

PROVIDING PLAINTIFFS WITH TOOLS:
THE SIGNIFICANCE OF *EEOC V.*
UNITED AIRLINES, INC.

*Michelle Letourneau**

INTRODUCTION

Under the Americans with Disabilities Act (ADA), employers are required to provide individuals with disabilities “reasonable accommodations,”¹ including reassignment of a current employee to a vacant job position² should the employee find himself or herself unable to perform the essential functions of her current job due to a disability, but is able to fulfill the functions of the vacant position with or without reasonable accommodation.³ Traditionally, circuit courts have been split on whether “reassignment” means automatic reassignment or simply the opportunity to compete for the position against other applicants.⁴ The only Supreme Court case on the

* Candidate for Juris Doctor, Notre Dame Law School, 2015; B.A. in Music Performance and Anthropology, University of Notre Dame, 2012. I would like to thank my advisor, Professor Michael Jenuwine, for help in developing the thesis of this Note, numerous helpful conversations, and draft reviews. I would also like to thank Professor Barbara Fick for lengthy discussions, which led me to adopt the particular approach and thesis of this Note. I would also like to thank Kay Halvorson, Nikki Harris, Laura Dettinger, and Warren Rees for their guidance in checking for preemption, which also led me to adopt the approach and thesis of this Note. I would like to thank Barry Taylor for suggesting this topic, and Rachel Margolis Weisberg for providing an idea for incorporating mental illness and/or mental disability into the Note. I would like to thank Ben Risacher for his review of an initial draft and all of the *Notre Dame Law Review* members who so carefully and generously edited this Note. I would like to thank my roommate, Karen Champion, for discussing the Note with me as I developed my ideas aloud and for providing useful questions and ideas during that development. I would like to thank my friends and family for their support. Finally, I would like to thank Ryan Belock for designing the “Reassignment Spectrum” graphic and for his endless support and encouragement throughout the entire writing and revising process.

1 42 U.S.C. §§ 12112(a), (b)(5)(A) (2012).

2 *Id.* § 12111(9)(B).

3 *See id.* §§ 12111(8), 12112(a); 29 C.F.R. § 1630.2(m) (2014).

4 *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007); Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002), *abrogated by* EEOC v. United Airlines Inc. (*United Airlines II*), 693 F.3d 760 (7th Cir. 2012); EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760; Smith v. Midland

issue, *US Airways, Inc. v. Barnett*,⁵ holds that ADA reassignment is not ordinarily reasonable where the employer has an established seniority system.⁶

Using the reasoning of that Supreme Court case, the Seventh Circuit seems to have clarified its position regarding whether reassignment is mandatory despite an employer's policy of selecting the best qualified candidate for a position.⁷ In March 2012, a three-judge Seventh Circuit panel published an opinion in the case of *EEOC v. United Airlines, Inc. (United Airlines I)*.⁸ In September 2012, the same panel vacated its own March opinion and wrote a new opinion (*United Airlines II*), overruling and abrogating Seventh Circuit precedents⁹ holding that a most-qualified selection policy may "trump" ADA reassignment.¹⁰ The Seventh Circuit likely did make mandatory reassignment ordinarily reasonable under the *Barnett* test.¹¹ While commentators have discussed the Seventh Circuit's contribution to the circuit split on this question,¹² the real contributions of *United Airlines II* were to temper what could have been a relatively employer-friendly decision in *Barnett* and to provide employees with tools to argue that reassignment is ordinarily reasonable despite many types of employment policies. In fact, the

Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1300–01 (D.C. Cir. 1998) (en banc).

5 *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 538 (2013) ("The only Supreme Court case addressing the reasonable accommodation provision is *U.S. Airways, Inc. v. Barnett*.").

6 *Barnett*, 535 U.S. at 394; Porter, *supra* note 5, at 538; Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 520–21 (2011).

7 *United Airlines II*, 693 F.3d at 762–65.

8 *EEOC v. United Airlines, Inc. (United Airlines I)*, 673 F.3d 543 (7th Cir. 2012), vacated, *United Airlines II*, 693 F.3d 760.

9 *United Airlines II*, 693 F.3d at 761, 763–64. Recently, another note was published on the topic of this Note. See Michael Creta, Note, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693 (2014). While I also argue that *United Airlines II* has most likely established that mandatory reassignment trumps best-qualified policies under the *Barnett* analysis, I develop the likelihood of this conclusion in more detail and argue explicitly that this likely conclusion helps plaintiffs to regain ground under a *Barnett* framework which had heightened the burden on plaintiffs to prove reasonableness. In fact, Creta may conflate the reasonableness and undue hardship analyses. See *id.* at 1707 n.99. I also explicitly state and argue that language from *United Airlines II* can be used by plaintiffs to argue that mandatory reassignment should be able to trump other employment policies besides best-qualified policies, see *id.* at 1726–28, even the limitations which are explicitly stated in *Midland Brake* and may be lauded by Creta, see *id.* at 1722 & n.197.

10 *United Airlines II*, 693 F.3d at 763 (citing *Barnett*, 535 U.S. at 405).

11 See Valerie Wicks, *7th Circuit Reverses Course; Reassignment May Be 'Reasonable Accommodation' Under ADA*, WESTLAW J. EMP. (Thomson Reuters, Wayne, PA), Jan. 2013, at *2.

12 See Taylor Brooke Concannon, Comment, *Don't Throw the Baby Out with the Bathwater: Taking the Seventh Circuit's Decision in EEOC v. United Airlines, Inc. Too Far*, 52 WASHBURN L.J. 613, 634 & n.174 (2013); Kevin P. McGowan, *Justices Decline to Review ADA Case on Duty to Reassign Disabled Employees*, BNA'S EMP. DISCRIMINATION REP. (Arlington, VA), June 2013, at 868–70.

language of *United Airlines II* may be even more useful to plaintiffs than pre-*Barnett* decisions from other circuits that had rejected the notion that a best-qualified selection policy could trump a reasonable request for reassignment under the ADA.

This Note will analyze the language of the *United Airlines II* decision, in light of *Barnett*, Seventh Circuit precedents regarding the reasonable accommodation of reassignment, and cases from other circuits that the Seventh Circuit cited in relevant part in its *United Airlines II* decision. Part I will provide an introduction to the relevant provisions of the ADA. Part II will summarize relevant portions of a series of cases predating *United Airlines II* that deal with the concept of reassignment as a reasonable accommodation under the ADA. These cases are discussed in considerable detail in order to highlight in Part III the significance of *United Airlines II*—particularly for employee-plaintiffs trying to argue that ADA reassignment should ordinarily trump various employment policies.

I. THE AMERICANS WITH DISABILITIES ACT

Recognizing that individuals with disabilities have experienced discrimination in the United States but traditionally had “no legal recourse to redress such discrimination,”¹³ Congress enacted the ADA in 1990.¹⁴ The purpose of the Act was to ensure federal recourse for such discrimination by “provid[ing] clear, strong, consistent, enforceable [national] standards addressing discrimination against individuals with disabilities.”¹⁵

Based on similar findings and purposes, the ADA was amended in 2008 in order to expand the definition of “disability.”¹⁶ By doing so, Congress emphasized that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations” rather than “extensive analysis” of “whether an individual’s impairment is a disability under the ADA.”¹⁷ One such obligation is that employers not discriminate against applicants or employees with disabilities.¹⁸

Title I of the ADA addresses discrimination against individuals with disabilities in the employment setting: “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.”¹⁹ “Covered entit[ies]” include “an employer, employment

13 42 U.S.C. § 12101(a)(4) (2012).

14 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

15 42 U.S.C. § 12101(b)(1)–(2).

16 *Id.* § 12102(1).

17 *Id.* § 12101(b).

18 *Id.* § 12112(a)–(b).

19 *Id.* § 12112(a) (emphasis added).

agency, labor organization, or joint labor-management committee,”²⁰ where an “employer” is defined as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.”²¹ A “qualified individual” is “an individual who, with or without reasonable accommodation, can perform *the essential functions* of the employment position that such individual holds or desires.”²² Discrimination “against a qualified individual on the basis of disability” includes

(5)(A) 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; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make *reasonable accommodation* to the physical or mental impairments of the employee or applicant.²³

In short, under the ADA, employers are *required* to provide reasonable accommodations to applicants or employees with disabilities unless the employer can prove undue hardship.²⁴ The ADA provides a definition and list of factors to consider when evaluating whether undue hardship exists, including “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; [and] the effect on expenses and resources, or the *impact otherwise of such accommodation upon the operation of the facility*.”²⁵ The EEOC also states in its ADA regulations that “[i]t may be a defense to a charge of discrimination . . . that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation).”²⁶

A nonexhaustive list of possible accommodations is outlined in the ADA and includes “reassignment to a vacant position.”²⁷ This accommodation has been surrounded by controversy over the years, resulting in a circuit split and a shift in Seventh Circuit jurisprudence. Why is this particular accommodation so controversial? One might speculate. All of the potential reasonable accommodations listed explicitly in the ADA besides “reassignment” seem to be aimed at enabling an individual with a disability to perform the essential functions of her assigned position. The “reassignment” accommodation

20 *Id.* § 12111(2).

21 *Id.* § 12111(5)(A).

22 *Id.* § 12111(8) (emphasis added).

23 *Id.* § 12112(b)(5)(A)–(B) (emphasis added).

24 29 C.F.R. § 1630.15(d) (2014); *see* 42 U.S.C. § 12111(9).

25 42 U.S.C. § 12111(10)(A) (emphasis added).

26 29 C.F.R. § 1630.15(e).

27 42 U.S.C. § 12111(9)(B).

seems to be the only one that considers essential functions outside of the assigned position. In fact, the EEOC regulations set particular boundaries for the expectations surrounding this accommodation—one of the few accommodations that “require further explanation.”²⁸ For example, employers are usually able to exercise significant discretion in selecting among accommodations when multiple reasonable accommodations are available.²⁹ However, the accommodation of reassignment is only available to employees, not to applicants,³⁰ and only after possible accommodations for the employee in her current position have been considered and/or rejected.³¹ Then, the employer must first consider the employee for any equivalent vacant positions before considering “a lower graded position.”³² However, the “employer is not required to promote an individual with a disability as an accommodation.”³³ Despite such attempts by the EEOC to clarify the expectations and borders of the “reassignment” provision, questions still remain regarding the “scope of the employer’s obligation to offer . . . a reassignment job” to an individual with a disability.³⁴ More specifically, courts have tried to determine when reassignment is “reasonable,”³⁵ particularly in light of an employer’s other employment policies.³⁶

The Supreme Court considered this question and held in 2002 that when considering reassignment as a reasonable accommodation, the employee must first establish that the reassignment would be “reasonable in the run of cases,” in light of an employer’s other employment policies.³⁷ If this first step results in a presumption that an employer’s employment policy would ordinarily prevail over the ADA reassignment provision,³⁸ the employee “nonetheless remains free to show that special circumstances warrant a finding” that reassignment is reasonable in this case.³⁹ Only after the employee-plaintiff has shown reasonableness, either “in the run of cases” or in this particular case, will the court consider whether the employer has a valid undue hardship defense.⁴⁰ The Court specifically rejected the plain-

28 29 C.F.R. § 1630.2(o).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1159 (10th Cir. 1999) (en banc).

35 *United Airlines II*, 693 F.3d 760, 761 (7th Cir. 2012); see Charles Conway, *Ordinarily Reasonable: Using the Supreme Court’s Barnett Analysis to Clarify Preferential Treatment Under the Americans with Disabilities Act*, 22 AM. U. J. GENDER SOC. POL’Y & L. 721, 727 (2014) (“Since its enactment, the ADA’s ‘reasonable accommodations’ requirement has perplexed employees and employers. The ADA’s vague language has led to many unresolved issues as employers, employees, and courts have interpreted the ambiguous terms of the statute in different ways.” (footnotes omitted)).

36 See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002).

37 *Id.* at 403.

38 *Id.* at 406.

39 *Id.* at 405.

40 See *id.* at 400–02.

tiff's contention that a showing of "reasonableness" merely required a showing of the "effectiveness" of the accommodation for the employee.⁴¹ However, it remains unclear exactly what constitutes "reasonable."⁴²

In the Seventh Circuit, ADA reassignment controversy has primarily concerned whether and when ADA reassignment should trump an employer's best-qualified selection policy.⁴³ In 2000, a court held that an employer could assign the most qualified applicant to a position, despite the reassignment provision of the ADA.⁴⁴ In 2002, in light of *Barnett*, the Seventh Circuit held that it was reasonable for a best-qualified policy to trump the ADA reassignment provision.⁴⁵ However, in its September 2012 *United Airlines II* opinion, the Seventh Circuit vacated its March 2012 *United Airlines I* opinion,⁴⁶ overruled its 2000 holding, and abrogated its 2002 holding.⁴⁷ While a seniority system might presumptively trump the ADA reassignment requirement,⁴⁸ a best-qualified selection policy cannot be equated with a seniority policy.⁴⁹ Through this conclusion and the language that the Seventh Circuit chose to use from the *Barnett* case, the Seventh Circuit helped to soften *Barnett's* "blow" to employee-plaintiffs—its requirement that plaintiffs show more than "effectiveness" to meet their burden of proving "reasonableness" in the first step of the reasonable accommodation analysis. The Seventh Circuit has provided employee-plaintiffs with valuable language and considerations to argue that a particular accommodation is "reasonable," even under the *Barnett* analysis and the unclear definition of "reasonableness."

