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Reasonable Accommodation vs. Seniority in the Application of the Americans with Disabilities Act

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REASONABLE ACCOMMODATION vs. SENIORITY IN THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

A. Statement of the Issue

The Ninth Circuit Court of Appeals created a split among circuits in determining that seniority policies are but one factor in the undue hardship analysis of a proposed reasonable accommodation in *Barnett v. U.S. Air, Inc.*[1] One of the dissenters had this to say about the majority's opinion:

> The sweeping language and exalted tone of the court's wide-ranging opinion make clear that it aspires to offer a definitive interpretation of the Americans with Disabilities Act (ADA). This might be less disturbing if this case actually involved an American with a disability. Because the court reaches out to decide several important issues of first impression in a case without a proper plaintiff, I must respectfully dissent. . . .[2]
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> . . . .
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> A case so transparently lacking in merit is an inappropriate vehicle for deciding multiple questions of first impression concerning the proper construction of an important statute (and creating a circuit split in the process). . . . The court has issued what in effect amounts to a lengthy advisory opinion on the ADA . . . .[3]

Despite the sharp criticism of Justice O'Scannlain's dissent, the Ninth Circuit, sitting en banc, made several rulings of first impression regarding Title I of the Americans with Disabilities Act (the "ADA").[4] The U.S. Supreme Court recently ruled on one of those issues, and that issue is the subject of this

1. Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (en banc) (O'Scannlain, J., dissenting), *rev'd*, 122 S. Ct. 1516 (2002).

2. *Id.* at 1123.

3. *Id.* at 1124.

4. The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (2000). The three issues of first impression addressed by the *Barnett* court were: (1) "the nature and scope of an employer's obligation to engage in the interactive process"; (2) "whether reassignment is a reasonable accommodation in the context of a seniority system"; and (3) "the appropriate standard for evaluating retaliation claims under the ADA." *Barnett*, 228 F.3d at 1108.

article.[5] The issue, as stated by Petitioner, US Airways, Inc., is "[w]hether the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system."[6] Two basic methods of treating seniority policies in relation to the duty to reasonably accommodate through reassignment developed prior to the Supreme Court's ruling on this issue. The majority of courts had held that reassignment in violation of a bona fide seniority policy is a per se bar to reassignment being a reasonable accommodation.[7] However, there is some support for a balancing approach like that applied by the Ninth Circuit in *Barnett*.[8] Despite sharp criticism of its ruling, and subsequent reversal and remand by the Supreme Court, the majority correctly came to the conclusion that the balancing approach is the more appropriate resolution of this issue. Considering the plain language of the ADA, the legislative history of the ADA, the Equal Employment Opportunity Commission (the "EEOC") regulations under the ADA and public policy, a per se bar is not permissible.

B. Brief Overview of the Americans with Disabilities Act

Title I of the ADA addresses discrimination in the employment sector.[9] The general nondiscrimination rule of the ADA reads: "No covered entity shall discriminate against a qualified individual with a disability because of the

5. US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002).

6. Brief for Petitioner at i, US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002) (No. 00-1250).

7. *Barnett*, 228 F.3d at 1120 n.9 (citing Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Willis v. Pac. Maritime Ass'n, 162 F.3d 561 (9th Cir. 1998), *aff'd en banc*, 244 F.3d 675 (9th Cir. 2001); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Davis v. Florida Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000)). The term "bona fide" has been used as a modifier of seniority policy to indicate that if there is direct proof of an employer seeking a seniority policy in order to avoid obligations under the ADA, that seniority policy will not be a bar to reassignment as a reasonable accommodation. *See, e.g.*, *Eckles*, 94 F.3d at 1046 n.7. In addition, some courts have required a "well established" seniority policy, which means if the policy has not been uniformly followed, the seniority policy will not necessarily bar reassignment in violation of the seniority policy as a reasonable accommodation. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999).

8. *Barnett*, 228 F.3d at 1119-1120. *See, e.g.*, Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 396-97 (E.D. Tex. 1995).

9. 42 U.S.C. §§ 12101-12117 (2000). The ADA has four titles. As mentioned, Title I deals with discrimination in employment. Title II concerns discrimination by public agencies and public transportation. *Id.* §§ 12131-12165. Title III addresses private entities that have facilities open to the public, which must be made accessible to disabled individuals. *Id.* §§ 12181-12189. The last title, Title IV, contains miscellaneous provisions. *Id.* §§ 12201-12213.

disability of such individual 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."[10] The term "covered entity" applies to employers as well as labor organizations. Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[11] Restated, a covered entity is required to provide reasonable accommodation to a disabled employee unless such reasonable accommodation would impose an undue hardship upon the covered entity.

Reasonable accommodation includes "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[12] Reassignment to a vacant position indicates, and the legislative history confirms, that employers are not required to "bump" other employees.[13] Under the express language of the ADA, both modifications of existing policies and reassignment to a vacant position can be reasonable.[14] Therefore, it should follow that modification of the seniority policy to allow a reassignment is reasonable, unless the position is not "vacant," or it causes undue hardship upon the employer. Courts, however, have come to differing results regarding this issue based on their interpretation of the ADA.

Most courts have reached the conclusion that a per se bar to reassignment in violation of a bona fide seniority policy is required under the ADA.[15] Under

10. 42 U.S.C. § 12112(a) (2000).

11. *Id*. § 12112(b)(5)(A).

12. *Id*. § 12111(9)(B).

13. *See* S. REP. NO. 101-116, at 63 (1989); *see also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174-75 (10th Cir. 1999). The term "bumping" means that an employee currently holds the position that the disabled employee is seeking as a reasonable accommodation.

14. 42 U.S.C. § 12111(9) ("The term reasonable accommodation may include . . . reassignment to a vacant position [and] . . . appropriate adjustment or modifications of . . . policies . . . .").

15. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 n.9 (9th Cir. 2000) (en banc) (citing Davis v. Florida Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); Willis v. Pac. Maritime Ass'n, 162 F.3d 561 (9th Cir. 1998); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 83 (3rd Cir. 1997); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Benson v. Northwest Airlines, 62 F.3d 1108, 1114 (8th Cir. 1995)). Generally, these courts have either been the district courts, or appellate courts reviewing de novo the granting of a summary judgment motion. *See, e.g.*,

the per se bar, if the disabled employee seeks reassignment to a position which a more senior employee has a right to under a bona fide seniority policy, reassignment is, as a matter of law, not a reasonable accommodation.[16] However, some courts, such as *Barnett*, have applied a balancing approach.[17] Under this approach, a seniority policy is but one factor in determining whether the requested employment action is a reasonable accommodation or whether it imposes an undue hardship such that the employer need not provide accommodation.[18] The Supreme Court articulated an entirely different rule, establishing a rebuttable presumption that creating an exception within a seniority system is unreasonable.[19] This could be overcome by the disabled employee proving special circumstances exist so that creating an exception to the seniority policy is not unreasonable.[20] This approach most closely resembles a per se bar because the Supreme Court indicated that it would be a very rare case in which the employee may overcome the presumption of unreasonableness.

C. Scope and Importance of Issue

The seniority system in *Barnett* was a policy of US Airways, and not associated with a collective bargaining agreement negotiated with a union. This distinction, however, was not a critical factor in the Supreme Court's determination of the issue.[21] The Supreme Court's decision, issued on April 29, 2002, will have a significant impact on all seniority systems and on those policies as a result of disability claims under the ADA. This article will address both employer created and union negotiated seniority policies.[22] The

Emrick v. Libbey-Owens-Ford Co, 875 F. Supp. 393 (E.D. Tex. 1995) (district court decision); *Eckles*, 94 F.3d 1041 (appellate court reviews grant of summary judgment de novo).

16. *See, e.g.*, *Eckles*, 94 F.3d at 1051 ("[W]e conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.").

17. *Barnett*, 228 F.3d 1105.

18. *See, e.g.*, *id.* at 1119-1120.

19. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1525 (2002).

20. *Id.*

21. *Id.* at 1524-25. The Court held that seniority systems, whether employer-imposed or contained within a collective bargaining agreement, create the same expectations for non-disabled employees. *Id.*

22. Seniority systems are of great importance in the employment arena. Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976). Seniority is usually awarded according to service time with the company. An employee who has been employed at the particular employer will have more seniority than another employer with less service time at that employer. These seniority policies may give more senior employees preferential treatment in decisions concerning layoff and recall procedures, promotions, transfers, demotions, shift assignment, preference in scheduling vacation time, overtime opportunities, parking privileges, and other similar benefits. *Id*. at 766-67.

determination of this issue could also have a significant impact on other employer-created policies such as mandatory overtime policies or non-transfer policies. It could also affect analysis of similar provisions in other acts such as Title VII of the Civil Rights Act of 1964.[23] This article will address these other possible impacts only peripherally, while focusing on the issue of accommodating disabled employees in companies with seniority systems.

This Comment will be organized into three additional sections. Section II will address the Supreme Court's decision in full, including the concurring and dissenting opinions.[24] Section II will also discuss prior cases that chose either to adopt a balancing approach or a per se bar. This Comment advocates the balancing approach adopted in the Ninth Circuit decision in *Barnett*, which will be a focus of Section II. Section III will separate and analyze the major issues that arise when answering this question, and why each supports a balancing approach or a per se bar. This section will include an analysis of the ADA and its legislative history, public policy arguments, the problem of conflict between the ADA and National Labor Relations Act (the "NLRA"),[25] and the appropriateness of resolving this issue through court action as opposed to legislative action. Finally, Section IV will be a conclusion offering a summary of the points made and a proposed resolution of this issue.

The Ninth Circuit in *Barnett* differentiated between cases involving a collective bargaining agreement, as opposed to a unilaterally imposed employer policy. *Barnett*, 228 F.3d at 1120 n.9. The difference lies in the burden it imposes upon other employees. No matter whether the seniority policy is a result of collective bargaining or employer imposed, expectation rights of an employee whose seniority rights are displaced are involved. Where there is a collective bargaining agreement, the contractual rights of the employees affected by a reasonable accommodation are also involved. This distinction should be considered by the fact finder in deciding whether a particular accommodation is a "reasonable accommodation." Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 396-97 (E.D. Tex. 1995). If a collective bargaining agreement is in effect it will be another factor to consider in the undue hardship analysis, along with expectations employees have under a seniority policy, whether part of a collective bargaining agreement or not. Therefore, in either situation the balancing approach should be used rather than a per se bar to reassignment.

23. 42 U.S.C. § 2000e-17 (2000).

