a reasonable accommodation when a disability prevents the employee from fully performing the duties to which he or she is assigned. 114 In contemplating what entails a reasonable accommodation, Congress made sure to provide an employer with a degree of flexibility by providing an illustrative, non-exhaustive list of actions it could take. 115 The plethora of options available to the employer, as well as the safeguards provided by the statute, function to lessen the burden felt by an employer faced with the need to provide an accommodation for a disabled employee.

One of the options for a reasonable accommodation is “reassignment to a vacant position.” 116 The most logical interpretation, as well as the interpretation most consistent with the

110 Id.
111 Id.
112 See Id.
113 See supra Part IV.A.
116 Id.
MANDATORY REASSIGNMENT AND THE ADA

Statutory language and the statute’s legislative history, is that the “reassignment” clause contemplates mandatory transfer as a reasonable accommodation. Holding the “reassignment” clause to confer mandatory transfer does not impermissibly turn the ADA into an aggressive affirmative action statute. On the contrary, this conclusion, when considered in conjunction with the statutory language and the safeguards it provides to an employer, is exactly what Congress contemplated when enacting the ADA. It is the conclusion that is most consistent with the ultimate purpose of the ADA, in that it most effectively guarantees a disabled employee an opportunity to exist on equal footing with his or her nondisabled co-workers and, ultimately, opens the door to at least one aspect of American life.