II. CASE ANALYSES

A. *Aka v. Washington Hospital Center*⁵⁰

After undergoing bypass surgery, Etim U. Aka was unable to perform the orderly job at Washington Hospital Center (WHC) he had held for nineteen years.⁵¹ Aka requested reassignment to a new position, but the hospital required Aka to investigate and apply for positions on his own;⁵² WHC gave Aka an eighteen-month "job search leave," during which he would continue to benefit from the collective bargaining agreement which "provide[d] that

41 *Id.* at 399–402.

42 See Porter, *supra* note 5, at 529–32.

43 See *United Airlines II*, 693 F.3d 760, 764 (7th Cir. 2012).

44 EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028–29 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760.

45 Mays v. Principi, 301 F.3d 866, 872 (7th Cir. 2002), *abrogated by United Airlines II*, 693 F.3d 760.

46 *United Airlines I*, 673 F.3d 543 (7th Cir. 2012), *vacated, United Airlines II*, 693 F.3d 760.

47 *United Airlines II*, 693 F.3d at 763–64.

48 See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002).

49 *United Airlines II*, 693 F.3d at 764.

50 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

51 *Id.* at 1286.

52 *Id.*

qualified WHC employees ‘[would] be given preferential treatment over nonHospital employees in filling bargaining unit vacancies,’ and also incorporate[d] an additional preference for employees with greater seniority.”⁵³ Aka applied for various positions but was not hired and in some cases was not even interviewed.⁵⁴ Aka filed complaints under the Age Discrimination in Employment Act (ADEA) and the ADA;⁵⁵ the ADA claim included two theories: disparate treatment and failure to provide “the reasonable accommodation of reassignment to a vacant position once he became disabled.”⁵⁶

In evaluating the reasonable accommodation claim, the D.C. Circuit first analyzed the meaning of “otherwise qualified.” Examining the language of the ADA, caselaw, the EEOC’s interpretive guidelines, and the legislative history of the ADA, the court held, “[a]n employee seeking reassignment to a vacant position is thus within the definition [of ‘otherwise qualified’] if, with or without reasonable accommodation, she can perform the essential functions of the employment position to which she seeks reassignment.”⁵⁷

Next, the court examined the collective bargaining agreement (CBA). Based on a plain language reading of section 14.5,⁵⁸ the court determined that the CBA allowed reassignment of “disabled employees to vacant positions in at least some circumstances”⁵⁹ and that “reassignment” under section 14.5 meant more than simply allowing an employee to compete for a vacant job.⁶⁰ Though the court could not determine whether the CBA and ADA were perfectly aligned or “what would occur” if they were in conflict,⁶¹ it did observe—in response to the dissent—that the ADA’s reassignment provision also requires more than “[a]n employee who on his own initiative applies for and obtains a job elsewhere in the enterprise.”⁶² The court also made some observations about limitations to ADA reassignment, which were comparable to those outlined in *Smith v. Midland Brake, Inc.*⁶³

B. *Smith v. Midland Brake, Inc.*⁶⁴

In *Midland Brake*, the Tenth Circuit en banc categorically rejected the notion that a best-qualified hiring policy could trump a reasonable reassignment under the ADA. After seven years of working in the light assembly department at Midland Brake, Robert Smith “developed muscular injuries and chronic dermatitis on his hands,” rendering him “unfit to work in the

53 *Id.* at 1286–87.

54 *Id.* at 1287.

55 *Id.*

56 *Id.* at 1288.

57 *Id.* at 1300–01.

58 *Id.* at 1302–03.

59 *Id.* at 1303.

60 *Id.* at 1302.

61 *Id.* at 1301, 1303.

62 *Id.* at 1305.

63 *Id.*; see *infra* Section II.B.

64 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc).

light assembly department.”⁶⁵ Unable to accommodate Smith in the light assembly department, Midland Brake eventually fired Mr. Smith.⁶⁶ The Tenth Circuit found that summary judgment was not appropriate because a material issue of fact remained “regarding whether Smith sufficiently invoked the interactive process and, if so, whether Midland Brake adequately responded to a request for reassignment,”⁶⁷ and remanded the case to the district court.⁶⁸ However, the Tenth Circuit en banc clearly rejected the earlier finding that an employee could not be considered a “qualified individual with a disability” because he could not “perform his existing job”⁶⁹ if the employee “could perform the essential functions of other available jobs within the company with or without a reasonable accommodation.”⁷⁰

The Tenth Circuit provided an analysis of—and limitations to—“an employer’s duty to reassign.”⁷¹ After determining that “reassignment” applies to “an existing employee, not a job applicant,” the court rejected the dissent’s suggestion “that the reassignment duty imposed by the ADA is no more than a duty merely to *consider* without discrimination a disabled employee’s request for reassignment along with all other applications.”⁷² The court ultimately held that:

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 [or “an additional exception”] unwarranted by the statutory language or its legislative history.⁷³

While the presence of a more qualified candidate could not be a factor that would preclude a “right to reassign,”⁷⁴ the court did list factors which could preclude a duty of reassignment.⁷⁵ First, the court emphasized that reassignment is only to be considered if it is not possible to accommodate the

65 *Id.* at 1160.

66 *Id.*

67 *Id.* at 1179.

68 *Id.* at 1180. The parties were permitted to submit, and the district court could consider, other claims for summary judgment. *Id.* The district court did consider such a claim—regarding whether Smith had shown he was qualified to perform a vacant position despite “sworn assertions to the [Social Security Administration] that he was permanently and totally disabled”—but again found that summary judgment was not appropriate; the case was later dismissed (and presumably settled). *Smith v. Midland Brake, Inc.*, 98 F. Supp. 2d 1233, 1239, 1242 (D. Kan. 2000).

69 *Midland Brake*, 180 F.3d at 1159–60.

70 *Id.* at 1159.

71 *Id.* at 1171.

72 *Id.* at 1164 (emphasis added). The court cited the plain language of the statute. *Id.* at 1164–66.

73 *Id.* at 1167, 1169.

74 *Id.* at 1166.

75 *Id.* at 1170–78.

employee in her current position.⁷⁶ Next, and very significantly, the court noted that reassignment must be “reasonable.”⁷⁷ However, the court did not provide a clear definition of “reasonable.”⁷⁸ This limitation on the “[s]cope of the reassignment duty” was listed separately from the list of “[s]pecific [l]imitations on an [e]mployer’s [d]uty to [r]eassign” that followed in the opinion and included the undue hardship defense.⁷⁹ Apparently, “reasonableness” was a factor to be considered in addition to other specific limitations and the undue hardship defense; reassignment was not presumed to be reasonable simply because it was included as a possible accommodation in the ADA or because it “passed” the other specific limitations listed.

Next, the court listed eight “*specific*” limitations—“broadly accepted limitations on an employer’s duty to reassign that have evolved under ADA case law in our circuit and others”⁸⁰—with support from the ADA, the EEOC guidelines, further EEOC guidance, caselaw from other circuits, and legislative history.⁸¹

1. The employer and employee must generally engage in “good-faith communications” through an interactive process that usually must be initiated by the employee and during which the employee must—if she is seeking or open to reassignment—express her desire to be reassigned if no accommodation for the employee’s current position is possible.⁸²
2. The court stated: “Reassignment is *limited to existing jobs* within the company. It is not reasonable to require an employer to create a new job for the purpose of reassigning an employee to that job.”⁸³
3. It also held that while a “vacant” position includes not only currently vacant positions but also “positions that the employer reasonably anticipates will become vacant in the fairly immediate future,”⁸⁴ the reassignment position under consideration must actually be vacant.⁸⁵ The court further explained that a collective bargaining agreement may trump the ADA reassignment accommodation requirement.⁸⁶
4. The court noted that some other employment policies—such as a “well entrenched seniority system”—might trump ADA reassignment

76 *Id.* at 1170–71.

77 *Id.* at 1171.

78 *Id.*

79 *Id.* at 1170–74.

80 *Id.* at 1171 (emphasis added).

81 *Id.* at 1171–78.

82 *Id.* at 1171–73.

83 *Id.* at 1174 (emphasis added).

84 *Id.* at 1175.

85 *Id.* at 1175.

86 *Id.* at 1175 (“Similarly, an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a vested priority right to such vacant positions.”).

where the policies “may be so fundamental to the way an employer does business that it would be unreasonable to set aside.”⁸⁷

5. The court stated that “[r]eassignment does not require promotion,” but that the employer should “consider lateral moves” before considering demotions.⁸⁸
6. The employee is also not guaranteed the reassignment position which he or she prefers; rather, “[s]o long as it is consistent with the above requirements, the employer is free to choose the reassignment that is to be offered.”⁸⁹
7. An “[e]mployer need offer only a reassignment as to which the employee is qualified with or without reasonable accommodation,”⁹⁰ and
8. “[N]o reassignment need be offered if it would create an ‘undue hardship’ on the employer.”⁹¹

The Tenth Circuit made reassignment, not *consideration* of reassignment, a mandatory accommodation, but with specific categorical limitations, including an unclearly defined “reasonableness” requirement.

C. EEOC v. Humiston-Keeling, Inc.⁹²

After Nancy House Cooker developed tennis elbow from a work accident, she was unable to perform her duties as a warehouse picker.⁹³ Houser’s employer first tried to accommodate Houser in her warehouse position by “rigg[ing] an apron” to enable Houser to continue “to carry pharmaceutical products from a shelf to a conveyor belt.”⁹⁴ Houser applied for “several vacant clerical positions . . . but in each case was turned down in favor of another applicant, and as a result was eventually let go by the company.”⁹⁵

Ultimately, the Seventh Circuit held “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 rather than the first qualified applicant.”⁹⁶ In short, a most-qualified-candidate hiring policy can trump the ADA reassignment requirement. The court rejected what it perceived to be the EEOC’s argument—that the ADA “require[s] that the dis-

87 *Id.* at 1175–76.

88 *Id.* at 1176–77.

89 *Id.* at 1177.

90 *Id.* at 1178.

91 *Id.*

92 227 F.3d 1024 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760 (7th Cir. 2012).

93 *Id.* at 1026.

94 *Id.* at 1026.

95 *Id.* at 1026–27.

96 *Id.* at 1029.

abled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show ‘undue hardship,’ a safe harbor under the statute”⁹⁷—because such an “interpretation requires employers to give bonus points to people with disabilities, much as veterans’ preference statutes do”⁹⁸ and may force the employer to “pass over the superior applicant who . . . might himself or herself be disabled or belong to some other protected class.”⁹⁹

The court also rejected what it perceived to be the EEOC’s argument that if an employee is merely able to compete, there is nothing “left of the duty to reassign a disabled worker to a vacant position.”¹⁰⁰ The court then distinguished *Aka* because that case did not involve a superior applicant without a disability or an employer with a “consistent policy of preferring the best candidate for a vacancy rather than merely hiring the first qualified person to apply.”¹⁰¹ It also rejected the Tenth Circuit cases, including *Midland Brake*, stating that “[a] policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory.”¹⁰²

While the court acknowledged “that antidiscrimination statutes impose costs on employers,” it explained that there is a “principled” difference

between requiring employers to clear away obstacles to hiring the best applicant for a job . . . and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of . . . a [“protected”] group. That is affirmative action with a vengeance. . . . It goes well beyond enabling the disabled applicant to compete in the workplace¹⁰³

The Seventh Circuit rejected the suggestion that the ADA reassignment requirement should trump an established policy of hiring the most qualified candidate.

D. US Airways, Inc. v. Barnett¹⁰⁴

After Robert Barnett hurt his back as a cargo handler for US Airways, “[h]e invoked seniority rights and transferred to a less physically demanding mailroom position,” which was periodically opened to a seniority-based bidding process.¹⁰⁵ Barnett requested, but was denied, a reassignment accommodation under the ADA—to allow him to keep the position to which he had been transferred rather than allowing other employees to bid for the

97 *Id.* at 1027 (quoting 42 U.S.C. § 12112(b)(5)(A) (2012)).

98 *Id.*

99 *Id.* at 1028.

100 *Id.* at 1027–28.

101 *Id.* at 1028.

102 *Id.*

103 *Id.* at 1028–29 (emphasis added).

104 535 U.S. 391 (2002); see Porter, *supra* note 5, at 538–41 (discussing *Barnett*).