24. Justice Breyer delivered the opinion of the Court. Justices Stevens and O'Connor both wrote separate concurrences. Opposing them were a dissent by Justice Scalia, which Justice Thomas joined, and a dissent by Justice Souter, which Justice Ginsburg joined. US Airways, Inc. v. Barnett, 122 S. Ct. 1516 (2002).

25. 29 U.S.C. § 151-169 (2000).

II. SUMMARY OF POSITIONS

A. Factual History of Barnett v. U.S. Air, Inc.

In *Barnett*, the plaintiff, Robert Barnett, injured his back while working in a cargo position for US Airways.[26] Upon returning from disability leave, Barnett realized he could no longer physically perform the functions required by the cargo position.[27] This claim was supported by Barnett's doctor and chiropractor, both of whom recommended Barnett avoid heavy lifting and prolonged periods of bending, twisting, turning, pushing and pulling, and prolonged periods of sitting and standing.[28] Subsequently, Barnett used his seniority to transfer to a mailroom position, which his doctor had approved.[29] After almost two years of service in the mailroom, Barnett became aware that two employees were going to exercise their seniority rights to obtain positions in the mailroom.[30] After being bumped by these employees, Barnett's seniority would only allow him to take a cargo position like the one he had previously held and could not perform due to his disability.[31] Barnett sent a letter to US Airways requesting that he be allowed to stay in the mailroom as a reasonable accommodation.[32] US Airways did not respond for five months, but during that period he was allowed to stay in the mailroom.[33] After five months, US Airways informed Barnett that he would not be allowed to stay in the mailroom position due to the seniority rights of the more senior employees.[34] As an alternative to remaining in the mailroom, Barnett asked for certain accommodations that would enable him to perform a cargo position.[35] US Airways denied all requested accommodations and proposed only that Barnett could bid for any job within his restrictions, which did not provide Barnett any resolution since the only job available would still have

26. *Barnett*, 228 F.3d at 1108. What this group of cargo positions entailed was not elaborated, but for the purposes of this article it is only important that it required heavy lifting that Mr. Barnett was unable to perform as a result of the back problems he suffered from and that no accommodation within those positions could be agreed to by Mr. Barnett and US Airways.

27. *Id*.

28. *Id.*

29. *Id*. The seniority policy of US Airways allowed more senior employees to bump less senior employees upon application by the more senior employees who wanted to change jobs. *Id.* at 1108-09.

30. *Id*. at 1108-09.

31. *Barnett*, 228 F.3d. at 1109.

32. *Id*.

33. *Id*.

34. *Id.* at 1108-09.

35. *Id.* at 1109. Mr. Barnett requested a mechanical lifting device or restructuring of the cargo position as possible accommodations that would allow him to resume work in a cargo position. *Id.*

been the cargo position, which he could not perform without reasonable accommodation.[36]

B. *Rebuttable Presumption—Supreme Court Resolution of US Airways, Inc. v. Barnett*

Justice Breyer's opinion started its analysis by reciting the general non-discrimination rule the ADA creates—"[A]n employer who fails to make 'reasonable accommodations to the known physical or mental limitations of an [employee] with a disability' discriminates '*unless*' the employer 'can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business.'"[37] Justice Breyer then considered US Airways' contention that the ADA requires only equal treatment for persons with disabilities, not preferential treatment.[38] Justice Breyer rejected that claim, and indicated that the ADA does, in fact, require preferential treatment for individuals with disabilities in the form of reasonable accommodations.[39] Justice Breyer went on to add, "the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the [ADA's] potential reach."[40] Justice Breyer also rejected US Airways' argument that, since the seniority system creates rights to all positions in the company, none of the positions can be considered "vacant," and, therefore, reassignment is not required because the ADA prohibits reassignment to a position that is not vacant.[41]

Justice Breyer noted that the ADA requires an employee to demonstrate that reasonable accommodation is possible, and the ADA requires that the employer is to prove that the accommodation would impose an undue hardship and is, therefore, not required.[42] In considering the employee's required showing that reasonable accommodation is possible, Justice Breyer stated that reassignment to a vacant position would normally be reasonable, but for the seniority system in place.[43] He announced that requiring proof that a seniority system should prevail on a case-by-case basis was not required, because "in the run of cases" reassignment in violation of a seniority system will be

36. *Barnett*, 228 F.3d at 1109. There was no evidence of whether Barnett was qualified, without accommodation, to any other position. *Id.*

37. US Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1519 (2002) (quoting 42 U.S.C. § 12112(b)(5)(A) (2000)).

38. *Id.* at 1520-21.

39. *Id.* at 1521.

40. *Id.*

41. *Id*. at 1521.

42. *US Airways, Inc.*, 122 S. Ct. at 1523.

43. *Id*. at 1523-24.

unreasonable.[44] Justice Breyer noted the following factors as reasons that varying a seniority system will normally be unreasonable.

First, Justice Breyer cited analogous case law, including decisions under Title VII, the Rehabilitation Act and several Circuits' rulings under the ADA.[45] According to Justice Breyer, the key to this case was the expectation created by seniority systems, regardless of whether they are contained within a collective bargaining agreement or unilaterally imposed by an employer, on other employees. The opinion indicated that the confusion created by a case-by-case determination would undermine seniority systems and the consistent, uniform approach they create to assigning employees to positions.[46] Justice Breyer's rule, however, still requires difficult case-by-case determinations. He permits an employee to overcome the presumption of unreasonableness by showing that other employees did not have justified expectations.[47] This could result from such things as an employer reserving the right to change a seniority system unilaterally, which does, in fact, make many exceptions to the seniority policy, and, thus, reduces expectations of other employees to the point that "one further exception is unlikely to matter."[48]

Justice Stevens wrote a separate concurrence to note that a seniority system is relevant to whether an accommodation is reasonable, but not to whether an accommodation creates an undue burden as the court of appeals had ruled.[49] This is not a critical issue, but it does relate to who carries the burden of proof. Employees have the burden to prove that reasonable accommodation is possible; employers carry the burden of proving that a particular accommodation poses an undue hardship and is, therefore, not required.[50] In the grand scheme of the ADA, this distinction does not matter. Courts can either rule that the employee has the burden of proving the accommodation is reasonable, or that the employers must prove the accommodation poses an undue hardship—as the Supreme Court did in *Barnett*, ruling that an employee must prove the accommodation is reasonable.

Justice O'Connor wrote a concurrence to indicate that she would base her rule in this situation upon whether the seniority system in place creates a legally enforceable right to a position.[51] If it does, then the position is not vacant, and reassignment to that position could not be a reasonable

44. *Id.* at 1524.

45. *Id.* ADA cases relied upon by Justice Breyer included *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1176 (10th Cir. 1999), *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998), and *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996). *Id.*

46. *Id.* at 1524-25.

47. *US Airways, Inc.*, 122 S. Ct. at 1525.

48. *Id.*

49. *Id.* at 1525-26 (Stevens, J., concurring).

50. *Id*. at 1526.

51. *Id*. at 1526-27 (O'Connor, J., concurring).

accommodation.[52] Justice O'Connor joined Justice Breyer's opinion because it would produce similar results.[53]

Justice Scalia wrote a dissent, which Justice Thomas joined. This dissent basically announced the unsupported view that the ADA required modification only to those policies that are disability related.[54] Since a seniority policy does not relate specifically to Barnett's disability, it cannot be a reasonable accommodation.[55] This Comment will not address this dissent beyond pointing out a few of its shortcomings. Justice Scalia cited the ADA's list of possible accommodations and then proceeded to discuss some of them and why they supported his proposition that only reasonable accommodations directed at disability-related obstacles were required.[56] He discussed two of the listed accommodations, "modification of equipment and devises" and "provisions of qualified readers or interpreters," which do support his position. These are accommodations directed to obstacles directly related to an employee's disability. However, Justice Scalia conveniently did not discuss other listed accommodations that did not support his contention, such as "appropriate adjustment or modification of . . . policies."[57] Another flaw of Justice Scalia's opinion was that it cited the EEOC as generally supportive of his position, when, in fact, the EEOC has explicitly supported a rule that would permit variance of a seniority policy as a reasonable accommodation.[58] Lastly, Justice Scalia's opinion indicated that even in a situation where the employer has created multiple exceptions to the seniority policy, one more exception for disabled employees would be too burdensome because the other employees still expect the existing exceptions to be the only exceptions.[59] As discussed later in this article, this is a situation where permitting variance of a seniority policy would be most justifiable because the other employees' expectations are not quite as strong.

Finally, Justice Souter offered a dissenting opinion in which Justice Ginsburg joined. This dissent supports a balancing approach such as that supported by this Comment and the Ninth Circuit's decision in this case. This

52. *US Airways, Inc.*, 122 S. Ct. at 1527.

53. *Id.* at 1526.

54. *Id.* at 1528 (Scalia, J., dissenting).

55. *Id.* at 1529.

56. *Id.* at 1530 (citing 42 U.S.C. § 12111(9) (2000)).

57. *US Airways, Inc.*, 122 S. Ct. at 1530. Interestingly enough, most courts that have discussed this issue have overlooked the fact that adjustment or modification of policies is specifically included in the non-exhaustive list of reasonable accommodations contained in 42 U.S.C. § 12111(9). This could be because they view reassignment to a vacant position as more closely analogous to varying a seniority policy.

58. *Id.* at 1530-31. *See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Compl. Manual (CCH), No. 915.002, § 902, at 5440 (Mar. 1, 1999) [hereinafter *EEOC Enforcement Guidance*].

59. *US Airways, Inc.*, 122 S. Ct. at 1531.

dissent notes that reasonable accommodation can include reassignment to a vacant position.[60] Although many provisions of the ADA have been modeled after Title VII, the ADA did not include a provision specifically removing variances in seniority systems from the definition of reasonable accommodation as Title VII and the Rehabilitation Act did.[61] In Justice Souter's opinion, this omission created an ambiguity that can be resolved by the legislative history of the ADA.[62] However, Justice Souter's dissent did depart from the balancing approach in one significant way. Justice Souter indicated that the legislative history was not enough to overcome laws that provided for the enforcement of collective bargaining agreements.[63] It was enough, however, to indicate that employer-imposed seniority systems, which do not have special protection by law, cannot be a bar to reasonable accommodation.[64] This was especially true here, where the seniority policy was contained in an employee handbook that was not intended to create enforceable contractual rights, and allowed US Airways to change any and all policies without advanced notice.[65] Based on this language, Justice Souter indicated that Barnett had met his burden by proving that variance in the seniority policy would be a reasonable accommodation, and the burden, consequently, was passed to US Airways to prove that this accommodation would impose an undue hardship.[66]

C. Ninth Circuit Ruling in Barnett—Judge Fletcher's Majority Opinion

The majority of the *Barnett* court considered, among other things, whether US Airways should be required to make an exception to its company's seniority policy in order to accommodate Barnett's disability. The majority cited the ADA as explicitly recognizing reassignment as a reasonable accommodation.[67] Then the court narrowed in on the key issues: (1) whether a disabled employee seeking reassignment as a reasonable accommodation should be given priority over non-disabled employees seeking the same

60. *Id.* at 1532.