105 *Barnett*, 535 U.S. at 394.

position according to the seniority system.¹⁰⁶ The Supreme Court considered the following question:

[In the case of] conflict between: (1) the interests of a disabled worker who seeks assignment to a particular position as a “reasonable accommodation,” and (2) the interests of other workers with superior rights to bid for the job under an employer’s seniority system. . . . [D]oes the accommodation demand trump the seniority system?¹⁰⁷

The Court ultimately concluded that “the seniority system will prevail in the run of cases.”¹⁰⁸

First, the Court addressed each of the parties’ interpretations of the ADA reassignment requirement. According to the Court, US Airways “claim[ed] that a seniority system virtually always trumps a conflicting accommodation”; that the conflicting accommodation is necessarily “unreasonable”; and that these contentions are primarily based on the idea that the ADA “seeks only ‘equal’ treatment for those with disabilities. It does not . . . require an employer to grant *preferential* treatment.”¹⁰⁹ The Court explicitly rejected US Airways’ preferential treatment argument, stating “that preferences will sometimes prove *necessary* to achieve the Act’s basic equal opportunity goal”; accommodations require that individuals with disabilities be treated differently, even if that different treatment may “violate[] an employer’s disability-neutral rule,”¹¹⁰ such as “[n]eutral furniture budget rules [that] would [otherwise] automatically prevent the accommodation of an individual who needs a different kind of chair or desk.”¹¹¹

Before addressing Barnett’s interpretation, the Court noted that the position which Barnett desired was vacant; the seniority system merely gave employees the right “to bid for . . . ‘vacant’ position[s].”¹¹² The Court rejected Barnett’s interpretations. The Court explained that “reasonable” does not mean “effective” in “ordinary English,”¹¹³ and Congress has never equated the two terms; the EEOC and lower courts also have never interpreted “enable” to “mean the same thing” as “reasonable.”¹¹⁴ Next, the Court explained why “‘reasonable accommodation’” is not “a simple, redundant mirror image of the term ‘undue hardship’”—“undue hardship” refers to impacts “on the operation of the business,”¹¹⁵ while an accommodation may be “unreasonable” due to “its impact . . . on fellow employees.”¹¹⁶

106 *Id.*

107 *Id.* at 393–94.

108 *Id.* at 394.

109 *Id.* at 397 (emphasis added) (citation omitted).

110 *Id.* (emphasis added).

111 *Id.* at 398.

112 *Id.* at 399.

113 *Id.* (internal quotation marks omitted).

114 *Id.* at 401 (internal quotation marks omitted).

115 *Id.* at 400 (quoting 42 U.S.C. §12112(b)(5)(A) (1994)) (internal quotation marks omitted).

116 *Id.*

Finally, the Court explained how the lower courts had reconciled the phrases “reasonable accommodation” and “undue hardship” so that they did not create a “burden of proof dilemma”:¹¹⁷

They have held that a plaintiff/employee (to defeat a defendant/employer’s motion for summary judgment) need only show that an “accommodation” seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.

Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.¹¹⁸

The Court next applied the lower courts’ test to this particular case, first asking whether a request for assignment to the mailroom position is reasonable “ordinarily or in the run of cases” where such an assignment “would violate the rules of a seniority system.”¹¹⁹ The Court concluded that “it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system.”¹²⁰ In support of this holding, the Court cited “[a]nalogous case law,” including a Title VII religious discrimination case and Rehabilitation Act cases.¹²¹ The Court admitted that “[a]ll these cases discuss *collectively bargained* seniority systems, not systems (like the present system) which are unilaterally imposed by management.”¹²² However, the Court explained that “the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems.”¹²³ Notably, “the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment”;¹²⁴ “a complex case-specific ‘accommodation’ decision made by management [should not undermine] the more uniform, impersonal operation of seniority rules.”¹²⁵

However, the Court did explain that “[t]he plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”¹²⁶ The Court provided examples, such as when an employer “fairly frequently” allows exceptions to the seniority system.¹²⁷ In short, the Supreme Court molded a “reasonableness” requirement which the plaintiff must meet before the court will consider the separate undue hardship analysis. To meet the reasonableness requirement,

117 *Id.* at 401–02 (internal quotation marks omitted).

118 *Id.* (citations omitted).

119 *Id.* at 402–03.

120 *Id.* at 403.

121 *Id.* (also citing cases which discuss collective bargaining agreements and the ADA, including *Midland Brake*).

122 *Id.* at 404.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 394.

127 *Id.* at 405.

the plaintiff must show more than that the accommodation listed in the ADA would be “effective”; the plaintiff either must show that an accommodation is reasonable in the “run of cases” or—if such ordinary reasonableness cannot be shown—is reasonable in this particular case.

*E. Huber v. Wal-Mart Stores, Inc.*¹²⁸

After Pam Huber injured her arm and hand, she was no longer able to fulfill her job duties as a grocery order filler.¹²⁹ Rather than automatically reassigning Huber to a vacant and equivalent position as a router, Huber’s employer required her to “apply and compete” for the position, which was ultimately filled by an individual who did not have a disability because he or she was the most qualified candidate for the position.¹³⁰ Huber took a janitorial position at another Walmart facility, making around half her previous salary.¹³¹

The court held that:

We agree [with the Seventh Circuit in *Humiston-Keeling*] and conclude the ADA is not an affirmative action statute and does not require an employer [as a reasonable accommodation] to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.¹³²

As this was a “question of first impression” for the Eighth Circuit,¹³³ it relied heavily on the Seventh Circuit’s decision in *Humiston-Keeling*: “In the Seventh Circuit, ADA reassignment does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant, if the employer has a policy to hire the most qualified applicant.”¹³⁴ In fact, the court explicitly adopted Walmart’s suggestion as being “in accordance with the purposes of the ADA.”¹³⁵

The Eighth Circuit intentionally aligned itself with the Seventh Circuit’s decision in *Humiston-Keeling* and against the Tenth Circuit in holding that most-qualified-candidate policies may trump the ADA reassignment requirement.

128 486 F.3d 480 (8th Cir. 2007); see Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 Miss. L.J. 67, 121 n.279 (2013) (discussing *Huber* and *Barnett*).

129 *Huber*, 486 F.3d at 481.

130 *Id.*

131 *Id.*

132 *Id.* at 483 (footnote omitted).

133 *Id.* at 482.

134 *Id.* at 483.

135 *Id.*

F. Mays v. Principi¹³⁶

This suit involved a claim under the Rehabilitation Act of 1973.¹³⁷ The Seventh Circuit concluded that “[t]here [were] no reasonable accommodation[s] that would have enabled the plaintiff to return to her old job as a regular staff nurse,”¹³⁸ and that the ADA does not require that two jobs be created—one for the plaintiff and one for someone to help the plaintiff fulfill the requirements of the plaintiff’s new position.¹³⁹ The court concluded that “assuming that she was qualified for such a job, if nevertheless there were better-qualified applicants—and the evidence is uncontradicted that there were—the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her.”¹⁴⁰ The court finally concluded that “the VA *did* accommodate the plaintiff’s disability, and the accommodation was reasonable,”¹⁴¹ even if not ideal for the plaintiff.

G. EEOC v. United Airlines, Inc.¹⁴²

The EEOC challenged United Airlines’ Reasonable Accommodation Guidelines—under which an employee who was no longer able to perform the essential functions of her job due to a disability would not be automatically assigned to a vacant position, but rather allowed to compete for the position with some preferential treatment¹⁴³—as a violation of the ADA.

In this case, the Seventh Circuit thought it “likely” that the EEOC’s interpretation in *Humiston-Keeling* “may in fact be a more supportable interpretation of the ADA.”¹⁴⁴ However, for the EEOC to “force an abandonment of *stare decisis*,” it would have to “show that *Humiston-Keeling* is inconsistent with an on-point Supreme Court decision or is otherwise incompatible with a change in statutory law.”¹⁴⁵ Ultimately, the court held it was consistent.¹⁴⁶ In short, the Seventh Circuit felt compelled by its own post-*Barnett* decisions—which relied on the pre-*Barnett* decision in *Humiston-Keeling*—to reject the EEOC’s contention that an individual with a disability should be reassigned if he or she is “‘at least minimally qualified to do the job,’”¹⁴⁷ even if that view was more in line with the ADA than was the *Humiston-Keeling* holding that a most-qualified-applicant policy may trump the ADA reassignment provision.

136 301 F.3d 866 (7th Cir. 2002).

137 *Id.* at 868.

138 *Id.* at 871.

139 *Id.*

140 *Id.* at 872.

141 *Id.*

142 673 F.3d 543 (7th Cir.), *vacated*, *United Airlines II*, 693 F.3d 760 (7th Cir. 2012).

143 *Id.* at 543–44.

144 *Id.* at 544.

145 *Id.* at 545.

146 *Id.* at 547.

147 *Id.* at 544 (emphasis added) (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760).

H. United Airlines II¹⁴⁸

On September 7, 2012, the same Seventh Circuit panel (Judges Cudahy, Kanne, and Sykes) vacated its March decision, issued a new opinion without a formal en banc procedure, and “circulated the new panel opinion to the full court under Rule 40(e).”¹⁴⁹ Tracing its original opinion nearly identically, the panel came to the opposite conclusion.¹⁵⁰

Rather than accepting its own precedent in *Humiston-Keeling* and post-*Barnett* decisions that relied on *Humiston-Keeling*, the court held that “[s]everal courts in this circuit have relied on *Humiston-Keeling* in post-*Barnett* opinions, though it appears that these courts did not conduct a detailed analysis of *Humiston-Keeling*’s continued vitality. The present case offers us the opportunity to correct this continuing error in our jurisprudence.”¹⁵¹

The court copied nearly identically its explanation of the history of the case, the court’s review standard, its explanation of the EEOC’s and the Seventh Circuit’s postures in *Humiston-Keeling*, and its explanation of the facts of the *Barnett* case.¹⁵² However, the analysis of the Supreme Court’s reasoning in *Barnett* differed between *United Airlines I* and *United Airlines II*¹⁵³—*United Airlines II* emphasized the two-step nature of the analysis, the plaintiff’s requirement merely to “show that an ‘accommodation’ seems reasonable on its face,” and the subsequent burden shift to the defendant.¹⁵⁴ *United Airlines II* also clarified that the *Barnett* decision was made in favor of the defendant because “the violation of a seniority system ‘would not [have been] reasonable in the run of cases,’” not because the defendant had presented an undue hardship as *United Airlines I* had claimed.¹⁵⁵ *United Airlines II* further clarified:

However, the Court was careful to point out that it was not creating a per se exception for seniority systems, since “[t]he plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of

148 693 F.3d 760 (7th Cir. 2012).

149 *Id.* at 761.

150 *Id.*

151 *United Airlines II*, 693 F.3d at 761.

152 Compare *id.* at 761–62, with *United Airlines I*, 673 F.3d at 544–45.

153 *United Airlines II*, 693 F.3d at 762–63; *United Airlines I*, 673 F.3d at 545. However, the first part of the paragraphs did begin with identical language. See, e.g., *United Airlines II*, 693 F.3d at 762 (“The Supreme Court first noted that ‘[t]he simple fact that an accommodation would provide a ‘preference’—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not ‘reasonable.’” (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002))).

154 *United Airlines II*, 693 F.3d at 762 (quoting *Barnett*, 535 U.S. at 401 (internal quotation marks omitted)). Compare *United Airlines II*, 693 F.3d at 762–63, with *United Airlines I*, 673 F.3d at 545.

155 *United Airlines II*, 693 F.3d at 763 (quoting *Barnett*, 535 U.S. at 403).

cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”¹⁵⁶

The court again acknowledged the EEOC’s argument that “the *Barnett* Court flatly contradicted much of the language of *Humiston-Keeling*” in language nearly identical to the language it had used in *United Airlines I*.¹⁵⁷ It also again noted that *Mays* “complicated” the “analysis of *Barnett*’s impact on *Humiston-Keeling*.”¹⁵⁸ However, the outcome of *United Airlines II* is markedly different from that of *United Airlines I*.

First, rather than acknowledging but ultimately rejecting the EEOC’s contention that it was wrong for the *Mays* court to equate a best-qualified selection policy with a seniority system,¹⁵⁹ *United Airlines II* explicitly adopted the EEOC’s argument and added to its reasoning:

The EEOC argues, and we agree, that the *Mays* Court incorrectly asserted that a best-qualified selection policy is essentially the same as a seniority system. In equating the two, the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule. *While employers may prefer to hire the best qualified applicant, 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.* To strengthen this critique, the EEOC points out the relative rarity of seniority systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.¹⁶⁰

Second, rather than acknowledging but rejecting the positions of the Tenth and D.C. Circuits in *Midland Brake* and *Aka*, respectively, the court decided to “adopt a similar approach” to those two courts.¹⁶¹

Third, the court made no attempt to address the two other post-*Barnett* Seventh Circuit opinions which had relied on *Humiston-Keeling* as good law beyond the assertion that “[s]everal courts in this circuit have relied on *Humiston-Keeling* in post-*Barnett* opinions, though it appears that these courts did not conduct a detailed analysis of *Humiston-Keeling*’s continued vitality.”¹⁶² Finally, the court rejected *United Airlines*’ argument that the court “should not abandon *Humiston-Keeling*, in part because the Eighth Circuit explicitly adopted the reasoning of *Humiston-Keeling* in [*Huber*],” acknowledging that “[t]he Eighth Circuit’s wholesale adoption of *Humiston-Keeling*” in *Huber* “ha[d] little import” where “[t]he opinion adopt[ed] *Humiston-Keeling* without analysis, much less an analysis of *Humiston-Keeling* in the context of

156 *Id.* (alterations in original) (quoting *Barnett*, 535 U.S. at 405).