61. *Id.* at 1532-33.

62. *Id.* at 1533 (citing both a House Report and Senate Report indicating that a collective bargaining agreement is but one factor to consider in reasonable accommodation determinations).

63. *Id.*

64. *US Airways, Inc.*, 122 S. Ct. at 1533.

65. *Id.* at 1534.

66. *Id.*

67. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000) (en banc), *cert. granted*, 121 S. Ct. 1600 (2001), *rev'd*, 122 S. Ct. 1516 (2002) ("The ADA explicitly states that reasonable accommodation may include reassignment.") (citing 42 U.S.C. § 12111(9)(B) (2000)). Within the definition of "reasonable accommodation," "reassignment to a vacant position" is included. 42 U.S.C. § 12111(9)(B) (2000).

position and (2) whether a seniority system was a per se bar to reassignment as a reasonable accommodation.[68]

Addressing the first issue, the majority relied upon the EEOC's guidance to support the proposition that the ADA does require giving a disabled employee a reassignment if that person is qualified for the position.[69] If this were not the case, the reassignment requirement "would be of little value and would not be implemented as Congress intended."[70] The majority then cited en banc decisions from the U.S. Courts of Appeals for the D.C. Circuit and the Tenth Circuit to support the assertion that the ADA requires more from employers than simply giving disabled employees a chance to compete for reassignment on an equal basis with non-disabled employees.[71]

The majority then moved on to the second issue, considering whether an employer's unilaterally created seniority policy is a per se bar to reassignment. The court noted that no other circuit had directly addressed this question.[72] After finding the text of the ADA offered no help, the court reviewed the ADA's legislative history. The court found no history speaking to seniority systems outside the collective bargaining context, but did discover that the available legislative history rejected a per se bar to reassignment in violation of a seniority policy.[73] The legislative history envisioned collective bargaining agreements containing a provision that allowed employers to take all necessary steps to comply with the ADA and alert their employees that the seniority policy may, in certain circumstances, be violated.[74]

To support their reading of the legislative history, the *Barnett* majority again cited the EEOC's position.[75] The EEOC Compliance Manual supports a fact specific analysis, treating the collective bargaining agreement as another

68. *Barnett*, 228 F.3d at 1117.

69. *Id.* at 1118 (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5456).

70. *Id.*

71. *Id.* (citing Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999)).

72. *Id.* (noting that all other decisions have involved a collective bargaining agreement's seniority policy, or simply have been dicta as is the case with *Aka*, 156 F.3d 1284 and *Smith*, 180 F.3d 1154).

73. *Barnett*, 228 F.3d at 1119 ("The legislative history indicates that a collective bargaining agreement can be a factor in determining the reasonableness of an accommodation but rejects any per se bar." (citing H.R. REP. NO. 101-485, pt. 2, at 63 (1990); S. REP. NO. 101-116, at 32 (1989))).

74. *Id.* ("[B]oth reports envision that collective bargaining agreements will incorporate provisions allowing for compliance with the ADA 'by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.'" (quoting H.R. REP. NO. 101-485, pt. 2, at 63; S. REP. NO. 101-116, at 32)).

75. *Id.* ("In the EEOC's view, such a per se rule nullifies Congress' intent that undue hardship always be determined on a case-by-case basis.") (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

factor in the undue hardship analysis.[76] Accordingly, the analysis would start by examining whether the employer could provide a reasonable accommodation that would both remove the workplace barrier and not violate the collective bargaining agreement.[77] If such an accommodation was not possible, the ADA would require the employer and the union, as exclusive bargaining representative, to engage in good faith negotiation in an effort to find an agreeable variance in the collective bargaining agreement which would allow the employer to provide a reasonable accommodation.[78] This accommodation would then be put in place, unless it unduly burdened other workers' expectations.[79] Relevant factors to consider in determining the undue burden upon other employees include "the duration and severity of any adverse effects caused by granting a variance and the number of employees whose employment opportunities would be affected by the variance."[80]

After discussing the EEOC position, the *Barnett* court reasoned that, in the absence of a collective bargaining agreement, where no bargained-for rights were involved, seniority without a showing of undue hardship should not bar reassignment.[81] The *Barnett* court also recognized other enumerated factors under the ADA to consider in an undue hardship analysis, "including the cost of the accommodation, the overall financial resources of the company and the scope of the employer's operations."[82] Finally, the court differentiated ADA cases from Title VII cases because the ADA does not have language protecting "bona fide seniority systems" as Title VII does.[83] The "undue hardship" requirement under the ADA is "substantially more demanding" than the same standard in Title VII.[84]

Concluding that the ADA can require an employer to disregard a bona fide seniority system, and that such a system is simply one factor in the undue hardship analysis, the court proceeded to apply the undue hardship analysis to the situation at hand. The court first looked at the extent of impact on other

76. *Id.* (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

77. *Id*. (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

78. *Barnett*, 228 F.3d at 1119 (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

79. *Id*. (citing at *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

80. *Id*. (citing *EEOC Enforcement Guidance*, *supra* note 58, at 5463).

81. *Id.* ("Here, where there is no collective bargaining agreement, no bargained for rights are involved. It would seem that the seniority system without more should not bar reassignment.")

82. *Id.* at 1120 (citing 42 U.S.C. § 12111(10)(B) (2000)).

83. *Barnett*, 228 F.3d at 1120 n.10 (citing Title VII, 42 U.S.C. § 2000e-2(h) (2000)). This section of Title VII states: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . ." 42 U.S.C. § 2000e-2(h) (2000).

84. *Barnett*, 228 F.3d at 1120 n.10 ("We note that the 'undue hardship' standard in the ADA is substantially more demanding than the hardship standard in Title VII in the context of 'reasonable accommodation' for the religion of employees.").

employees if Barnett were allowed to keep his position despite the other employees' greater seniority.[85] The court expressly noted that reasonable accommodation does not require the "bumping" of another employee.[86] But the court did not view this employment action as bumping and concluded that the only adverse effect of accommodation would be the removal of one position from the seniority bid process.[87] In its analysis, the court also considered the number of ADA claimants employed by US Airways, the claimants' seniority levels and the claimants' need for reasonable accommodation that violated the seniority policy.[88] The court finally held that US Airways did not present enough evidence to support its claim that removing one position from the seniority bid process would unduly disrupt the seniority process.

In Justice O'Scannlain's dissent, joined by Justices Trott and Kleinfeld, the main point of contention was that Barnett was not disabled as defined in the ADA.[89] Relying on *Thompson v. Holy Family Hospital*,[90] the dissent refused to accept a twenty-five pound lifting restriction as substantially limiting the major life activity of working.[91] In order to be disabled within the meaning of the ADA, an individual must be substantially limited in a "major life activity."[92] However, the majority in *Barnett* made a compelling case that this

85. *Id.* at 1120. The *Barnett* court viewed the situation at the time of the adverse employment action, and, therefore, considered Barnett to be the current occupant of the mailroom position.

86. *Id.* at 1120. There is disagreement over the meaning of the term "bumping." Under a strict interpretation, bumping would mean only taking a position which is currently filled by another employee. This is the approach adopted by the majority in *Barnett*. *Id.* at 1120. However, other courts have defined it much more broadly. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999). The court in *Smith* held that any position, even if not currently occupied, is not vacant if another, more senior, employee under a seniority policy has a right to the position; therefore, any such variation to a seniority policy would require bumping. *Id.* at 1175.

87. *Barnett*, 228 F.3d at 1120. The court further stated:

> Barnett already occupied the mail room position at the time of his request for reasonable accommodation. Therefore, permanently reassigning Barnett to the mail room position as a reasonable accommodation did not require "bumping" any other employee from the position. While this accommodation would eliminate one position from the seniority bid process, U.S. Air has failed to demonstrate that doing so would cause an undue hardship.

Id.

88. *Id.* at 1120-21.

89. *Id.* at 1123.

90. 121 F.3d 537 (9th Cir. 1997). For further discussion of this issue, see *Lown v. J.J. Eaton Place*, 598 N.W.2d 633 (Mich. Ct. App. 1999).

91. *Barnett*, 228 F.3d at 1123 ("The similarities between *Thompson* and the instant case, in terms of both the plaintiff's claimed disabilities and the employer's responses thereto, are striking. Under *Thompson*, it is clear that no genuine issue of material fact exists as to Barnett's disability.").

92. 42 U.S.C. § 12102(2)(A) (2000).

was not a determinative issue.[93] The majority ruled that since U.S. Airways did not raise the issue as a cross-appeal in its opening or reply brief, the issue was waived.[94] Additionally, *Thompson* was distinguished because Barnett had restrictions beyond simply a twenty-five pound lifting restriction.[95]

Judge Trott wrote a separate dissent to indicate that the majority opinion leaves employers, employees and lawyers with no guidance and invites litigation.[96] Judge Trott viewed this as a question for Congress to resolve rather than the courts.[97] Judge Trott then reprinted Judge Wiggins' opinion from the Ninth Circuit's original decision in this case, which was subsequently replaced after the en banc hearing.[98] In that opinion, the legislative history of the ADA was considered ambiguous on the subject. This ambiguity existed because Judge Wiggins viewed the situation involved in this case as employee bumping.[99] The majority viewed this case differently from bumping because there were no other options under the seniority system for the disabled employee.[100] Then, based upon that ambiguity, Judge Wiggins relied on cases from other circuits that held that reasonable accommodation does not require exempting a disabled employee from a collectively bargained seniority system.[101] Judge Wiggins expressed the view that the ADA, in no way, requires disabled employees be given preference over non-disabled employees.[102] This conforms to one line of reasoning used by courts to reach the conclusion that a per se bar should be applied.

D. Cases Addressing the Barnett Decision

Some courts had addressed the issue after the Ninth Circuit's ruling in *Barnett*, but before the Supreme Court's resolution of the issue. These courts declined to follow the Ninth Circuit's approach. In a case involving an employer created seniority policy, *EEOC v. Sara Lee Corp.*,[103] the Fourth Circuit declined to follow *Barnett*. In a later Ninth Circuit decision, *Willis v.*

93. *Barnett*, 228 F.3d at 1111 n.1.