157 *Id.*

158 *Id.* (internal citation omitted); compare *United Airlines II*, 693 F.3d at 763–64, with *United Airlines I*, 673 F.3d at 545.

159 *United Airlines I*, 673 F.3d at 546.

160 *United Airlines II*, 693 F.3d at 764 (emphasis added).

161 *Id.* at 765.

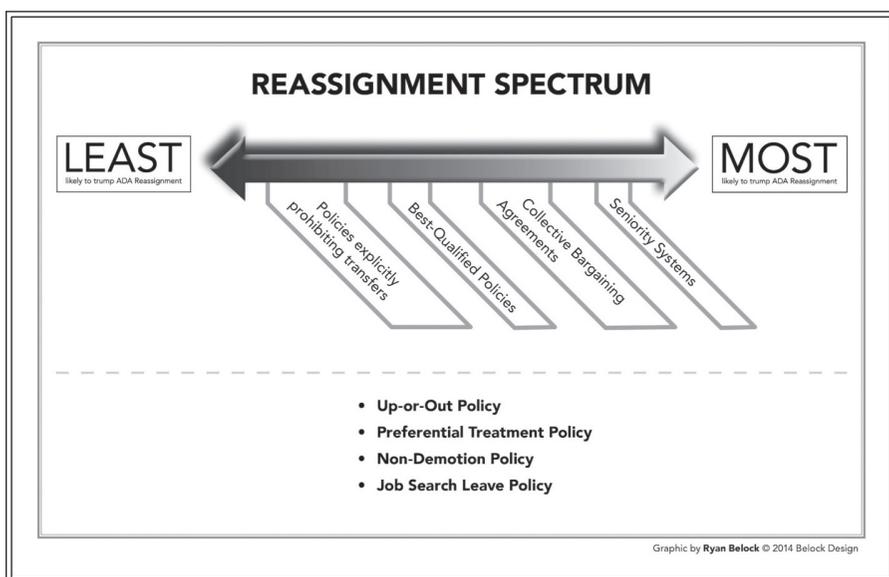
162 *Id.* at 761.

Barnett.”¹⁶³ Rejecting its post-*Barnett* precedents, the Seventh Circuit held that *Humiston-Keeling*—and its holding that a best-qualified-candidate selection policy could trump the ADA reassignment provision—had not survived *Barnett*.¹⁶⁴

III. ANALYSIS

A. Background

In evaluating the benefits of *United Airlines II* to the plaintiff’s toolbox, it is most useful to imagine a spectrum of employment policies regarding reassignment, ranging from those which almost certainly cannot trump ADA reassignment to those which make reassignment unreasonable “in the run of cases.”



Midland Brake and EEOC enforcement guidance make it clear that the ADA reassignment provision certainly trumps any employment policies generally prohibiting transfers within the company, unless, of course, the employer could show undue hardship.¹⁶⁵

163 *Id.* at 764 (footnote omitted) (citing *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483–84 (8th Cir. 2007)). *United Airlines I* would have been willing to “lessen[] this [circuit] split” between the Tenth and D.C. Circuits on the one hand and the Eighth Circuit on the other by siding with the Tenth and D.C. Circuits “if, in fact, *Barnett* undermine[d] *Humiston-Keeling*.” *United Airlines I*, 673 F.3d 543, 546 (7th Cir. 2012), *vacated*, *United Airlines II*, 693 F.3d 760.

164 *United Airlines II*, 693 F.3d at 761.

165 *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1176 (10th Cir. 1999) (en banc) (citing U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REASONABLE ACCOMMODATION AND UNDE

Though the *Aka* court was presented with a collective bargaining agreement including a provision for employees with disabilities,¹⁶⁶ it explicitly refused to address what would happen if a collective bargaining agreement conflicted with the ADA.¹⁶⁷ Meanwhile, *Midland Brake* held that “an existing position would not truly be vacant [and therefore not available for ADA reassignment], even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a vested priority right to such vacant positions.”¹⁶⁸ Both opinions were written before *Barnett*.¹⁶⁹

Meanwhile, *Midland Brake* stated in dicta and *Barnett* held that seniority systems can most likely trump ADA reassignment where the seniority systems are consistently applied.¹⁷⁰ The real danger of *Barnett* is that it generalizes the seniority system exception—that it is ordinarily unreasonable for an ADA reassignment provision to trump a seniority system—into a rebuttable presumption test, applicable to all considerations of whether a reassignment is reasonable. This potentially opens the door for other exceptions to the reassignment requirement. For example, while *Midland Brake* categorically rejected that best-qualified policies can be used to prevent ADA reassignment,¹⁷¹ *Barnett* left open the question of whether a best-qualified policy could make reassignment ordinarily unreasonable under its new rebuttable presumption test.¹⁷²

In addition, *Barnett* heightened the burden on plaintiffs to prove reasonableness.¹⁷³ *Barnett* tried to argue that a “reasonableness” evaluation merely

HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT 41 (1999)); *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, www.eeoc.gov/policy/docs/accommodation.html (last modified Oct. 22, 2002).

166 *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc).

167 *Id.* at 1301.

168 *Midland Brake*, 180 F.3d at 1175.

169 *Id.* at 1154; *Aka*, 156 F.3d at 1284.

170 *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402–06 (2002); *Midland Brake*, 180 F.3d at 1175–76.

171 *Midland Brake*, 180 F.3d at 1164–70. The court in *Aka* also declared that reassignment must mean more than consideration. *Aka*, 156 F.3d at 1304.

172 *Barnett* also does not address collective bargaining agreements generally—that is, those that do not relate to or provide for seniority systems. See Anderson, *supra* note 128, at 121 n.279; Conway, *supra* note 35, at 724.

173 One scholarly article from 2003—just after *Barnett* but long before *United Airlines II*—suggested that *Barnett* had a narrow holding which left many ambiguities for future application, especially regarding which issues should be determined at the reasonableness stage and undue hardship phase, and which party should be responsible for particular showings at each stage. Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 960–67, 980–85 (2003). Another scholar has read *Barnett* even more broadly: “*Barnett* requires the ADA’s accommodation requirement to yield to all workplace policies that constrain employer discretion, at least in most instances.” Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discre-*

requires a determination of whether the accommodation is effective for the person with a disability, and that any other interpretation would simply make “reasonable accommodation” and “undue hardship” mirror images of one another—creating a problem of proof where the plaintiff must prove “reasonableness” and the employer must show “undue hardship.”¹⁷⁴ However, *Barnett* rejected all of these interpretations and specifically indicated that while the ADA “refer[red] to an ‘undue hardship on the operation of the business,’” “a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees.”¹⁷⁵ The Court adopted the approach that the lower courts had developed to give both “reasonable accommodation” and “undue hardship” meaning, while avoiding the burden of proof dilemma: a plaintiff must show an accommodation “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases” and, if achieved, the defendant “must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”¹⁷⁶ In other words, while plaintiffs had argued that they should not have to show anything more than that an accommodation would have been effective, the Court rejected that argument and held that the plaintiff had to do more work by actually proving that something is reasonable.¹⁷⁷ This is distinct from showing that something is an undue hardship.¹⁷⁸

The Court did temper the burden on plaintiffs slightly in its application of the lower courts’ approach to the case at hand. The Court added that if the plaintiff could not show that an accommodation was “reasonable on its face” or “ordinarily or in the run of cases,” she could still try to show reasonableness in the particular circumstances of the case,¹⁷⁹ and even provided some examples of how the plaintiff might do so in the context of a seniority system.¹⁸⁰ The Court also rejected US Airways’ argument that the ADA does not require preferential treatment¹⁸¹ and provided other language that proved to be useful to the Seventh Circuit in further tempering *Barnett’s* heightened burden on plaintiffs with a relatively plaintiff-friendly approach.¹⁸²

The meaning of “reasonable” was unclear before *Barnett* and remains unclear after *Barnett*, as evidenced in law review articles and by many differing circuit court interpretations on the subject both before and after *Bar-*

tion, Reasonable Accommodation, and the Costs of Individualized Treatment, 32 YALE L. & POL’Y REV. 1, 38 (2013).

174 See *supra* Section II.D.

175 *Barnett*, 535 U.S. at 400 (quoting 42 U.S.C. § 12112(b)(5)(A) (1994)); see *supra* Section II.D.

176 *Barnett*, 535 U.S. at 401–02.

177 See *Barnett*, 535 U.S. at 401–02; *supra* Section II.D.

178 See *supra* Section II.D.

179 *Id.* at 405.

180 *Id.*

181 See *supra* notes 109–10 and accompanying text.

182 See *infra* subsections III.C.3–4.

nett.¹⁸³ However, the Seventh Circuit's decision in *United Airlines II* and some of the language that the Seventh Circuit adopted from *Barnett* and the EEOC helped to (1) regain ground for plaintiffs after and under the *Barnett* approach by establishing a plaintiff-friendly border on the reassignment spectrum; and (2) provide plaintiffs with tools to argue that other employment policies should fall toward the left side of the spectrum—that is, that other policies should not render reassignment ordinarily unreasonable.¹⁸⁴

B. *The Seventh Circuit's Contribution to a Circuit Split*¹⁸⁵

United Airlines II is very significant in the jurisprudence of reassignment as a reasonable accommodation. The Seventh Circuit has shifted what was “at least” a two-to-one circuit split regarding whether a best-qualified policy can trump the ADA, with *Midland Brake* on one side, *Huber* on the other, and the Seventh Circuit now siding with *Midland Brake*.¹⁸⁶ In a similar vein, *Aka* held that “reassignment” meant more than simply “allow[ing] [an employee] to compete for jobs precisely like any other applicant.”¹⁸⁷ The *United Airlines II* court explicitly joined the Tenth Circuit in *Midland Brake* and the D.C. Circuit in *Aka*.¹⁸⁸ It said that *Humiston-Keeling*, which held strictly 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,’”¹⁸⁹ did not survive past *Barnett*.¹⁹⁰ However, the Eighth Circuit had previously adopted the Seventh Circuit’s *Humiston-Keeling* decision in *Huber* and continued to cite *Huber*, even after *United Airlines II*.¹⁹¹ Hence, it seems

183 See Porter, *supra* note 5, at 543–553, 544 n.93.

184 See *infra* subsections III.C.2–4.

185 One scholarly source summarizes the Seventh Circuit’s contribution to the circuit split as follows: “The [Seventh Circuit] recently joined the 10th and D.C. circuits in determining that an employer *must*, under most circumstances, reassign the disabled employee to the vacant position in order to comply with the Americans with Disabilities Act, even if she is not the most qualified candidate.” Wicks, *supra* note 11, at *1 (footnote omitted).

186 See McGowan, *supra* note 12, at 869 (“The federal appeals courts currently are split at least 2-1 on the issue, with the Seventh Circuit and the Tenth Circuit in [*Midland Brake*], holding that the ADA requires an employer to grant the accommodation of reassignment if the disabled employee meets the minimum qualifications for the vacant job. The Eighth Circuit in *Huber* reached the opposite conclusion, ruling the ADA does not require an employer to grant a disabled employee’s request for reassignment if there is a better qualified candidate for the vacancy.” (citation omitted)).

187 *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc).

188 *United Airlines II*, 693 F.3d 760, 765 (7th Cir. 2012).

189 *Id.* at 762 (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760).

190 *Id.* at 761.

191 *Knutson v. Schwan’s Home Serv., Inc.*, 711 F.3d 911, 916 (8th Cir. 2013). A Third Circuit case also seemed to be incorrect in citing a pre-*Barnett* Second Circuit opinion in a string cite: “see also *Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1035 (2d Cir. 1993) (‘[A] reasonable accommodation generally does not require an employer to reassign a disabled

that the circuit split may not be completely resolved, but evaluating any circuit split, potential resolution of any circuit split, and the impact of *United Airlines II* on any circuit split is unfortunately beyond the scope of this Note.¹⁹²

The Seventh Circuit did not overrule *Humiston-Keeling* by explicitly stating that ADA reassignment will always trump a best-qualified selection policy. Instead, it adopted the two-step *Barnett* approach.¹⁹³ It also stated that “[t]he *Mays* Court understandably erred in suggesting that deviation from a best-qualified selection policy *always* represented [an undue] hardship” and that “the *Barnett* framework does not contain categorical exceptions.”¹⁹⁴ The Seventh Circuit clarified that US Airways in *Barnett* had won not because its “‘neutral rule’” was an “‘automatic exemption’”¹⁹⁵ to the reassignment requirement of the ADA but “because its situation satisfied a much narrower, fact-specific exception based on the hardship that could be imposed on an employer utilizing a seniority system.”¹⁹⁶ In short, *Humiston-Keeling* was incorrect in the sense that it held categorically that a best-qualified selection policy would trump the ADA. The Seventh Circuit bolstered the rejection that it did make of *Humiston-Keeling* by explaining that *Barnett* had rejected *Humiston-Keeling*’s anti-preference interpretation of the ADA—“that the ADA is ‘not a mandatory preference act’ but only a ‘nondiscrimination statute’”¹⁹⁷—by stating that “this argument ‘fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.’”¹⁹⁸ Even if the circuit split has not been resolved, *United Airlines II* has certainly contributed to conversations regarding best-qualified selection policies and the proper application of *Barnett* more generally.¹⁹⁹

employee to a different position.’)” *Yovtcheva v. City of Phila. Water Dep’t*, 518 F. App’x 116, 122 (3d Cir. 2013).