94. *Id.*

95. *Id.* ("Barnett faced further restrictions regarding prolonged standing or sitting and excessive or repeated bending, twisting, turning, stopping, pulling and pushing.").

96. *Id.* at 1125 (Trott, J., dissenting) ("I am troubled by the regrettable position in which we leave employers, employees, and the lawyers who advise them in connection with these important and possibly costly decisions. To require them to deal with a seniority system as 'merely one factor' leaves them with no guidance, none at all.").

97. *Id.* For further discussion of this issue see *infra* notes 245-46 and accompanying text.

98. *Barnett*, 228 F.3d at 1125.

99. *Id.*

100. *Id.* at 1120.

101. *Id.* at 1125-26.

102. *Id.* at 1126.

103. 237 F.3d 349 (4th Cir. 2001).

Pacific Maritime Association,[104] *Barnett* was distinguished. After discussing these cases, this article will then discuss one case, *Emrick v. Libbey-Owens-Ford Co.*,[105] which has adopted a balancing approach like that of *Barnett*. This section will then conclude with a discussion of cases which have decided the issue in favor of a per se bar to modifying seniority policies, as most courts have.

In *Sara Lee*, the court was confronted with an employer created seniority system.[106] This case involved an epileptic employee, Vanessa Turpin, who was only able to work if allowed to remain on the day shift.[107] After a plant closing, as per the seniority system, the displaced employees were able to work at another plant and displace less senior employees.[108] An employee with twenty years of seniority more than Turpin requested the day shift at the plant at which Turpin worked and would have displaced Turpin to the second or third shift, which she was unable to work.[109] The company refused her request to bypass the seniority system, and suggested three options for reasonable accommodation. All three options were in conformance with the seniority system, but would not allow Turpin to effectively perform the essential functions of the job.[110]

104. 244 F.3d 675, 680-81 (9th Cir. 2001) (en banc). The original opinion in *Willis* was rendered before the en banc hearing of *Barnett*. *See* Willis v. Pac. Mar. Ass'n., 162 F.3d 561 (9th 1998). After the Ninth Circuit en banc hearing in *Barnett*, the Ninth Circuit affirmed, en banc, the *Willis* decision and superceded the first *Willis* decision. 244 F.3d 675. In that decision, the Ninth Circuit distinguished *Barnett* based on the fact that the seniority policy in *Willis* was contained within a collective bargaining agreement, as opposed to being unilaterally implemented by the employer. *Willis*, 244 F.3d at 680-81.

105. 875 F. Supp. 393 (E.D. Tex. 1995). The District Court for the Eastern District of Texas decision held that a seniority policy, whether within a collective bargaining agreement or not, is only one factor in determining the reasonableness of a proposed accommodation under the ADA. The district court found no prior case to have decided on the issue in this opinion handed down on February 8, 1995. *Id.* at 396.

106. *Sara Lee*, 237 F.3d at 351.

107. *Id.* Ms. Turpin, despite taking medication and seeing a neurologist, suffered occasional seizures. The worst of these seizures would occur nocturnally. The nocturnal seizures would cause shaking, kicking, salivating, and, at least once, bedwetting. After the nocturnal seizures, Ms. Turpin would often be left bruised, exhausted and unrested. Some of the daytime seizures had occurred while Ms. Turpin was working. She could feel the seizures coming on, and sit elsewhere until the seizure would end. After the seizure she was able to return to what she had been previously doing. *Id.* at 350-51.

108. *Id.* at 351. Ms. Turpin worked at Sara Lee's Florence, South Carolina plant. When the Hartsville, South Carolina plant closed, under Sara Lee's internal seniority policy, the displaced employees could use their seniority to replace less senior employees at other plants. One of the employees from the Hartsville plant requested Ms. Turpin's position, had twenty more years seniority than did Turpin, and so had a right to the position under the seniority policy. *Id.*

109. *Id.*

110. *Id.* Sara Lee "gave Turpin three options, all based upon the seniority policy: 1) move to the second or third shift; 2) go on layoff status with recall rights for twelve months (including the

The court started its analysis by citing the ADA's requirement that an employer is required to reasonably accommodate a disabled employee, unless it was shown to be an undue hardship.[111] The court also found that the reasonable accommodation requirement, beyond not imposing an undue hardship, had to be "reasonable."[112] The court recognized the weight of authority holding that an employer need not violate a non-discriminatory policy as a reasonable accommodation.[113] The court next announced that a seniority policy is the perfect example of a policy to which the employer is entitled to respect.[114] The court recognized the fact in this case, which most other cases did not have to consider, that Turpin was requesting to stay in her position, not to displace another worker who had greater seniority. However, without analysis, the court stated that "[t]his is a distinction without a difference."[115] The court made no attempt to consider what effect allowing Turpin to remain in her position would produce.[116] The court simply reasoned that requiring Sara Lee to bypass the seniority system would expose it to litigation from any employees who were not given the benefit they expected under the seniority system.[117] The court finished by stating a reasonable accommodation requiring variance to a seniority policy would make the ADA into a mandatory preference statute, rather than an anti-discrimination statute as it is meant to be.[118]

right to be recalled to a first shift position should one become available); or 3) take a severance package." *Id.*

111. *Sara Lee*, 237 F.3d at 353.

112. *Id.*

113. *Id.* at 353 ("Virtually all circuits that have considered the issue have held the ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy.").

114. *Id.* at 354 ("Although the ADA allows an employee to transfer to a vacant position, Turpin has no statutory right to supercede Sara Lee's seniority system.").

115. *Id.*

116. Presumably the employee with twenty years experience requesting the day shift is not the one who will be affected, but rather the person with the next lowest seniority to Turpin. This is because of the "trickle down" effect of seniority policies. The more senior employee, not being able to replace the disabled employee, will take the next best position, displacing a less senior employee. This less senior employee could then displace an employee with lower seniority, and down the line until the employee actually displaced has seniority similar to or worse than the disabled employee. This trickle down effect would lessen the individual burden since the displaced employee was actually one with slightly more seniority than the employee who is most effected. Also, there are other situations that would illustrate why the effect on other employees may not be so serious. For example, requiring an employee to take the second or third shift after transferring to a different plant would be less of a burden than if the employee had no job available at all.

117. *Sara Lee*, 237 F.3d at 355. For a discussion of why this argument is unpersuasive, see *infra* notes 227-33 and accompanying text.

118. *Id.* (citing Dalton v. Suburu-Isuzu Auto., Inc., 141 F.3d 679, 679 (7th Cir. 1998) (A "contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a

The Ninth Circuit distinguished *Willis v. Pacific Maritime Association* from *Barnett* because it involved a seniority policy created by a collective bargaining agreement instead of an employer-established seniority system.[119] The court in *Willis* stated that before the undue hardship analysis, it must first determine whether violating a collective bargaining agreement's seniority system is an undue hardship per se or just a factor in the balancing analysis under the undue hardship standard.[120] *Willis* cited eight circuits which have followed the per se bar,[121] and noted that only one district court and several commentators suggested using the balancing approach.[122] The court found that the collective bargaining agreement seniority system consisted of bargained-for, contractual rights of other employees. Thus, any request to bypass that system would be unreasonable, and it could not be evaluated through an undue hardship balancing test.[123] The court then addressed the legislative history of the ADA suggesting a balancing approach rather than a per se bar.[124] Despite this, the court rejected the balancing approach because Congress was fully aware of the "well-established precedent" which refused to require employers to violate a collective bargaining agreement's bona fide seniority policy under Rehabilitation Act cases at the time the ADA was enacted.[125] Moreover, Congress did not expressly rebut a per se bar within the language of the ADA.[126] The court then announced that sound public policy supports a per se

result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.")).

119. Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 680-81 (9th Cir. 2001) (en banc).

120. *Id.* at 680.

121. *Id.* (citing Davis v. Florida Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 81-83 (3d Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995)).

122. *Id.* (citing Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 396-97 (E.D. Tex. 1995); William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 ST. THOMAS L. REV. 359 (1997); Eric H.J. Stahlhut, *Playing the Trump Card: May An Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71 (1993); Robert A. Dubault, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L.J. 1271 (1995)).

123. *Id.* at 681.

124. *Willis*, 244 F.3d at 681 ("We acknowledge that some of the legislative history suggests a balancing approach.").

125. *Id.* at 681 ("However, we, like our sister circuits which have confronted the issue, must also recognize that Congress enacted the ADA fully aware of the 'well established precedent' under the Rehabilitation Act . . . and yet failed to include any provision to counter that precedent . . .").

126. *Id.*

bar,[127] because a balancing approach would place the employers in a situation where they had to guess whether a specific request was a reasonable accommodation.[128] This guess would then put the employer in danger of violating the ADA, on the one hand, and the NLRA, on the other hand, for any employees who were bumped.[129] In certain instances, the terms of the collectively bargained seniority policy are flexible enough to permit an accommodation of a less senior employee. The court in *Willis* did not rule on the question of whether such an accommodation could be required under the ADA.[130] The court also defined "bona fide seniority system" as one created for legitimate purposes, and not for discriminatory purposes, and would allow a plaintiff to argue that the seniority system was not bona fide.[131]

E. Support for a Balancing Approach

Similar to *Barnett*, the court in *Emrick v. Libbey-Owens-Ford* favored a rule in support of allowing such variation to a seniority policy depending on the results of a balancing test.[132] In *Emrick*, the court first looked to decisions under the Rehabilitation Act, which are persuasive authority under the ADA.[133] Under the Rehabilitation Act, the generally accepted notion was that reassignment in violation of a collective bargaining agreement or seniority policy was per se unreasonable.[134] The Supreme Court concluded that the routine operation of a bona fide seniority system does not infringe upon an

127. *Id.*

128. *Id*.

129. *Willis*, 244 F.3d at 681-82 ("We are persuaded that it would be improper to subject an employer to the Hobson's choice of violating the ADA or the NLRA, or at least subjecting itself to the threat of litigation under these statutes, depending on the outcome of a 'balancing' approach."). For a discussion of why this argument is unpersuasive, see *infra* notes 227-33 and accompanying text.

130. *Id.*

131. *Id*. at 682 ("Our decision does not preclude an employee from arguing that a proposed accommodation is reasonable despite a conflict with a [collective bargaining agreement] provision that does not contain a bona fide seniority system.").

132. Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 396-97 (E.D. Tex. 1995).

133. *Id.* at 395. Congress apparently borrowed the term "reasonable accommodation" from the EEOC regulations issued in implementing the Rehabilitation Act of 1973, and, for this reason, cases decided under the Rehabilitation Act are considered to be guidance on this issue. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996).

134. *Emrick*, 875 F. Supp. at 395 (citing Carter v. Tisch, 822 F.2d 465, 467-68 (4th Cir. 1987); Jasany v. United States Postal Serv., 755 F.2d 1244, 1251 (6th Cir. 1985); Daubert v. United States Postal Serv., 733 F.2d 1367, 1368-72 (10th Cir. 1984); Florence v. Frank, 774 F. Supp. 1054, 1062 (N.D. Tex. 1991)); *see also* Rose Daly-Rooney, Note, *Reconciling Conflicts Between the Americans With Disabilities Act and The National Labor Relations Act To Accommodate People With Disabilities*, 6 DEPAUL BUS. L.J. 387, 394-95 (1994).

employee's rights under the Rehabilitation Act.[135] The court ruled that disrupting an employee's expectations under a seniority policy would "greatly disrupt a settled and worked-for reliance on valid interests and expectations . . . ."[136] Therefore, seniority rights should be given special weight to create a balance between the interests of the disabled employees in not being discriminated against and the non-disabled employees rights under the collective bargaining agreement.[137]

The *Emrick* court then sought guidance from the legislative history of the ADA. The court concluded that an employer cannot use a collective bargaining agreement to do what is otherwise forbidden under the Act.[138] Additionally, the court in *Emrick* pointed out that the list of reasonable accommodations in the ADA specifically includes reassignment. *Emrick* also cited two commentators who have agreed that seniority should be a factor in the analysis of undue hardship and that a per se rule is inappropriate.[139] Recognition was made that the ADA does not require the employer bump another employee in order to create a vacancy.[140] The court concluded this discussion by stating that the ADA requires assurance of equality for disabled employees, and not preference over other employees.[141]

In addition to *Emrick* and *Barnett*, two other courts have indicated support for the balancing approach without actually making a determination of the issue. In *Aka v. Washington Hospital Center*, the court stated in dicta that collective bargaining agreements should be read consistent with federal law and that the court was "skeptical" of whether a collective bargaining agreement could waive individual rights granted by the ADA.[142] Citing *Barnett*, the court in *Jensen v. Wells Fargo Bank* proposed that a disabled employee is to receive preferential treatment over non-disabled employees in reassignment

135. *Emrick*, 875 F. Supp. at 396 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 78-80 (1977); Lorance v. AT&T Techs., Inc., 490 U.S. 900, 900-13 (1989)).

136. Emrick, 875 F. Supp. at 396.

137. *Id.* ("[T]o alter entitlements under a valid seniority system can greatly disrupt a settled and worked-for reliance on valid interests and expectations of many innocent workers.") (citing *Lorance*, 490 U.S. at 904-09)).

138. *Id.*

139. *Id.* (citing Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans With Disabilities Act*, 1991 DET. C. L. REV. 925 (1991); Daly-Rooney, *supra* note 134). *See* 42 U.S.C. § 12111(9) (2000).

140. *Emrick*, 875 F. Supp. at 397.

141. *Id.* at 398.

142. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1303 n.25 (D.C. Cir. 1998) (stating the employer "would thus effectively be claiming that the [collective bargaining agreement] waives [the disabled employee's] ADA rights. Although we need not decide now whether such waivers are permissible, we are skeptical.").

decisions.[143] Both of these decisions, however, do not necessarily show a preference for a balancing approach, but rather a general disagreement with a per se bar. Additionally, the decisions simply make a statement without any analysis beyond recognition of prior persuasive precedent. As a result, these decisions do not possess a great deal of persuasive force, but they do indicate that some courts are willing to support an approach other than a per se bar to reassignment in violation of a collective bargaining agreement. However, irrespective of the cases discussed in this section, a great majority of courts favor a per se bar to reassignment in violation of a seniority policy.

F. Courts Adopting a Per Se Bar[144]

In addressing whether employers are required to allow a variance in a collective bargaining agreement seniority policy, most circuits have adopted a per se bar.[145] The reasoning throughout these circuits is generally very similar, and these courts have been increasingly ready to adopt the easy-to-apply per se bar in alignment with prior persuasive predecent, and not a balancing approach.

In *Eckles v. Consolidated Rail Corp.*, the Seventh Circuit addressed the issue of which test to apply.[146] The court in *Eckles* discussed the undue

143. Jensen v. Wells Fargo Bank, 102 Cal. Rptr. 2d. 55, 69 (Cal. Ct. App. 2000) ("[W]hen reassignment of an existing employee is the issue, the disabled employee is entitled to preferential consideration.").

144. The per se bar is generally subject to certain exceptions. The main exception is for seniority provisions drafted with the intent to discriminate against disabled employees. *See, e.g.*, Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 682 (9th Cir. 2001) (en banc). Courts will term the per se bar applying to "bona fide" or "legitimate" seniority policies. *See, e.g.*, Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996) ("[T]he collective bargaining agreement at issue did not subject [disabled employees] to prohibited discrimination by establishing a bona fide seniority system that regulates the holding of positions at Conrail."); EEOC v. Sara Lee Corp., 237 F.3d 349, 353-54 (4th Cir. 2001) ("[R]easonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy."). "A 'bona fide' seniority system is one that was created for legitimate purposes, rather than for the purpose of discrimination." *Eckles*, 94 F.3d at 1046 n.7. Another exception often stated involves situations where the policy is not "well-established," meaning the policy has not been followed strictly in the past so that employees do not have legitimate expectations created from the policy. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999).

145. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 n.9 (9th Cir. 2000) (en banc) (citing Davis v. Florida Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); *Willis*, 162 F.3d at 561; Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997); *Eckles*, 94 F.3d at 1051; Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995)).

146. *Eckles*, 94 F.3d at 1045-46. This case actually involved a situation in which the collective bargaining agreement allowed a more senior employee to be bumped by written agreement by the union and the employer. Eckles was allowed to bump a more senior employee because the union and employer made an agreement. *Id.* at 1044. Later the union rescinded its

hardship analysis, and pointed out that seniority systems pose a conflict between the disabled employee and his or her co-workers rather than the employer.[147] Furthermore, the court found that an employer cannot use a contractual obligation to avoid an obligation imposed by the ADA.[148] However, in *Eckles*, this same challenge was dismissed because the plaintiff offered no evidence that the employer enacted the seniority system to bypass its obligations under the ADA.[149] The court also relied on the definition of reasonable accommodation for guidance. The tribunal found it significant that reassignment to a vacant position was included.[150] By including the word "vacant," it can be inferred that Congress did not intend other employees to be pushed from their positions to accommodate a disabled employee.[151]

The *Eckles* court, however, found the express language of the ADA somewhat ambiguous.[152] For this reason, the court reviewed the history of the term "reasonable accommodation" as applied under the ADA. It found that Congress borrowed the term from the regulations issued by the EEOC during its implementation of the Rehabilitation Act of 1973.[153] Because of the presence of these regulations, cases decided under the Rehabilitation Act were considered to be guidance on the issue.[154] Those cases rejected the notion that employers should violate a seniority system as a reasonable accommodation under the Rehabilitation Act and a virtual per se rule developed.[155] Because of this "well-established precedent," Congress drafted the ADA with knowledge that the Rehabilitation Act had a per se bar to reassignment in violation of a

agreement with the employer and a more senior employee was allowed to bump Eckles. *Id.* This resulted in Eckles having to take involuntary sick leave until he was able to find a job that he could perform and had seniority for. *Id.* Eckles then had a seizure and had to take involuntary sick leave; upon returning, the employer forced him to find a new position. *Id.* Eckles was able to successfully bid for a new job, but was still not protected from a more senior employee bumping him. *Id.*

147. *Id.* at 1045-46.

148. *Id.* at 1046.

149. *Id.* ("Eckles does not claim that the seniority system was established, even in part, in order to bypass the duty to accommodate under the ADA; and there is no evidence of such subterfuge.").

150. *Id.* at 1047.

151. *Eckles*, 94 F.3d at 1047.

152. *Id*.

153. *Id*.

154. *Id*.

155. *Id.* The per se bar to violating a seniority system was subject to a requirement that the system be bona fide or non-discriminatory in civil rights cases under Title VII and the Rehabilitation Act. Most courts currently maintain this requirement. Some have stated this requirement by prohibiting negotiation of seniority provisions with "actual intent to discriminate . . . on the part of those who negotiated or maintained the [seniority] system." Lorance v. AT&T Techs., Inc., 490 U.S. 900, 905 (1989) (quoting Pullman-Standard v. Swint, 456 U.S. 273, 289 (1982).

seniority system.[156] The court also noted that Title VII did not require violation of otherwise valid agreements such as the collectively bargained seniority rights of other employees.[157] The court then reviewed the legislative history and also found it somewhat ambiguous, but, in general, more supportive of not requiring deviation from a seniority policy to provide a disabled employee a reasonable accommodation.[158] The court recognized the decision in *Emrick*, but refused to accept its reasoning and conclusion that a balancing test should be applied.[159] The court concluded that "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."[160] The court pointed to other decisions coming to this conclusion as well.[161]

The Tenth Circuit reached the same result in *Smith v. Midland Brake, Inc.*, but the court tackled this issue in the context of a collective bargaining agreement in a slightly different way.[162] The *Smith* court based its decision on the phrase "reassignment to a vacant position."[163] It found that this express language of the ADA did not allow bumping another employee in order to reassign a disabled employee. The court reasoned that a position is not really vacant, even if not currently occupied, if another employee has a right to it under the seniority system.[164] Since greater seniority meant that an employee has a right to the position, a disabled employee could not require the employer to violate the seniority system as a reasonable accommodation.[165] While *Smith* did not adopt a per se bar to such reasonable accommodation, it came very close. The *Smith* court stated that a seniority policy could be violated, but only if it was not so well entrenched or so well established that it gave legitimate expectations of a job to a more senior employee.[166] This approach, while better than a per se bar, was limited only to circumstances in which an

156. *Eckles*, 94 F.3d at 1048.

157. *Id.* (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977)).

158. *Id.* at 1049.

159. *Id.* at 1050 n.15 (indicating also that *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), a subsequent decision in the same district, had already questioned the continued application of *Emrick*).

160. *Id.* at 1051.

161. *Eckles*, 94 F.3d at 1051 (listing Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995)).

162. 180 F.3d 1154, 1174-76 (10th Cir. 1999).

163. *Id.* at 1174-75. The term "reassignment to a vacant position" is one of the examples of possible reasonable accommodations set out in the definition of "reasonable accommodation" in the ADA. *See infra* text accompanying note 181; 42 U.S.C. § 12111(9)(B) (2000).

164. *Smith*, 180 F.3d at 1175.

165. *Id.* at 1175-76.