192 One student note denied that *United Airlines II* “constitute[d] the brazen shift in policy attributed to it by scholars. Instead, this Comment contends that, in light of *Barnett*, the Seventh Circuit has identified a middle ground that attempts to reconcile it with *Barnett*, while still remaining loyal to the ADA’s text, legislative history, and purpose.” Concanon, *supra* note 12, at 634–35.

193 *United Airlines II*, 693 F.3d at 762–64.

194 *Id.* at 764 (emphasis added).

195 *Id.* at 763 (quoting *US Airways v. Barnett*, 535 U.S. 391, 398 (2002) (internal quotation marks omitted)).

196 *Id.* (citing *Barnett*, 535 U.S. at 405).

197 *Id.* (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760).

198 *Id.* (quoting *Barnett*, 535 U.S. at 397).

199 There is significant conversation regarding *Barnett* and *United Airlines II*. See McGowan, *supra* note 12, at 868.

C. *The Seventh Circuit's Contribution to the Plaintiff's Toolbox*

1. The Seventh Circuit Likely Did Make Mandatory Reassignment Ordinarily Reasonable²⁰⁰

The Seventh Circuit adopted the *Barnett* analysis but is admittedly unclear as to which circumstances should fall under the “reasonableness” analysis, and which should fall under “undue hardship” analysis. That is, if the consideration of the seniority system came in during the “reasonableness” analysis,²⁰¹ the plaintiff would have had to show that reassignment *in light of an employer's seniority system* was reasonable.²⁰² However, the *United Airlines II* court stated: “The Supreme Court has found that accommodation through appointment to a vacant position is reasonable. Absent a showing of undue hardship, an employer must implement such a reassignment policy.”²⁰³ The court did not clearly state in that language that the first step “reasonableness” determination could be affected by other circumstances, but rather appeared to leave the work for the second step.²⁰⁴ Further, the court stated that “[t]he *Mays* Court understandably erred in suggesting that deviation from a best-qualified selection policy always represented such a[n] [undue] hardship.”²⁰⁵ The *Mays* court equated a better-qualified selection policy with a seniority system for purposes of *Barnett* by substituting “better qualified” for “more senior,” “the employer’s normal method of filling vacancies” for “seniority system,” and “a break” for “superseniority” in the following sentence²⁰⁶: “This conclusion is bolstered by a recent decision of the Supreme Court which holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer’s seniority system.”²⁰⁷ The *Mays* court itself did not say that the best-qualified selection policy came in during the “undue hardship” analysis;²⁰⁸ it did not even use the term “undue hardship.” If *Mays* was simply read as inserting a best-qualified selection policy into the *Barnett* analysis, as in the above quotation, it would have been considered at the first reasonableness stage, as was the seniority system in *Barnett*, not at the undue hardship second stage, as *United Airlines II* seems to assert.²⁰⁹

200 At least some scholarly sources seem to assume that this is the case. See Wicks, *supra* note 11, at *2.

201 *Barnett*, 535 U.S. at 403–05.

202 See *id.*

203 *United Airlines II*, 693 F.3d at 764.

204 See *id.*

205 *Id.*

206 *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002) (internal quotation marks omitted), *abrogated by United Airlines II*, 693 F.3d 760.

207 *Id.* (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 393–95, 403–07 (2002)).

208 See *id.*

209 *Barnett*, 535 U.S. at 402–03; *United Airlines II*, 693 F.3d at 764 (providing no citation for the statement that “[t]he *Mays* Court understandably erred in suggesting that deviation from a best-qualified selection policy always represented such a hardship”). Scholarly

However, *United Airlines II* explicitly aligned itself with the Tenth Circuit in *Midland Brake* and the D.C. Circuit in *Aka*, as discussed in Section III.B of this analysis.²¹⁰ *Midland Brake*, *Humiston-Keeling*, and *Mays* all spoke in “best” and/or “qualified” terms.²¹¹ Meanwhile, *Aka* spoke in terms of “compet[ing] for jobs” versus being “appointed to a new position” when questioning the meaning of reassignment in a reasonable accommodation claim.²¹² Both languages seem to address the same issue: if a best-qualified selection policy could trump ADA reassignment, that would mean that the employee with a disability would only be able to compete in order to show that he is the most qualified candidate—that is, “compete” for a position rather than be mandatorily reassigned if he is “otherwise qualified.”

The *United Airlines II* opinion could also be interpreted as taking the position that “reassignment” means “mandatory appointment” to a new position. First, the court said that “[t]he Supreme Court has found that accommodation *through appointment* to a vacant position is reasonable. Absent a showing of undue hardship, an employer *must implement* such a reassignment policy.”²¹³ Even more explicitly, the court speaks of “mandatory reassignment” in its directions on remand²¹⁴:

In this case, the district court must first consider (under *Barnett* step one) if *mandatory reassignment* is ordinarily, in the run of cases, a reasonable accommodation. Assuming that the district court finds that *mandatory reassignment* is ordinarily reasonable, the district must then determine (under *Barnett* step two) if there are fact-specific considerations particular to United’s employment system that would create an undue hardship and render *mandatory reassignment* unreasonable.²¹⁵

In the footnote after the first sentence of the remand directions, the court stated that the first step should not be difficult because “mandatory

pieces similarly confuse and conflate the reasonableness and undue hardship steps of the analysis as well. See, e.g., Conway, *supra* note 35, at 734 (“The Court reiterated its determination that the existence of a non-discriminatory policy is not dispositive by allowing the employee to show that reassignment does not impose an undue hardship on the employer because the non-discriminatory policy is not routinely enforced or contains so many exceptions that it does not create an enforceable expectation by other employees.” (footnote omitted)); see also Stephen Gee, Note, *The “Moral Hazards” of Title VII’s Religious Accommodation Doctrine*, 89 CHI-KENT L. REV. 1131, 1143 (2014) (“Judge Cudahy found that *Barnett* created a two-step process in evaluating whether an accommodation would not impose undue hardship by violating an otherwise strictly enforced neutral rule or law of general applicability. Judge Cudahy remanded the case to determine whether a mandated reassignment passes the *Barnett* two-step analysis.” (footnotes omitted)).

210 *United Airlines II*, 693 F.3d at 765.

211 *Mays*, 301 F.3d at 872 (examples include “better qualified” and “not as well qualified”); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027–29 (7th Cir. 2000) (examples include “best applicant” and “best candidate”), *overruled by United Airlines II*, 693 F.3d 760; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1168–70 (10th Cir. 1999) (en banc).

212 *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc).

213 *United Airlines II*, 693 F.3d at 764 (emphasis added).

214 *Id.*

215 *Id.* (emphasis added) (footnote omitted).

reassignment” was “the very accommodation analyzed in *Barnett*.”²¹⁶ It is in this sense that *United Airlines II* joins the Tenth Circuit and the D.C. Circuit, which “ha[d] already determined that the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement).”²¹⁷

United Airlines II's directions for remand explicitly indicate that the lower court should consider whether “mandatory reassignment” is ordinarily reasonable, not whether mandatory reassignment in light of other relevant circumstances—such as a policy that requires individuals with disabilities to compete for vacant positions but provides those individuals with ‘preferential treatment’ in that process (as was the case in the United Airlines Reasonable Accommodation Guidelines²¹⁸)—is ordinarily reasonable. However, the footnote after the first sentence of the directions does seem to contemplate that other circumstances could potentially be considered at this stage. The court explained that where “mandatory reassignment” was the accommodation analyzed in *Barnett*, “the Supreme Court ‘assume[d] that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system.’”²¹⁹ The court went on to explain that “[t]here is no seniority system at issue here. However, we suppose it is possible there is some comparable circumstance of which we are unaware.”²²⁰ The Seventh Circuit also stated in the main text of its opinion that “[a]n ‘employer’s showing of violation of the rules of a seniority system is by itself ordinarily sufficient’ to demonstrate that the accommodation sought is unreasonable.”²²¹ The court seems to acknowledge that *Barnett* did more in the first step than consider whether mandatory reassignment alone was reasonable.²²² *United Airlines II*'s conclusion does little to clarify exactly what must be considered at each stage of analysis. Even if *United Airlines II* has adopted the *Barnett* analysis so that the plaintiff does possess a real burden of showing reasonableness on the first step, however, the Seventh Circuit still makes the language of that first step more plaintiff-friendly.

2. *United Airlines II* Likely Set a Plaintiff-Friendly Border on the Reassignment Spectrum Under the *Barnett* Analysis

The Seventh Circuit used *Barnett* to reject its own employer-friendly precedent. The court explicitly overturned *Humiston-Keeling*: “[W]e now make

216 *Id.* at 764 n.3.

217 *Id.* at 764–65.

218 *Id.* at 761.

219 *Id.* (second alteration in original) (quoting *US Airways, Inc., v. Barnett*, 535 U.S. 391, 403 (2002)).

220 *Id.* at 761 n.3.

221 *United Airlines II*, 693 F.3d at 763 (quoting *Barnett*, 535 U.S. at 402–03).

222 *See id.*

clear that *Humiston-Keeling* did not survive *Barnett*.²²³ It also seems to have implicitly overruled *Craig v. Potter*²²⁴ and *King v. City of Madison*.²²⁵ Though *United Airlines II* did not mention these cases explicitly, as had *United Airlines I*,²²⁶ *United Airlines II* did acknowledge that “[s]everal courts in this circuit ha[d] relied on *Humiston-Keeling* in post-*Barnett* opinions.”²²⁷ However, the court also noted that “it appears that these courts did not conduct a detailed analysis of *Humiston-Keeling*’s continued vitality.”²²⁸ Then, it clearly stated, “[t]he present case offers us the opportunity to correct this continuing error in our jurisprudence.”²²⁹ The court specifically chose to quote plaintiff-friendly language from *Barnett*: “The Supreme Court first noted that ‘[t]he simple fact that an accommodation would provide a ‘preference’—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not ‘reasonable.’”²³⁰ The court also cited other language from *Barnett* that contradicted *Humiston-Keeling*’s claim “that the ADA is ‘not a mandatory preference act.’”²³¹

Abrogating a Seventh Circuit case which had tried to apply *Barnett*,²³² *United Airlines II* adopted and added to the plaintiff’s argument “that the *Mays* Court incorrectly asserted that a best-qualified selection policy is essentially the same as a seniority system.”²³³ The court adopted the following wording that had been attributed to the EEOC in *United Airlines I*: “In equating the [best-qualified selection policy and the seniority system], the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule.”²³⁴ The “rule” to which the court is likely referring is likely that stated in the prior section of this analysis—that mandatory reassignment is ordinarily reasonable. Whether considering other employment policies during the reasonableness or undue hardship phase, allowing a best-qualified policy to make mandatory reassignment unreasonable would essentially negate the idea that reassignment is mandatory. That is, if a best-qualified selection policy may trump the ADA requirement for accommodation

223 *Id.* at 761.

224 90 F. App’x 160 (7th Cir. 2004).

225 550 F.3d 598 (7th Cir. 2008).

226 *United Airlines I*, 673 F.3d 543, 546 (7th Cir. 2012), *vacated*, *United Airlines II*, 693 F.3d 760.

227 *United Airlines II*, 693 F.3d at 761.

228 *Id.*

229 *Id.* at 762 (alterations in original) (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002)).

230 *Id.* at 762 (internal quotation marks omitted).

231 *Id.* at 763 (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000), *overruled by United Airlines II*, 693 F.3d 760).

232 *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002), *abrogated by United Airlines II*, 693 F.3d 760.

233 *United Airlines II*, 693 F.3d at 764.

234 *Id.*; see *United Airlines I*, 673 F.3d 543, 546 (7th Cir. 2012), *vacated*, *United Airlines II*, 693 F.3d 760.

through reassignment, then reassignment is no longer mandatory; the employee may compete for a position but is not automatically reassigned.²³⁵ Further, for *United Airlines II* to hold that equating a best-qualified policy to a seniority system would “swallow the rule,”²³⁶ the rule to which the court refers must be more than simply being considered for reassignment, because a best-qualified selection policy would be equivalent to such consideration and would have already “swallow[ed] the rule.”²³⁷

United Airlines II also acknowledged the EEOC’s further support for its rejection of the *Mays* analysis: “the EEOC points out the relative rarity of seniority systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.”²³⁸ The court also added its own support: “[w]hile employers may prefer to hire the best qualified applicant, 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.”²³⁹ By rejecting the idea that a best-qualified policy could be treated as the seniority system had been treated in *Barnett*, the court rejected the idea that a best-qualified policy could provide a rebuttable presumptive exception to the reassignment requirement, as the seniority system had been treated in *Barnett*. Though remanding to the district court, the court seems to be strongly suggesting that a best-qualified selection policy likely cannot make reassignment unreasonable “in the run of cases.”²⁴⁰ Subsequent cases and scholarly articles have interpreted *United Airlines II* in such a way.²⁴¹

Midland Brake and *Aka* also stated—perhaps more clearly than *United Airlines II*—that best-qualified policies cannot ordinarily trump the ADA.²⁴² However, neither opinion considered best-qualified policies in terms of “reasonableness,” as apparently required under *Barnett*.²⁴³ Instead, both found that the very meaning of “reassignment” in the ADA made it impossible for a best-qualified policy to trump the ADA reassignment requirement.²⁴⁴ *Midland Brake* went on to explain that the reassignment requirement was cabined in other ways, including reasonableness.²⁴⁵ *Aka* did not even seem to address the meaning of “reasonableness” directly. Instead, the court simply rejected

235 See *United Airlines II*, 693 F.3d at 764 (“In equating the two, the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule.”).

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*

240 This phrase is quoted many times in *United Airlines II*. See, e.g., Wicks, *supra* note 11, at *1, *2.

241 See, e.g., Reyazuddin v. Montgomery Cnty., 7 F. Supp. 3d 526 (D. Md. 2014).

242 See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164–70 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1303–06 (D.C. Cir. 1998) (en banc).

243 See *Midland Brake*, 180 F.3d at 1164–70; *Aka*, 156 F.3d at 1303–06.

244 See *Midland Brake*, 180 F.3d at 1164–70; *Aka*, 156 F.3d at 1303–06.

245 See *Midland Brake*, 180 F.3d at 1170–78.

the dissent's suggestion that Aka's "only right was to be treated like any other applicant for that position"²⁴⁶ and addressed the meaning of the term "reassignment," itself. In fact, *Midland Brake* quoted Aka's very language.²⁴⁷ Much more briefly than in *Midland Brake*, Aka did suggest some limitations on the reassignment provision, but none of those limitations even directly addressed the limitation of "reasonableness."²⁴⁸ Further, Aka's discussion of whether ADA reassignment means more than being "treated like any other applicant," is all arguably dicta, as the question was not raised in the lower court.²⁴⁹

Therefore, *United Airlines II* was not only meaningful because it contributed to a the circuit split discussion regarding whether individuals with disabilities should merely be considered for job positions under the reassignment provision, but more importantly because it evaluated best-qualified policies under the *Barnett* reasonableness analysis. If the "Reassignment Spectrum" in Section III.A of this analysis were to be redrawn according to *Barnett* and *United Airlines II*, *Barnett* had set the right end of the spectrum ("most likely to trump ADA reassignment") with "seniority systems," and *United Airlines II* had set the left border ("least likely to trump ADA reassignment"). That is, while *Barnett* set only an employer-friendly precedent and border for the new reassignment spectrum, *United Airlines II* seems to establish that there does exist a plaintiff-friendly border for reasonableness of reassignment under the *Barnett* approach at best-qualified policies.²⁵⁰ *United Airlines II* is using the *Barnett* approach in a plaintiff-friendly way.

Neither *Barnett* nor *United Airlines II* specifically addressed employment policies that explicitly prohibited transfers.²⁵¹ Presumably, such policies would remain to the left of best-qualified policies on the reassignment spectrum. The EEOC guidelines, which were updated after *Barnett*, continued to assume that policies prohibiting transfers could not prohibit ADA reassignment.²⁵² Logically, it seems that if employees with disabilities cannot be made to prove that they are the best qualified applicant for a given position, they also could not be explicitly prohibited from being transferred at all.

Neither *Barnett* nor *United Airlines II* clearly establishes whether collective bargaining agreements can render ADA reassignment ordinarily unrea-

246 *Aka*, 156 F.3d at 1303.

247 *Midland Brake*, 180 F.3d at 1164 (quoting *Aka*, 156 F.3d at 1304).

248 See *Aka*, 156 F.3d at 1305; see also *Midland Brake*, 180 F.3d at 1164–70.

249 *Aka*, 156 F.3d at 1303–05.

250 See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403–406 (2002); *United Airlines II*, 693 F.3d 760, 763–65 (7th Cir. 2012).

251 See *Barnett*, 535 U.S. at 391; *United Airlines II*, 693 F.3d at 760.

252 *Enforcement Guidance*, *supra* note 166 ("It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees." (footnote omitted)).

sonable, either.²⁵³ Nor do they address where other employment policies—such as “up-and-out policies,” “job search leave policies,” “preferential treatment,” or “non-demotion policies”—would fit on the spectrum of reasonableness. However, *United Airlines II* provides language and cites that may be useful for plaintiffs going forward to argue that such policies should not render reassignment presumptively unreasonable under the *Barnett* reasonableness approach.

3. *United Airlines II* May Provide Plaintiffs with Tools to Analogize Employment Policies to Best-Qualified Policies Rather than Seniority Systems²⁵⁴

Barnett created the employer-friendly border in the reasonableness analysis by holding that “it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system.”²⁵⁵ However, the *United Airlines II* court noted that:

[T]he [*Barnett*] Court was careful to point out that it was *not creating a per se exception for seniority systems*, since “[t]he plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”²⁵⁶

United Airlines II more clearly, and probably more accurately, explained the *Barnett* decision as a “two-step” approach than had *United Airlines I*, where the Seventh Circuit stated that “[w]hile *Barnett*’s request for assignment to the mailroom was a ‘reasonable accommodation’ within the meaning of the statute, the violation of a seniority system would present an undue hardship to any employer.”²⁵⁷ By quoting the language from *Barnett*, the Seventh Circuit technically does nothing more than restate a step of *Barnett*. *Barnett* was

253 *Barnett* merely considered collective bargaining agreements in terms of “collectively bargained seniority systems.” See *Barnett*, 535 U.S. at 403–04. *United Airlines II* merely cited *Smith v. Midland Brake, Inc.* in stating that “our sister Circuits have already determined that the ADA requires employers to appoint disabled employees to vacant positions, provided that such accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement).” *United Airlines II*, 693 F.3d at 765 (citing *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc)). The EEOC guidelines also do not address collective bargaining agreements. See *Enforcement Guidance*, *supra* note 166.

254 Valerie Wicks states the following: “The crucial question that arises from the *Barnett* line of cases is *which* employer policies will overcome the employer’s obligation to reassign a disabled employee as a reasonable accommodation under the ADA. Put differently, when will reassignment ‘seem[] reasonable on its face,’ and when will it not?” Wicks, *supra* note 11, at *4 (quoting *Barnett*, 535 U.S. at 402).

255 *Barnett*, 535 U.S. at 403.

256 *United Airlines II*, 693 F.3d at 763 (alterations in original) (emphasis added) (citing *Barnett*, 535 U.S. at 405).

257 *United Airlines I*, 673 F.3d 543, 545 (7th Cir. 2012) (citing *Barnett*, 535 U.S. at 403), *vacated*, *United Airlines II*, 693 F.3d 760.

clear and even provided examples to support that while a seniority system might ordinarily trump ADA reassignment and render that reassignment unreasonable, the plaintiff could provide evidence of special circumstances to rebut that presumption.²⁵⁸ The *Barnett* Court also stated, in rejecting US Airways' contention "that a seniority system virtually always trumps a conflicting accommodation demand,"²⁵⁹ that "[i]n sum, the nature of the 'reasonable accommodation' requirement, the statutory examples, and the Act's silence about the exempting effect of neutral rules together convince us that the Act does not create any such *automatic exemption*."²⁶⁰ *United Airlines II* chose to emphasize such aspect of the *Barnett* decision by clearly stating that there was no "per se exception for seniority systems."²⁶¹

The court also used language that indicated that it considered the seniority system to be a relatively unique exception to mandatory reassignment.²⁶² The court was careful to state that the exception in *Barnett* for seniority systems was "narrow[]" and "fact-specific."²⁶³ The court also explicitly noted (from the EEOC) the "relative rarity"²⁶⁴ of seniority systems and the "distinct challenges of mandating reassignment" where such systems are in place,²⁶⁵ as well as "the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy."²⁶⁶

The *United Airlines II* may have accepted, however, that collective bargaining agreements could or would trump ADA reassignment. The court held that an undue hardship could "render mandatory reassignment unreasonable,"²⁶⁷ joining the Tenth and D.C. Circuits in this interpretation.²⁶⁸ In *Midland Brake*, the Tenth Circuit had explicitly noted that "protecting rights guaranteed under a collective bargaining agreement . . . would make it unreasonable to require an employer to reassign a disabled employee to a particular job."²⁶⁹ By including the parenthetical and the reference to the *Midland Brake* opinion, the Seventh Circuit may be suggesting that collective bargaining agreements should make reassignment ordinarily unreasonable. While *Midland Brake* seemed to include both collective bargaining agreements and seniority systems as per se exceptions to the reasonableness of ADA reassignment,²⁷⁰ it is not clear from a simple parenthetical and cite reference whether the *United Airlines II* court considered collective bargaining agreements to be potential presumptions against reasonableness or

258 *Barnett*, 535 U.S. at 405–06.

259 *Id.* at 397.

260 *Id.* at 398 (emphasis added).

261 *United Airlines II*, 693 F.3d at 763.

262 See Conway, *supra* note 35, at 735–38.

263 *United Airlines II*, 693 F.3d at 763.

264 *Id.* at 764.

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.* at 764–65.

269 Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175–76 (10th Cir. 1999) (en banc).

270 *Id.*

potential indicators of undue hardship. It is unlikely that the court was creating a *per se* exception. After all, the Seventh Circuit stated that “the *Barnett* framework does not contain categorical exceptions,”²⁷¹ even for seniority systems.²⁷² *United Airlines II* may have been willing to give some consideration to collective bargaining agreements as exceptions to ADA reassignment in some sense.²⁷³ However, even if the Seventh Circuit was trying to suggest by the parenthetical that it might consider the exceptional nature of collective bargaining agreements, the suggestion could only be considered *dicta*.²⁷⁴ That is, future Seventh Circuit decisions which were confronted with a collective bargaining agreement would be free to reject the collective bargaining agreement parenthetical in *United Airlines II*. Seventh Circuit plaintiffs could certainly argue that collective bargaining agreements outside of collectively bargained seniority systems are more like best-qualified policies than seniority systems in light of *Barnett* and *United Airlines II*.

Other than the exception of seniority systems and the potential exception of other collective bargaining agreement policies, the Seventh Circuit did not specifically note any other circumstances that would certainly create a presumption of unreasonableness.²⁷⁵ Therefore, plaintiffs can certainly argue with the language of *United Airlines II* that other policies—such as “up-and-out policies,” “job search leave policies,” or “non-demotion policies”—should fall on the left side of the spectrum, as unlikely to trump ADA reassignment because they are more like best-qualified policies than “relative[ly] rar[e]” seniority systems.²⁷⁶ *United Airlines II* chose to use the *Barnett* reasonableness analysis in a plaintiff-friendly way.

4. The Language of *United Airlines II* May Prove Even More Beneficial to Employee-Plaintiffs than the Language of *Midland Brake*

Barnett created uncertainty by rejecting a categorical approach to determine which employment policies can or cannot trump the ADA and threatened the ground that plaintiffs had gained in the Tenth and D.C. Circuits regarding certain employment policies—such as best-qualified policies—under such a categorical approach. However, *United Airlines II* helped plaintiffs to regain the ground of best-qualified policies under the *Barnett* reasonableness approach—*United Airlines II* interpreted “reasonableness” in a plaintiff-friendly way. In so doing, *United Airlines II* may have created a more plaintiff-friendly approach after *Barnett* for addressing other types of employment policies than even *Midland Brake* had offered in its more categorical approach.

271 *United Airlines II*, 693 F.3d at 764.

272 *Id.* at 763.

273 *See id.* at 765.

274 *See id.*

275 *See id.* at 760.

276 *See id.* at 764.

Most basically, *Midland Brake* fairly explicitly states that collective bargaining agreements trump the ADA—not under a reasonableness analysis but rather under an interpretation of what it means for a job to be vacant.²⁷⁷ Under the heading of “[t]he existing job must be vacant,” the court stated that “an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a vested priority right to such vacant positions.”²⁷⁸ Rather than interpreting collective bargaining agreements under the “reasonableness” requirement, *Midland Brake* finds their limitation under the “vacant” term of the statute.²⁷⁹ Meanwhile, both *Barnett* and *United Airlines II* mention collective bargaining agreements in some capacity,²⁸⁰ suggesting that they should be interpreted under the “reasonableness” language of the statute. In fact, *Barnett* explicitly rejects that a seniority system should be analyzed under the term “vacant”: “Nothing in the Act, however, suggests that Congress intended the word ‘vacant’ to have a specialized meaning. And in ordinary English, a seniority system can give employees seniority rights allowing them to bid for a ‘vacant’ position.”²⁸¹

However, neither *Barnett* nor *United Airlines II* actually decides whether all collective bargaining agreements would ordinarily make ADA reassignment unreasonable.²⁸² Further, even if collective bargaining agreements were to make reassignment unreasonable “in the run of cases,” *Barnett*, as emphasized in *United Airlines II*, would refuse to make the exception—or any exception—to the reassignment requirement categorical. In such a way, plaintiffs should have an opportunity to challenge at least one categorical limitation in *Midland Brake* under the *Barnett* reasonableness analysis as interpreted in *United Airlines II*, and *United Airlines II* provides the plaintiffs the opportunity to analogize collective bargaining agreements to the left side of the spectrum.