166. *Id.* at 1176.

employer has a history of granting variations in the seniority policy. Where a union-negotiated seniority policy is in place, this will almost assuredly never occur. Therefore, this possible exception will apply only to employer-created seniority systems, and only if the employer regularly grants variations in the policy. The significance of this decision is not this limited exception, but the reasoning used to reach the court's conclusion.

Two general lines of reasoning have developed for not requiring employers to violate a collectively bargained for seniority provision. The first is the view that no position is vacant if there is a more senior employee who desires the position. Therefore, according to the express language of the ADA, an employer is not required to give a disabled employee a position over a more senior employee. The second rationale comes to the same conclusion, but through a review of prior precedent, the express language of the ADA, the legislative history of the ADA, the rights of other employees and public policy. While this is the more universally accepted reasoning for protecting seniority policies, seniority policies are better balanced with other factors in determining whether the requested employment action is a reasonable accommodation or an undue hardship.

III. ANALYSIS AND CRITIQUE OF THE ISSUES

A. Prior Persuasive Precedent

The most prevalent argument against reassigning a disabled employee in violation of a seniority policy is precedent. Many courts have simply adopted the rule as it applies to collective bargaining agreements without analysis of the underlying issues.[167] On the other hand, some courts have adopted the per se bar based on precedent, but then discussed some particular aspect of the underlying issues. For example, in *Davis v. Florida Power & Light Co.*, the court cited a long line of precedent and then discussed in a footnote the adoption by the EEOC of a balancing approach.[168] The court rejected the EEOC approach because it viewed the guidance as inconsistent with the ADA and with other courts' previous reasoning on the issue.

In *EEOC v. Sara Lee Corp.*, the court concluded that the provisions of a collective bargaining agreement should not be violated and went on to state that "[a] seniority system provides a prime example of a policy that a company

167. *See* Cameron v. Navistar Int'l Transp. Corp., 39 F. Supp. 2d 1040, 1048 n.8 (N.D. Ill. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912-13 (7th Cir. 1996); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997); Kralik v. Durbin, 130 F.3d 76, 82-83 (3d Cir. 1997); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995).

168. 205 F.3d 1301, 1306-07 (11th Cir. 2000).

is entitled to respect."[169] The court discussed the effect of a violation on other employees and held that the unwanted related effect was the key to why a company cannot be required to violate the terms of a seniority policy.[170] The court emphasized that other civil rights laws imposed costs on employers only and not on co-employees of the protected employee.[171] A "contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees."[172]

Although most courts had stated their holdings in terms of a seniority provision of a collective bargaining agreement without discussing the impact, if any, of an employer-created seniority provision outside a collective bargaining agreement, the *Sara Lee* court specifically stated that the source of the provision made no difference.[173] Since the Supreme Court has issued its ruling in *Barnett*, there is controlling precedent that both sources should be treated similarly.

B. Plain Language of the ADA

In its statement of findings for the ADA, Congress stated that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" and that, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[174] In order to carry out enforcement of the ADA to ensure that these findings are addressed, a flexible, workable standard for the many different situations that arise under the ADA must be applied.[175]

169. 237 F.3d 349, 354 (4th Cir. 2001).

170. *Id.* at 354-55.

171. *Id.* ("All antidiscrimination statutes, from Title VII to the ADA, impose costs on employers. . . . The difference in this case is that requiring an employer to break a legitimate and non-discriminatory policy tramples on the rights of other employees as well.").

172. *Id.* at 355 (quoting Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998)).

173. *Id.* ("No reason exists for creating a different rule for legitimate and non-discriminatory policies that are not a part of a collective bargaining agreement. All workers—not just those covered by collective bargaining agreements—rely upon established company policies.").

174. 42 U.S.C. § 12101(a)(8)-(9) (2000).

175. 29 C.F.R. § 1630 app. (2001) (EEOC Interpretive Guidance) ("[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.").

Title I of the ADA addresses discrimination in the employment sector.[176] The general nondiscrimination rule of the ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual 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."[177] A covered entity is defined as "an employer, employment agency, labor organization, or joint labor-management committee."[178] Accordingly, both employers and labor unions are prohibited from discriminating under Title I of the ADA. Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[179] A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[180] Restated, a covered entity is not required to provide reasonable accommodation to a disabled employee if such reasonable accommodation would impose an undue hardship.

Reasonable accommodation includes "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[181] Two of these reasonable accommodations are pertinent to the present analysis, "reassignment to a vacant position" and "appropriate adjustment or modifications of . . . policies."

Reassignment to a vacant position indicates, and the legislative history confirms, that employers are not required to "bump" other employees.[182] As discussed previously, what the term "vacant" means has been a key factor in some cases calling for a per se bar to variation of a seniority policy.[183] In *Eckles*, the seniority policy allowed for more senior employees, if qualified, to bid on and receive a job even if a less senior employee already held that job.[184]

176. 42 U.S.C. §§ 12101-17 (2000).
177. *Id.* § 12112(a).
178. *Id.* § 12111(2).
179. *Id.* § 12112(b)(5)(A).
180. *Id.* § 12111(8).
181. 42 U.S.C. § 12111(9).
182. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174-75 (10th Cir. 1999).
183. *See, e.g.*, Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996).
184. *Id.*

The less senior employee would then have to bid for another job in which the employee was qualified and had greater seniority than the person that currently held the job.[185] In this context, the court ruled that no position is vacant if there is a more senior, qualified employee because of the ability to bid for and receive any job held by a less senior employee.[186] This is one of the ambiguities in the ADA. Other courts have held that "vacant" would include any job not currently filled by an employee.[187]

Appropriate adjustment or modification of policies as a reasonable accommodation is another somewhat ambiguous term in the ADA, which is a result of the ADA's breadth. This concept has not been applied in decisions regarding whether an employer must violate a seniority system to reassign an employee as a reasonable accommodation. Presumably, this is because "reassignment to a vacant position" has been viewed as more on point with regard to this issue, since reassignment is the action to be taken. Comparing these two possible accommodations, the key term is "vacant." Under the express language of the ADA, both modifications of existing policies and reassignment to a vacant position can be reasonable.[188] Therefore, it follows that modification of a seniority policy to allow reassignment can be reasonable if the position is vacant, and if it does not cause undue hardship. In light of this somewhat ambiguous language, it is necessary to consider whether the legislative history of this Act supports a reading that allows reassignment in violation of a seniority policy.

C. Legislative History

Both the House and the Senate Reports contain language to the effect that seniority policies are but one factor in determining whether an accommodation of a disabled employee would be a reasonable accommodation.[189] Despite this language, courts have ruled seniority policies to be a per se bar to this sort of accommodation.[190] Courts have focused on "well established precedent" that the Rehabilitation Act does not require violation of a "bona fide seniority

185. *Id.*

186. *Id.* ("We also acknowledge that under a seniority system like that in place . . . [here], few positions are ever truly 'vacant,' in the sense of being unfilled.").

187. *See supra* text accompanying note 164.

188. 42 U.S.C. § 12111(9)(B) (2000). Both terms are included within a list of possible reasonable accommodations contained in the definition of "reasonable accommodation." *Id.*

189. H.R. REP. NO. 101-485, pt. 2, at 63 (1990); S. REP. NO. 101-116, at 32 (1989). The House Report stated:

> [I]f a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.

H.R. REP. NO. 101-485, pt. 2, at 63.

190. *See, e.g.*, Willis v. Pac. Mar. Ass'n, 244 F.3d 675 (9th Cir. 2001).

system" and reasoned that had Congress intended to change this rule, it would have been explicitly stated in the language of the ADA.[191] As discussed above, however, the ADA does include language providing that reasonable accommodation may include "modifying . . . policies."[192]

Requiring employers and unions to grant variations in seniority policies is consistent with the approach envisioned by the drafters of the ADA. The drafters were concerned with the wide spread unemployment of disabled Americans resulting in the poverty of these individuals.[193] Reviewing a Lou Harris poll, the Senate Committee on Labor and Human Resources recognized that two-thirds of working-age Americans with disabilities were not working despite sixty-six percent of these individuals preferring to work.[194] In "absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job."[195] This was costing taxpayers billions of dollars annually in support payments and lost income tax revenue and kept disabled Americans from becoming self-reliant, leaving them in unjust, unwanted dependency.[196] These concerns would be better addressed through a flexible, case-by-case assessment of whether a violation of another employee's seniority rights would be a reasonable accommodation or whether it would present an undue hardship for the employer or the labor union.

This flexible approach is adopted in the legislative history of the ADA. The Senate Committee on Labor and Human Resources stated that "the decision as to what reasonable accommodation is appropriate is one of which must be determined based on the particular facts of the individual case."[197] A "fact-specific case-by-case approach to providing reasonable accommodation is generally consistent with the interpretations of [reasonable accommodation]

191. *See, e.g.*, *id.* at 681. The *Willis* court stated:

> However, we, like our sister circuits which have confronted the issue, must also recognize that Congress enacted the ADA fully aware of the "well established precedent" under the Rehabilitation Act which refused to require employers to violate a [collective bargaining agreement's] bona fide seniority system, and yet failed to include any provision to the counter that precedent in the plain language of the ADA.

Id. (citation omitted).

192. 42 U.S.C. § 12111(9)(B) (2000).

193. S. REP. NO. 101-116, at 9 (1989) (submitted by the Committee on Labor and Human Resources) ("Individuals with disabilities experience staggering levels of unemployment and poverty.").

194. *Id.*

195. *Id.*

196. *Id.* at 17 ("President Bush has stated: 'On the cost side, the national Counsel on the Handicapped states that current spending on disability benefits and programs exceeds $60 billion annually.'"); H.R. REP. NO. 101-485, pt. 2, at 43 (1990) (submitted by the House Committee on Education and Labor) (finding "that discrimination results in dependency on social welfare programs that cost taxpayers unnecessary billions of dollars each year").

197. S. REP. NO. 101-116, at 31 (1989).

under sections 501, 503, and 504 of the Rehabilitation Act of 1973."[198] This flexible approach was also endorsed by the House Committee on the Judiciary,[199] and is a well-recognized guide to making determinations of whether a particular accommodation poses an undue hardship.[200] This approach is consistent with the concepts of reasonable accommodation and undue hardship as espoused throughout the ADA's legislative history.