Under the categorical limit, *Midland Brake* explained that “other important employment policies besides . . . [those] under a collective bargaining agreement” might “make it unreasonable to require an employer to reassign a disabled employee to a particular job.”²⁸³ *Midland Brake* contemplated “a well entrenched seniority system which, even though not rooted in a collective bargaining agreement, is so well established that it gives rise to legitimate expectations by other, more senior employees to a job that the disabled employee might desire,” rendering reassignment unreasonable “at least

277 *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174–75 (10th Cir. 1999) (en banc).

278 *Id.*

279 *Id.*

280 *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 403–406 (2002); *United Airlines II*, 693 F.3d at 764–65.

281 *Barnett*, 535 U.S. at 399.

282 *See supra* note 256 and accompanying text.

283 *Midland Brake*, 180 F.3d at 1175–76.

under some circumstances.”²⁸⁴ The Tenth Circuit then further stated that “[t]here may be other such important employment policies that it would not be reasonable for an employer to set-aside in order to accomplish reassignment of a disabled employee,” though the court did not “attempt . . . to itemize all such policies that may exist nor comment upon such policies which may be so fundamental to the way an employer does business that it would be unreasonable to set aside.”²⁸⁵

That is, the Tenth Circuit had clearly stated that collective bargaining agreements, at least some seniority systems, and potentially other policies could trump ADA reassignment. Meanwhile, the Seventh Circuit emphasized “the relative rarity of seniority systems,”²⁸⁶ and only after emphasizing that the first step of the *Barnett* analysis should not be difficult when considering a best-qualified policy did the Seventh Circuit admit the following: “[W]e suppose it is possible there is some comparable circumstance [to a seniority system] of which we are unaware.”²⁸⁷ It is not clear whether the court meant that it is possible that there are other circumstances *in this case* of which the court was unaware or other circumstances *generally, in the universe*. Further, the court did not seem to explicitly address the fact that United Airlines policy was to allow for some preferential treatment in competing for a position.²⁸⁸ Though dicta, perhaps plaintiffs could use this omission to argue that even best-qualified policies with some preferential treatment cannot trump mandatory reassignment. The court also emphasized that even if reassignment was not reasonable in the run of cases, the plaintiff could still prove it was reasonable under the particular circumstances of the case.²⁸⁹ In short, while *Midland Brake* explicitly stated that policies other than seniority systems and collective bargaining agreements might trump reassignment, *United Airlines II* only admitted with reluctance that other employment policies *might* compare to seniority systems (though such systems are rare and the court was unaware of such comparable policies at least in this case, and perhaps in general), giving plaintiffs strong language with which to work. *Midland Brake* cites many other categorical limitations on the scope of the ADA reassignment obligation, including that “[r]eassignment is limited to existing jobs within the company,” “[r]eassignment does not require promotion,” “[e]mployers may choose the proffered reassignment,” “[e]mployer[s] need offer only a reassignment as to which the employee is qualified with or without reasonable accommodation,” and “‘[u]ndue hardship.’”²⁹⁰ Some subse-

284 *Id.* at 1176. Here, *Midland Brake* quotes *Aka* for its proposition that “[a]n employer is not required to reassign a disabled employee in circumstances when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.” *Id.* (quoting *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc)) (internal quotations omitted).

285 *Id.*

286 *United Airlines II*, 693 F.3d 760, 764 (7th Cir. 2012).

287 *Id.* at 764 n.3.

288 *Id.* at 761.

289 *Id.*

290 *Midland Brake*, 180 F.3d at 1174–78.

quent cases seem to suggest that there are still basic limitations to the meaning of reassignment, including that a position is vacant and that a new position need not be created.²⁹¹ Therefore, it is still possible that some categorical limitations to reassignment may still exist. However, *Barnett* and *United Airlines II* leave open the possibility that the classifications of former categorical limits to reassignment may be reconsidered, at least with regard to other employment policies—as seems to have been done with the consideration of collective bargaining agreements.²⁹²

Midland Brake also explains that reassignment “is [l]imited by the [m]odifier of [r]easonableness.”²⁹³ The court seems to incorporate this limitation into some of its “[s]pecific[ally] [listed] [l]imitations on an [e]mployer’s [d]uty to [r]eassign.”²⁹⁴ For example, under the limitation that “[a]n employer need not violate other important fundamental policies underlying legitimate business interests,” the court states the following: “*Because reasonableness is our guide*, there may be other important employment policies besides protecting rights guaranteed under a collective bargaining agreement that would make it unreasonable to require an employer to reassign a disabled employee to a particular job.”²⁹⁵ The court also explicitly states after its explanation of “reasonableness” and as an introduction to its list of “[s]pecific [l]imitations on an [e]mployer’s [d]uty to [r]eassign,” that “[t]he scope of *Midland Brake*’s obligation to offer Smith a reassignment position is further constrained by some of the broadly accepted limitations on an employer’s duty to reassign that have evolved under ADA case law in our circuit and others.”²⁹⁶ Thus, it seems that *Midland Brake* contemplates that reassignment may be even further limited by the “reasonableness” requirement than the specific limitations which it has listed. Meanwhile, *Barnett* seems to suggest and the Seventh Circuit seems to assume that reasonableness is *the* guide to determining whether a particular employment policy should trump the ADA in the run of cases. *Barnett* and *United Airlines II* have also helped to provide some definition to reasonableness—which *Midland Brake* failed to define. However, *Barnett* provided a two-step rebuttable presumption step for reasonableness, but still did not clearly define what would make a reassignment policy “reasonable” or “unreasonable” “in the run of cases.” *United Airlines II* guaranteed that the definition would be relatively plaintiff-friendly, suggesting that a policy must closely resemble seniority systems, which are relatively rare and implicate property-rights and administrative concerns. Conversely, a plaintiff could argue that a policy more closely resembles a best-qualified policy.

291 See *Reyazuddin v. Montgomery Cnty.*, 7 F. Supp. 3d 526, 550 (D. Md. 2014).

292 Cf. *Wicks*, *supra* note 11, at *4 (summarizing the state of employment policies affecting reassignment since *United Airlines II*).

293 *Midland Brake*, 180 F.3d at 1171 (emphasis omitted).

294 *Id.* (emphasis omitted).

295 *Id.* at 1175–76 (emphasis added).

296 *Id.* at 1171 (emphasis omitted).

5. Subsequent Cases

Though the point of this Note is not to discuss the circuit split specifically, it is worth mentioning that it does not appear that other circuits have addressed best-qualified reassignment policies since *United Airlines II*. The circuit court cases that do cite *Barnett* mostly do not address reassignment.²⁹⁷

a. Some Circuit Court Cases Have Applied the Reasoning of *Barnett* to Non-Reassignment Accommodations

In *Hwang v. Kansas State University*,²⁹⁸ the Tenth Circuit applied some of *Barnett*'s reasoning regarding inflexible seniority systems to inflexible leave policies at issue in the case and under the Rehabilitation Act.²⁹⁹

The case emphasizes some language from *Barnett* that may be useful for plaintiffs rejecting that inflexible leave policies can be immune from attack³⁰⁰—and *United Airlines II* may be able to supplement this helpful language. The case also emphasizes that *Barnett* can be applied both to Rehabilitation Act cases and to accommodations other than reassignment.³⁰¹

Barnett has also been applied to other forms of accommodation as courts continue to work out the meaning of “reasonableness.” In *Jones v. Nationwide Life Insurance Co.*,³⁰² the plaintiff requested but was denied a time extension for taking a test because his employer was not made aware of his disability and because the requested accommodation was unreasonable. The plaintiff had requested the accommodation too late and had not shown that the accommodation “would enable [him] to perform the essential functions of [his] job.”³⁰³ The court cited *Barnett* for the proposition that it was the plaintiff’s “burden to demonstrate that his requested accommodation ‘seem[ed] reasonable on its face’”—which the plaintiff failed to do.³⁰⁴

In *Solomon v. Vilsack*,³⁰⁵ the court cited *Barnett* in a plaintiff-friendly manner under the Rehabilitation Act, regarding an accommodation request for a maxiflex schedule.³⁰⁶ Because the reasonableness analysis is context-dependent, “it is rare that any particular type of accommodation will be categorically unreasonable as a matter of law. This case is no exception.”³⁰⁷ Citing various authorities, it found that “an ‘open-ended’ or maxiflex schedule”

297 See *infra* subsection III.C.5.

298 753 F.3d 1159 (10th Cir. 2014).

299 *Id.* at 1164.

300 See *id.* at 1162–65.

301 See *id.* at 1161–64.

302 696 F.3d 78 (1st Cir. 2012).

303 *Id.* at 90 (alterations in original) (quoting *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009)) (internal quotation marks omitted).

304 *Id.* (alteration in original) (quoting *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002)).

305 763 F.3d 1 (D.C. Cir. 2014).

306 See *id.* at 9–10.

307 *Id.* at 10.

could not be “unreasonable as a matter of law”³⁰⁸ and that here, the plaintiff had “discharged her summary-judgment duty of coming forward with sufficient evidence for a reasonable jury to find in her favor on all four elements of her accommodation claim.”³⁰⁹

b. Other Cases Cite the Ninth Circuit’s *Barnett* Opinion

Other cases do cite *Barnett*, and one of those cases—*Cardenas-Meade v. Pfizer, Inc.*³¹⁰—does address reassignment, but it only does so in dicta after dismissing the claim because the plaintiff was not disabled.³¹¹ The court quotes the Ninth Circuit’s *Barnett* opinion for the idea that “[e]mployers ‘who fail to engage in the interactive process in good faith [] face liability . . . if a reasonable accommodation would have been possible.’”³¹² It then quoted pre-*Barnett* decisions from other circuits to explain the following:

But while a reasonable accommodation under the ADA does include “reassignment to a vacant position,” requests for re-assignment to a new supervisor are disfavored. While it is appropriate to consider the reasonableness of such a request on a “case-by-case” basis, there is a “presumption . . . that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of plaintiff’s workplace, the request was reasonable) therefore lies with the plaintiff.” Here, given that *Cardenas-Meade* was in a probationary initial training period as an employee and had already failed the required final examination, it is not clear that the benefits of such a transfer would have outweighed the associated administrative costs.³¹³

United Airlines II might be useful for arguing against such a presumption in the Seventh Circuit.

c. Some Cases Continue to Try to Determine What May Be Considered a Reasonable Transfer

Some cases continue to attempt to determine what a reasonable transfer may be. For example, *Rorrer v. City of Stow*³¹⁴ found that a transfer could not be considered unreasonable merely because the plaintiff could not fulfill all of the duties of a particular job description, where the duties which the plaintiff is unable to fulfill are not actually a necessary part of the job³¹⁵: “The City’s unwillingness to modify a job description to accommodate Rorrer,

308 *Id.* at 11 (quoting *Solomon v. Vilsack*, 845 F. Supp. 2d 61, 72 (D.D.C. 2012)).

309 *Id.* at 12.

310 510 F. App’x 367 (6th Cir. 2013) (per curiam).

311 *See id.* at 370–72.

312 *See id.* at 372 (alterations in original) (quoting *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), *vacated sub nom.* *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)).

313 *Id.* (alterations in original) (citations omitted) (citing the Seventh, Second, and Third Circuits).

314 743 F.3d 1025 (6th Cir. 2014).

315 *See id.* at 1040–45.

even though that modification would not have required any change in job duties, falls short of the City's obligation 'to locate a suitable position' for Rorrer after he identified a vacancy and requested a transfer."³¹⁶

The Fifth Circuit presents an apparent limitation to transfer: "[I]t would not have been reasonable for the GSA to search for a replacement position until it knew for sure when Murry would be returning from her incapacitation."³¹⁷

d. Cases Citing *United Airlines II*

The *United Airlines II* opinion has, to this point, been cited in several cases. In three cases, *United Airlines II* was cited only for its standard in cases completely unrelated to ADA reassignment.³¹⁸ In four other cases, its holding has not been cited substantively.³¹⁹ In *EEOC v. Midwest Independent Transmission Systems Operator, Inc.*,³²⁰ the court used the *Barnett* analysis as stated in a Third Circuit case—and quoted by *United Airlines II*—in a non-reassignment reasonable accommodation analysis, namely, analysis of "[a] lengthy leave of absence."³²¹

In *Selan v. Valley View Community Unit School District 365-U*,³²² the court noted that the defendant had "originally argued that the ADA did not require it to transfer [the Plaintiff]," but that since the time of that brief, *United Airlines II*

reversed our Court of Appeals' prior position by announcing that court's unanimous holding "that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."³²³

316 *Id.* at 1045.