Reasonable accommodation "incorporates a range of actions that may be necessary to allow a person with a disability to perform the essential functions of a job,"[201] and is a key requirement of the ADA.[202] The House Committee on Education and Labor envisioned a process that starts with identification of possible accommodations through discussion with the disabled employee and any other information source.[203] After possible accommodations are identified, then the accommodation should be "assess[ed] . . . [for] effectiveness and equal opportunity."[204] The accommodation must be effective for the employee and be considered for reliability and how timely it may be implemented.[205] The Committee went on to indicate its support for the proposition "that a reasonable accommodation should provide a meaningful equal employment opportunity," meaning that it would give disabled employees an opportunity to reach a level of performance comparable to that of a non-disabled employee.[206] If two or more effective reasonable accommodations are available, the

198. *Id.*

199. H.R. REP. No. 101-485, pt. 3, at 41 (1990). The Committee felt that a listing of factors to be considered in reasonable accommodation determinations as to undue hardship was more appropriate than a proposal which would have set an arbitrary ceiling on cost of accommodation compared to salary of the employee. *Id.* The rejected proposal called for a fixed limit of over ten percent of the disabled employee's salary as per se undue hardship. *Id.*

200. *See* 1 CORPORATE COUNSEL'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT, 104.030 (William A. Hancock ed., 1999) [hereinafter CORPORATE COUNSEL'S GUIDE]. *See also* 2 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES § 22:20 (1992); AMERICANS WITH DISABILITIES ACT: LAW, REGULATIONS AND INTERPRETIVE GUIDANCE § 3.9 (Robert A. Maroldo ed., 1992).

201. H.R. REP. NO. 101-485, pt. 3, at 34 (1990).

202. *See* H.R. REP. NO. 101-485, pt. 2, at 33 (1990); H.R. REP. NO. 101-485, pt. 3, at 39 (1990) ("This reasonable accommodation requirement is central to the non-discrimination mandate of the ADA."); 135 CONG. REC. S4993 (daily ed. May 9, 1989) (remarks of Senator Kennedy stating "[t]he removal of physical barriers and access to reasonable accommodations are among the most essential elements of this measure").

203. H.R. REP. NO. 101-485, pt. 2, at 66 (1990) ("[T]he search for possible accommodations must begin with consulting the individual with a disability. Other resources to consult include the appropriate State Vocational Rehabilitation Services agency, the Job Accommodations Network operated by the President's Committee on Employment of People With Disabilities, or other employers.").

204. *Id.*

205. *Id.*

206. *Id.*

employer is permitted to choose the least costly or more easily implemented one as long as the accommodation does, indeed, provide a meaningful equal employment opportunity to the disabled employee.[207] Still remaining is the requirement that the accommodation not impose an undue hardship.

Throughout the drafting of the ADA, undue hardship was defined in flexible terms, with no specific conditions. The concept of undue hardship has been stated as "an action requiring significant difficulty or expense i.e., an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program."[208] The term "undue hardship" was included for two reasons.[209] First, it was intended to distinguish it from the definition of "readily achievable" under Title III regarding the requirement of alteration of public buildings to allow access to disabled people.[210] Second, the undue hardship burden "creates a more substantial obligation on the employer."[211] The term undue hardship requires a significant obligation on the employer's part, rather than simply an insignificant or de minimis obligation.[212]

Some courts have placed too much reliance on the precedent under the Rehabilitation Act that concluded seniority systems were not to be violated. However, the ADA's legislative history specifically includes modifying policies and contains language indicating a seniority system is but one factor in an undue hardship determination.[213] In order to encourage employment among a minority of Americans who faced serious unemployment and dependency, Congress enacted the ADA, which requires reasonable accommodation to the known limitations of disabled employees.[214] Congress intended the process of finding a reasonable accommodation to be flexible in order to meet the requirements of the employee, while not imposing an undue hardship on the employer. Congress recognized that every employer is different, and, therefore, envisioned a case-by-case approach to determining whether an accommodation poses such an undue hardship.

207. H.R. REP. NO. 101-485, pt. 3, at 40 (1990).

208. S. REP. NO. 101-116, at 35 (1989).

209. H.R. REP. NO. 101-485, pt. 3, at 40 (1990).

210. *Id.*

211. *Id.*

212. *Id.*

213. H.R. REP. NO. 101-485, pt. 2, at 63 (1990); S. REP. NO. 101-116, at 32 (1989). The House Report stated:

> [I]f a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.

H.R. REP. NO. 101-485, pt. 2, at 63.

214. 42 U.S.C. § 12112(b) (2000).

In fact, Congress considered the risk to employers of not having clearly defined standards on which to base their decisions and responded by creating a progressive system under the ADA to identify reasonable accommodations. The employer must first determine whether an accommodation exists that would enable an employee to perform the essential functions of that employee's *current* position.[215] Therefore, if an accommodation may be found in an employee's current position, the risk that other employees' seniority rights will be infringed is reduced.[216] If an accommodation may not be found in the employee's current position, then the employer must look to other possible accommodations, one of which could require variation of the seniority policy.[217] However, if more than one effective reasonable accommodation can be identified, the employer may choose between the two.[218] This allows an employer to avoid variation of the seniority policy if another effective accommodation exists. An employer is also not required to implement an accommodation that imposes an undue hardship on the employer; thus, if varying the seniority system would result in undue hardship, the employer may avoid such a variation.[219] Despite possible uncertainty in results, which could lead to increased litigation costs, an employer has other protections for this problem, as will be later discussed. Reading the ADA in such a way to allow variation of a seniority policy not only promotes the basic purpose of the legislation, but it also affords protections for employers such that a variance of a seniority policy likely not impose an undue burden upon them.

D. Other Employees' Rights

Some courts have suggested that seniority systems may be so "well entrenched," whether contained within a collective bargaining agreement or not, that other, more senior employees have a legitimate expectation to a job.[220] Where this is so, requiring an employer to disrupt and violate these legitimate expectations would "constitute a fundamental and unreasonable alteration in the nature of the employer's business."[221] As the legislative history also indicates, Congress desired to have other employees' expectations under a seniority provision to be a factor in the undue hardship analysis.[222]

215. AMERICANS WITH DISABILITIES ACT: LAW, REGULATIONS AND INTERPRETATIVE GUIDANCE, *supra* note 200, at § 3.10(5).

216. This risk is not completely eliminated due to many seniority clauses allowing employees with higher seniority to "bump" lower ranking employees.

217. AMERICANS WITH DISABILITIES ACT: LAW, REGULATIONS AND INTERPRETATIVE GUIDANCE, *supra* note 200, at § 3.10(5).

218. *Id.*

219. *Id.*

220. *See, e.g.*, Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999).

221. *Id.*

222. H.R. REP. NO. 101-485, pt. 2, at 63 (1990). This Report stated:

An employer may prove hardship based on the effects on coworkers of a variation in a seniority policy, but it is uncertain what types of impact on coworkers would be considered as undue hardship.[223] One court suggested that "[w]hat would be lost to the other employees, particularly more senior employees, would be some of the value of their seniority within the company, not their employment."[224] Under an undue hardship analysis, as the discriminatory effect on other employees increases, the more likely it is that a court will find the accommodation imposes an undue hardship and is, therefore, not required. Thus, balancing the need for an accommodation against the undue hardship it could impose will protect the other employees' legitimate rights, while protecting the rights of disabled employees under the ADA at the same time.[225]

Some courts and commentators have distinguished seniority provisions contained in collective bargaining agreements from those not contained within a collective bargaining agreement. The distinction is one of degree. Under a collective bargaining agreement, the seniority rights are part of an explicit employment contract, whereas, without a collective bargaining agreement, the seniority rights of employees give rise to expectations under an employer's policy. Under a balancing test of undue hardship, this would result in a greater likelihood that collectively bargained seniority rights would carry more weight than seniority policies imposed by the employer, but not contained within a collective bargaining agreement. In this way, both the rights of disabled employees and the rights of non-disabled employees may be considered and balanced in order to maximize the result for all involved. An even better resolution of this issue would be for the employer to condition application of the seniority system on any conflicting ADA requirements. This would then reduce the expectancy interests of the non-disabled employees.

E. Public Policy

Two main policy arguments must be considered. First, opponents of a balancing test argue that it is unfair to subject employers to litigation costs under either the NLRA or ADA based on the decision they make. This problem would occur where an employer makes a reasonable accommodation in violation of a seniority policy and the displaced employee brings a claim under the NLRA resulting from the employer's violation of the collective

> [I]f a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, that agreement would not be determinative on the issue.

Id.

223. *See* Opuku-Boateng v. California, 95 F.3d 1461, 1468 (9th Cir. 1996).

224. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996).

225. *See* Daly-Rooney, *supra* note 134, at 398.

bargaining agreement. However, if the employer refuses to make such reasonable accommodation in violation of the seniority policy, the disabled employee could bring a claim under the ADA. In this way, the employer could face litigation no matter which choice it makes. Second, proponents of the balancing test argue against the ability of employers to avoid the duties imposed by the ADA by either negotiating employment policies with the union or unilaterally imposing employment policies, if there is no union, that allow the employer to rule out a possible accommodation in violation of that policy as imposing an undue hardship. Both policy issues will be discussed below.

One governmental study, admitted into the record of the hearing before the Committee on Small Business in the House of Representatives, determined that among reasonable accommodations provided by federal contractors, the lowest costing accommodations included "changing hours, work procedures, and task assignments; transferring the workers to a new job; and orienting coworkers."[226] While this study is isolated and outdated, its underlying principle remains true: assuming it has been determined that a reasonable accommodation does not impose an undue hardship, any financial cost to an employer would be minimal.

The main cost argued by employers is litigation costs generated from both uncertainty in determining when a seniority system should be violated, and suits, possibly under the NLRA, brought by those employees who had their seniority rights violated.[227] In effect, this argument makes two claims: (1) that an employer could be found in violation of both the ADA and NLRA, and, thus, subject to claims brought under both acts and (2) that litigation of such claims under the ADA or NLRA will be costly.[228] This argument is unpersuasive for two reasons. First, the enforcement agencies of the ADA and the NLRA have established a "Memorandum of Understanding" to effectively deal with the situation where a conflict arises between the acts.[229] Second, even in the face of costly litigation, violation of seniority rights will only occur in limited circumstances. To require violation of a seniority system, the

226. *Americans With Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong. 19 app. IV (1990), *reprinted in* 5 DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336, at doc. 23 (Bernard D. Reams, Jr., et al. eds., 1992) (citing BERKLEY PLANNING ASSOCIATES, A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS (June 17, 1982)). The study surveyed two thousand federal contractors covered by the Rehabilitation Act of 1973, with 367 responding. *Id.* This study was sponsored by the Employment Standards Administration, Department of Labor. *Id.*

227. *See* Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 681-82 (9th Cir. 2001) (en banc).

228. The Equal Employment Opportunity Commission oversees enforcement of the ADA and the National Labor Relations Board oversees enforcement of the NLRA.

229. Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission (Nov. 16, 1993), *available at* http://www.eeoc.gov/docs/eeoc-nlrb-ada.html (last visited Oct. 2, 2002).

accommodation in the employee's current position would, first, have to be unavailable or impose undue hardship.[230] Second, there would have to be no other accommodations that are better or more convenient for the employer without imposing undue hardship.[231] Lastly, a violation of seniority rights would not be required if it posed an undue hardship. Factoring these considerations with the relatively low number of disabled employees any given employer employs would lead to very limited circumstances in which a variance to the seniority system would be required. The larger the employer is the greater the risk it has, but also the employer is more able to absorb the costs.[232] It makes sense to subject some employers to risk in a few limited circumstances to both further the ADA's underlying theme of keeping disabled Americans at work so they may lead more economically independent lives, and for the greater good of opening "once-closed doors into a bright new era of equality, independence and freedom."[233]

Beyond the cost issue, another issue arises. An employer could avoid obligations of reasonable accommodation required by the ADA in two situations. Outside of a collective bargaining context, an employer could unilaterally create employment policies that prohibit changes in employment procedures, such as seniority policies. Where a union represents the employees, the union could enter a collective bargaining agreement that prohibits changes in other employment procedures, the issue takes a slightly different form, and this variation will be discussed under subsection F, *infra*.

F. Collective Bargaining Agreements

Two general issues arise when the seniority clause is contained in a collective bargaining agreement. The first being involvement of a union and the NLRA. The other issue that arises is better classified as a public policy issue. If a per se bar were established to provisions such as seniority policies, an employer could conveniently use a collective bargaining agreement to reduce the company's obligations to provide reasonable accommodations under the ADA. In fact, not allowing otherwise reasonable accommodations to Americans with disabilities would not only be required by the agreement—it would be mandated by law.

One of the arguments relied upon by courts in applying a per se bar to accommodations requiring an employer to violate a seniority policy is that under a balancing approach, an employer may be required to choose whether to

230. AMERICANS WITH DISABILITIES ACT: LAW, REGULATIONS AND INTERPRETIVE GUIDANCE, *supra* note 200, at § 3.10(5).

231. *Id.*

232. *See, e.g.*, S. REP. NO. 101-116, at 10 (1989).

233. Remarks on Signing the Americans with Disabilities Act of 1990, BOOK II PUB. PAPERS 1068 (July 26, 1990).

violate the NLRA or the ADA.[234] This argument fails to recognize a union's obligations under the ADA. Unions are obliged in two ways. First, employers may not enter contractual relationships, including ones with labor unions, that subject their employees to discrimination.[235] Secondly, unions are specifically included in the ADA's definition of "covered entity,"[236] so unions must conform to the duties required under the ADA, including reasonable accommodation.[237]

Thus, an employer cannot do contractually what it could not do under the ADA.[238] This requirement applies whether or not the employer or union intended for the relationship to have a discriminatory effect.[239] Therefore, an employer or union may not, through contract, avoid a duty to make a reasonable accommodation.[240] However, under a balancing approach, employers and unions could still protect their interests while maintaining compliance with the ADA. Since the terms of a collective bargaining agreement, such as a seniority policy, are in the undue hardship analysis, if an employer could show that varying a seniority policy would be unduly disruptive to its employees or to the functioning of the business, the accommodation would not be required.[241]

The EEOC took the position that the union's duty of reasonable accommodation is to negotiate with the employer for a variance in the collective bargaining agreement.[242] However, this joint obligation of the union and the employer is not required if such variance would impose an undue hardship. This process is consistent with both the ADA and the NLRA. As the exclusive bargaining representative, a union may negotiate variations in the collective bargaining agreement with an employer without violating the

234. *See, e.g.*, Willis v. Pac. Mar. Ass'n, 236 F.3d 675, 681-82 (9th Cir. 2001) (en banc) ("We are persuaded that it would be improper to subject an employer to the Hobson's choice of violating the ADA or the NLRA, or at least subjecting itself to the threat of litigation under these statutes, depending on the outcome of a 'balancing' approach.").

235. 29 C.F.R. § 1630.6 (2001).

236. 42 U.S.C. § 12111(2) (2000).

237. 4 CORPORATE COUNSEL'S GUIDE, *supra* note 200, at 605.102 (reprinting a NLRB opinion letter regarding a union's right to obtain certain medical information for purposes of collective bargaining).

238. 29 C.F.R. § 1630.6 app. (2001). The appendix consists of interpretive guidance issued by the EEOC.

239. *Id.*

240. *See* H.R. REP. NO. 101-485, pt. 2, at 59-60 (1990).

241. 29 C.F.R. § 1630.6 app. ("[A]n employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement.").

242. 4 CORPORATE COUNSEL'S GUIDE, *supra* note 200, at 605.102. This requirement, of course, arises only where there is no other reasonable accommodation and the accommodation would not pose an undue hardship, or unduly burden other employees.

NLRA.[243] Thus, the requirements under both the ADA and the NLRA may be met. Most commentators reached the conclusion, before the courts took up this issue, that "[e]xcluding seniority systems would have made the goals of the ADA illusory."[244]

G. Appropriateness for Court Action Versus Legislative Action

As previously noted, most courts that have ruled on the issue of whether the ADA may require variation of a seniority policy as a reasonable accommodation have relied on prior persuasive precedent without any analysis of the issues.[245] The courts that have conducted a full analysis have either relied on the misguided notion that a position is not vacant if no current employee holds it, but a more senior employee is bidding for the job, or have misapprehended the plain language and legislative history of the ADA. Since the per se rule against variation of seniority policies has resulted from a judicial misapplication and misapprehension of the ADA, it is most appropriate for the court, rather than the legislature, to remedy it. This is true despite Judge Trott's assertion, in his dissent to the majority's decision in *Barnett*, that this is a policy question for the legislature to resolve.[246] However, now that the Supreme Court has issued its ruling, which comes very close to a per se bar, it will be up to the legislature to remedy this situation.

IV. CONCLUSION

Rather than applying a per se bar to reassignments that require variation of a seniority policy, courts should consider the hardship it creates upon the employee(s) affected as a factor in the undue hardship analysis. Some of the factors to consider in this analysis would include: (1) the actual effect on non-disabled employees resulting from the variation from the seniority policy; (2) the frequency of and reasons for prior deviations from the seniority policy; and

243. National Labor Relations Act, 29 U.S.C. § 158(d) (2000) (specifying a particular process that must be followed in order to seek a modification of a collective bargaining agreement).

244. *See* Daly-Rooney, *supra* note 134, at 401. *Cf.* Ervin, *supra* note 139, at 926-97 ("The duty of a covered entity under the ADA to make reasonable accommodation is different from the duty imposed by the Rehabilitation Act and should be capable of mitigation by the provisions of a collective bargaining agreements only under extraordinary circumstances."); Stahlhut, *supra* note 122, at 92 ("Equity concerns also dictate that collectively bargained rights should not automatically trump a disabled employee's request for accommodation."); DuBault, *supra* note 122, at 1292 ("To conclude that the ADA shuns per se determinations and requires a genuine ad hoc balancing of ADA and NLRA rights and obligations is only the beginning. The more difficult question is what factors must be considered when balancing those rights and obligations and why.").

245. *See supra* Part III.A.

246. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1125 (9th Cir. 2000) (en banc) (Trott, J., dissenting) ("What to do with seniority systems in this context is a policy question for Congress, one which we as judges have no authority or ability to resolve.").

(3) whether the seniority policy is contained in a collective bargaining agreement or is an employer-imposed seniority system.

The actual effect of a variation of a seniority policy upon non-disabled employees will vary greatly depending on the type of action required. Under the ADA, it is clear that bumping of employees is not required,[247] so if a senior employee holds a position and the disabled employee seeks that position, the accommodation will impose an undue hardship. However, if a disabled employee seeks reassignment to an otherwise vacant position that another more senior employee is bidding for, it is more likely that granting the less senior disabled employee the position will not impose an undue hardship. This would be especially true in circumstances in which a disabled employee is seeking reassignment to a vacant position of which no more senior employee is bidding for, even if the position requires a certain amount of seniority which the disabled employee has not yet attained. Since no rights of other employees would be affected, the employer would be required to show that the requisite seniority requirement is a business necessity. Accommodations should, therefore, be assessed for actual effect on employees, and this effect should then be considered as a factor in the undue hardship determination.

Courts should also consider the frequency of and reasons for prior deviations from the seniority policy as factors in the undue hardship analysis. If an employer has previously assented, either unilaterally or with the consent of the union, to a variation in the seniority policy, the other employees' expectations arising from the seniority policy would decrease. Thus, the greater number of variations in the past will decrease the hardship falling on other employees. Also, the lower importance or lower necessity of prior deviations would decrease the expectations of other employees and the hardship they may face. For example, if an employer had an open position which required a certain amount of seniority, and the employer granted an exception to the policy in order to fill the position from within the company, it would be more likely that allowing a similar exemption to the policy for a disabled employee would result in less of a hardship on the employer and other employees.

Whether the seniority policy is contained within a collective bargaining agreement or is unilaterally imposed by an employer will also bear on the decision. Where a collective bargaining agreement is involved, there may be a slightly greater expectation from the employees that the policy will be adhered to, thus, resulting in a greater burden of hardship on the employees. However, unions are also a "covered entity" within the meaning of the ADA, and they should have a burden to establish reasonable accommodations for disabled employees. Even in the absence of a collective bargaining agreement, employees have reasonable expectations of employer adherence to the

247. *See supra* note 13 and accompanying text.

seniority policy. Employers should also remember that they should not be allowed to do through contract what they could not otherwise do. Creating seniority policies would be an easy way for employers to avoid obligations under the ADA, and with the widespread use and importance of such policies, it would be much easier for the employer to mask any attempt to avoid the duty to reassign under the ADA. If employers are able to avoid obligations in this way, employment policies will be put in place with minimal justification, and the obligations imposed by the ADA to reasonably accommodate disabled employees will be negated by the employment policies adopted.

In addition, the progressive system implemented by Congress to determine whether a variance of a seniority policy is required helps protect the employer from an unreasonable amount of litigation over its decision. Because of this system, in many circumstances the employer will not even have to consider a reassignment that is contrary to a seniority policy because either another reasonable accommodation within the disabled employee's current position or another accommodation, consistent with the employment policies already in place, is available. Therefore, only if a reasonable accommodation within an employee's current position is not possible and other reasonable accommodations consistent with employment policies impose an undue hardship should variation of seniority policies be considered.

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