317 *Murry v. Gen. Servs. Admin.*, 519 F. App'x 866, 869 (5th Cir. 2013).

318 *Kane Cnty. Personnel, Inc. v. Fed. Ins. Co.*, No. 13 C 8800, 2014 WL 2609799, at *3 (N.D. Ill. June 11, 2014); *Westchester Fire Ins. Co. v. Zurich Am. Ins. Co.*, No. 13 C 2207, 2014 WL 1018115, at *4 (N.D. Ill. Mar. 12, 2014); *Nw. Mem'l Hosp. v. Virtual Imaging, Inc.*, No. 12 C 9201, 2013 WL 6382988, at *1 (N.D. Ill. Dec. 5, 2013).

319 *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 533 n.1 (7th Cir. 2013) (explaining that the district court had cited *Mays*, which was abrogated by *United Airlines II*); *Jennings v. Panetta*, 492 Fed. App'x 698, 699 (7th Cir. 2012) (noting that the plaintiff "was barred from filing a civil suit in federal court until either the EEOC issued a final decision or 180 days had passed" and citing *Mays*, which had been abrogated by *United Airlines II*); *Chi. Reg'l Council of Carpenters v. Thorne Assocs.*, 893 F. Supp. 2d 952, 956 (N.D. Ill. 2012) (quoting the standard for dismissal as "[t]he complaint is read 'in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the non-movant's] favor'" (alteration in original) (quoting *United Airlines II*, 693 F.3d 760, 761–62 (7th Cir. 2012))); *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, No. 12 C 4978, 2012 WL 4120506, at *1 (N.D. Ill. Sept. 18, 2012) (citing the same standard).

320 No. 1:11-cv-1703-WTL-DML, 2013 WL 2389856 (S.D. Ind. May 30, 2013).

321 *Id.* at *4; see *United Airlines II*, 693 F.3d at 763 n.1.

322 No. 10 CV 7223, 2013 WL 146415, at *1 (N.D. Ill. Jan. 14, 2013).

323 *Id.* at *10 n.10 (quoting *United Airlines II*, 693 F.3d at 761).

Therefore, the defendant instead argued that there were no available vacant positions for the plaintiff, and the court decided that there was “a genuine issue of material fact as to” that point.³²⁴

In *Rouse v. Chicago Transit Authority*,³²⁵ *United Airlines II* was not used directly. Addressing a Rehabilitation Act “failure-to-transfer” claim, the court cited a Third Circuit case—after finding that the Seventh Circuit had not addressed the elements of a failure-to-transfer case—in holding that a plaintiff in “a failure-to-transfer case . . . ‘bears the burden of demonstrating: (1) that there was a vacant, funded position; (2) that the position was at or below the level of plaintiff’s former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with a reasonable accommodation.’”³²⁶ *United Airlines II* was only cited within a failure-to-modify claim for the proposition that “[d]iscovery ultimately may belie Plaintiff’s allegations by, for example, demonstrating that accommodating Plaintiff’s request would have posed an undue hardship on [the Chicago Transit Authority].”³²⁷

The *Reyazuddin v. Montgomery County*³²⁸ district court made clear that section 504 of the Rehabilitation Act “shall be judged by the same standards as those used for Title I of the ADA.”³²⁹ Under that analysis, the court cited *United Airlines II* in a paragraph that described the accommodation of reassignment and some “traditional” limitations, such as only resorting to reassignment if accommodating the employee in his “current position” would pose an undue hardship,³³⁰ for the following proposition: “If the employee can be accommodated by reassignment to a vacant position, the employer must offer the employee the vacant position.”³³¹ The court also cited *Barnett* for its two-step “reasonableness” test, which reconciled the terms “reasonable accommodation” and “undue hardship.”³³²

The employer in this case had transferred each member of a particular department to a particular new position except one blind employee, due to computer program inaccessibility.³³³ The blind employee selected a position from other opportunities offered by the employer; when the employee applied for the other position, she was interviewed but not selected.³³⁴ Regarding the position to which her colleagues were transferred, it was unclear whether the court was evaluating that failure as a failure to transfer or a failure to accommodate.³³⁵ In any case, the plaintiff was found to have

324 *Id.* at *10.

325 No. 13-cv-05260, 2014 WL 3810876 (N.D. Ill. July 31, 2014).

326 *Id.* at *7 (quoting *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 230 (3d Cir. 2000)).

327 *Id.* (citing *United Airlines II*, 693 F.3d at 762).

328 7 F. Supp. 3d 526 (D. Md. 2014).

329 *Id.* at 546 (citing 29 U.S.C. § 794(d) (2012); see *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995)).

330 *Reyazuddin*, 7 F. Supp. 3d at 550.

331 *Id.* (citing *United Airlines II*, 693 F.3d at 761).

332 *Id.* at 545–46.

333 *Id.* at 534.

334 *Id.* at 535–38.

335 See *id.* at 543–52.

shown “at least a genuine dispute of fact as to whether Plaintiff’s proposed accommodation [of a particular widget to make the computer program accessible] permits her to perform the essential functions of the . . . job,”³³⁶ but the defendant was found to have shown an undue hardship defense.³³⁷ The court found that the plaintiff was offered other positions as a reasonable accommodation when she was not placed in the new position with her colleagues and that plaintiff “chose not to apply” for numerous subsequent vacancies.³³⁸ The fact that the plaintiff did eventually apply and compete for—but was denied—another position was evaluated under a disparate impact analysis, rather than a failure to accommodate.³³⁹ If instead the claim had been evaluated as a failure to accommodate claim, it would have been interesting to see how *United Airlines II* would have been applied to what seemed to be an employment policy requiring the plaintiff to apply for consideration for vacant positions. This case may demonstrate two things as the Seventh Circuit moves forward after *United Airlines II*: (1) that *United Airlines II* may be applied in Rehabilitation Act cases, and (2) that the Seventh Circuit still maintains some clear parameters limiting the reassignment requirement besides “reasonableness.”

In *Rednour v. Wayne Township*,³⁴⁰ the court quoted both *Barnett* and *United Airlines II* for the *Barnett* two-step reasonableness test.³⁴¹ Regarding a request for a temporary light-duty position, the plaintiff was found to have “met her initial burden of showing that [such] reassignment . . . may constitute a reasonable accommodation to her disability.”³⁴² It seems that the Seventh Circuit is still working out the reasonableness of light-duty positions: “At least in the context of injuries suffered on the job, the Seventh Circuit has held that ‘our case law and the EEOC’s interpretation of the ADA have approved of an employer’s offer of light-duty assignments as a reasonable accommodation.’”³⁴³ While indefinite accommodations are considered to be “an unreasonable request of an employer,”³⁴⁴ the court emphasized that “there exists considerable middle ground between a two-to-four week period and a truly ‘indefinite’ one.”³⁴⁵

One of the most extensive uses of *United Airlines II* has been in *Kosakowski v. PNC Financial Services Group, Inc.*,³⁴⁶ where the Eastern District of Penn-

336 *Id.* at 548.

337 *Id.* at 549.

338 *Id.* at 551.

339 *See id.* at 553–61.

340 No. 1:13-cv-00320-SEB-DKL, 2014 WL 4754816 (S.D. Ind. Sept. 24, 2014).

341 *Id.* at *11.

342 *Id.* at *12.

343 *Id.* (quoting *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 696 (7th Cir. 1998); *cf. Reyazuddin*, 7 F. Supp. 3d at 550 (stating “nor is the employer required to reallocate essential job functions or assign an employee to ‘permanent light duty’” (citing *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987))).

344 *Rednour*, 2014 WL 4754816, at *14 (citation omitted).

345 *Id.*

346 No. 12-cv-00038, 2013 WL 5377863 (E.D. Pa. Sept. 26, 2013).

sylvania decided that the defendant was not entitled to summary judgment when the plaintiff claimed she had not been reasonably accommodated through reassignment, and the defendant had “a policy of hiring the most qualified applicant for the position and [argued] that plaintiff would have to go through the same process as any external candidate.”³⁴⁷ First, the court rejected the defendant’s reliance on *Huber*,³⁴⁸ stating that “the *Huber* Court relied significantly on the decision in [*Humiston-Keeling*], which was expressly overruled in [*United Airlines II*].”³⁴⁹ The court then used *United Airlines II* and a Third Circuit case to show that “[n]ormally, a request for reassignment is a reasonable accommodation request,” that “[t]herefore, in this case, after plaintiff requested that she be reassigned based on her disability, and positions became available for which plaintiff was qualified, defendant had the burden to show that such reassignment would cause an undue hardship,”³⁵⁰ and that “a ‘best-qualified selection policy’ does not categorically amount to an undue hardship for an employer.”³⁵¹ *Kosaki* was obviously influenced by the *United Airlines II* analysis, but continues to show the confusion of whether employment policies should be considered under a reasonableness or undue hardship analysis. *United Airlines II* has been applied, but plenty of ground remains for plaintiffs to use *United Airlines II* to clarify the meaning of reasonableness in the reassignment context.

CONCLUSION

United Airlines II has certainly contributed to various circuit split conversations, including (1) whether best-qualified selection policies trump ADA reassignment, (2) the proper borders and applications of the *Barnett* decision, and (3) the meaning of reasonableness, at least in the reassignment context. However, the real significance of *United Airlines II* comes in its use by plaintiffs—plaintiffs in the Seventh Circuit in particular, and possibly in other circuits as well. First, *United Airlines II* directly overturned employer-friendly precedent in the Seventh Circuit that had upheld that best-selection policies could trump the ADA reassignment requirement—abrogating *Mays* and overturning *Humiston-Keeling*. Second, *United Airlines II* helped to temper what could have been a relatively strong blow to plaintiffs in *Barnett*. *Barnett* has rejected the suggestion of the plaintiffs that a showing of “reasonableness” was nothing more than a showing of the “effectiveness” of a proposed accommodation for the employee with a disability. The *Barnett* Court rejected this notion and instead created a two-step analysis with rebuttable presumptions in which the “reasonableness” analysis—for which the plaintiff was responsible—had to carry some weight. The plaintiff must show that reassignment was reasonable when considering other circumstances of

347 *Id.* at *15–17 (citation omitted).

348 *Id.* at *16.

349 *Id.* (citations omitted).

350 *Id.*

351 *Id.* at *17 (citing *United Airlines II*, 693 F.3d 760 (7th Cir. 2012)).

employment “ordinarily” or “in the run of cases” or, if unable to do so, show particular circumstances that make a presumptively unreasonable accommodation reasonable in these particular circumstances. Only if the plaintiff is able to make one of these showings will the defendant be required to show undue hardship. The Court also clarified that undue hardship and reasonable accommodation were not “mirror images”³⁵²—undue hardship concerned the operation of business³⁵³—but the Court did not clearly define the parameters of “reasonableness.” It did hold, though, that the plaintiff had to show that reasonableness,³⁵⁴ and set a rebuttable presumption border—never categorical, as the plaintiff could show particular circumstances³⁵⁵—that seniority systems made reassignment unreasonable in the run of cases.³⁵⁶

In light of this decision, *United Airlines II* helped to regain ground for plaintiffs. It set another rebuttable presumption border: best-qualified selection policies cannot trump reassignment absent a showing by the defendant of undue hardship. It also emphasized that even seniority systems cannot create a per se exception under the *Barnett* approach. The Seventh Circuit did not clarify the middle ground between best-qualified selection policies and seniority systems; the court was also unclear regarding whether collective bargaining agreement fit into the analysis, where they fit into the analysis, or whether they always trump mandatory reassignment. Other circuits continue to try to work out this middle ground as well.³⁵⁷ However, by setting the other end of the presumption spectrum, *United Airlines II* has provided plaintiffs going forward with a means to argue reasonableness regarding the accommodation or reassignment. That is, plaintiffs can argue that a particular employment policy is more like a most-qualified selection standard than a seniority system standard. Even further, *United Airlines II* provides useful language for plaintiffs to argue that a particular policy is not like the “narrower, fact-specific exception” of a seniority system³⁵⁸ and language “reject[ing] [an] “anti-preference interpretation of the ADA.”³⁵⁹ Even with a seniority system, *United Airlines II* emphasized that the exception was not per se;³⁶⁰ a plaintiff can even look to the *Barnett* opinion itself for examples of circumstances which might render a seniority system unfit for exception—for ideas or even for comparison.³⁶¹ *United Airlines II* may even leave ground for employee-plaintiffs to challenge some of the categorical limitations of reassignment stated in *Midland Brake*. Through all of the presumption borders

352 *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002).

353 *Id.* at 400–01.

354 *See id.*

355 *Id.* at 405–06; *see supra* note 117 and accompanying text.

356 *Barnett*, 535 U.S. at 403.

357 *See supra* subsection III.C.5.

358 *See United Airlines II*, 693 F.3d 760, 763 (7th Cir. 2012).

359 *Id.* at 763.

360 *Id.*

361 *See Barnett*, 535 U.S. at 405–06.

and circumstantial exceptions regarding the reasonableness of a reassignment accommodation under the ADA, the Seventh Circuit has helped to clarify borders and provided plaintiff-friendly language for future litigation.