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THE DEVELOPMENT OF REASSIGNMENT TO A VACANT POSITION IN THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

In 1992, the employment provisions of the Americans With Disabilities Act ("ADA") came into effect. The main goal of the ADA is to help bring the members of the disabled population in the United States to join the workforce by eliminating discrimination in employment.¹ One of the requirements of the ADA is that employers must make "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."²

Notably though, the ADA only protects against discrimination³ for a "qualified individual with a disability,"⁴ which 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 an individual holds or desires."⁵

Before the creation of the ADA, there was some protection against employment discrimination under the Rehabilitation Act of 1973 ("Rehabilitation Act").⁶ Although it may be too early to assess the effectiveness of the ADA, Congress had passed it

because of the inadequate protection that was available until that time under the Rehabilitation Act.\textsuperscript{7}

One of the most significant differences between the Rehabilitation Act and the ADA, is that reassignment to a vacant position can be one of the reasonable accommodations which an employer may make to enable a disabled employee to perform the essential functions of a job.\textsuperscript{8}

This Note will look at the prior view of reassignment under the Rehabilitation Act, the current view of reassignment under the ADA, and finally, problems that are still left unresolved.

\hspace{1cm} \textbf{II. The Employee's Need For Reassignment}

The change toward reassignment from the Rehabilitation Act to the ADA seems to stem from an element of unfairness toward the disabled employee.\textsuperscript{9} Assume that Jack is a mechanic for an airline, and is diagnosed with an ailment that prevents him from exerting extensive, repetitive pressure on his wrists, causing him to no longer be able to fulfill all of his functions as a mechanic. Under the Rehabilitation Act, if there are any reasonable accommodations which the airline can take to allow Jack to remain in the position of a mechanic, but not have to exert extensive, repetitive pressure on his wrists, they must do so. But assuming that there is no reasonable accommodation, under the Rehabilitation Act, the airline does not have to transfer Jack to a similar or even a lower type of position, such as an assistant, even if such a position is open and Jack is qualified.

If Jack is a good worker, is it fair for him to be fired for his disability, especially when there are other jobs open which he is qualified to do and which will not adversely affect his disability? This type of unfairness has spurred the change toward reassignment that was included in the ADA.

\hspace{1cm} \textsuperscript{7} See Pub. L. No. 101-336, §2, 104 Stat. 328, 328-29 (1990).
\textsuperscript{9} The facts of the following hypothetical are based on those from Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995), where the court held that the employee made a prima facie case that he was able to perform the essential functions of a mechanic's position, so that the burden was shifted to the employer to prove that a reasonable accommodation was not possible.
III. REASSIGNMENT UNDER THE REHABILITATION ACT

The Rehabilitation Act of 1973\(^\text{10}\) was enacted, among other reasons, to help disabled individuals attain meaningful employment,\(^{11}\) have a chance for independent living,\(^{12}\) and to be integrated into society through programs, projects, and a guarantee of equal opportunity.\(^{13}\)

\section*{A. Statutory Language}

The key wording of the Rehabilitation Act which deals with reassignment reads as follows: "No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . ."\(^\text{14}\) An individual with a disability includes "any individual who has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment . . ."\(^{15}\)

When looking at section 504, which prohibits discrimination of disabled individuals, the plain language does not clearly state that reasonable accommodations need to be made to prevent discrimination against an otherwise qualified individual. To reach that meaning, one needs to go to the interpretive guidance of the Department of Health and Human Services ("DHHS").\(^\text{16}\)

\section*{B. Interpretive Guidance for the Rehabilitation Act}

The DHHS interprets the prohibition of discrimination in the Rehabilitation Act to mean that "[n]o qualified handicapped person shall, on the basis of the handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance."\(^\text{17}\) It then goes on to list sev-

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\(^{11}\) See id. § 701(b)(2).
\(^{12}\) See id.
\(^{13}\) See id. § 701(b)(1)(A), (E), (F).
\(^{16}\) See 45 C.F.R. § 84.1 (1997).
\(^{17}\) Id. § 84.4(a).
eral discriminatory actions which are prohibited.\textsuperscript{18} One only reaches the requirement of reasonable accommodation when looking at the definition of a "qualified handicapped person," which, in reference to employment settings, is defined as a handicapped person who can perform the essential functions of the job, with some reasonable accommodation.\textsuperscript{19}

In later sections that pertain specifically to employment practices, the DHHS reiterates that no qualified handicapped person shall be discriminated against on the basis of that handicap, or in any activity to which this part of the DHHS applies.\textsuperscript{20} It then lists more activities to which employment discrimination is prohibited.\textsuperscript{21}

Finally, the DHHS specifies the elusive doctrine of reasonable accommodation.\textsuperscript{22} It states that "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."\textsuperscript{23} The reasonable accommodations that the DHHS lists are, by virtue of the language used, not exhaustive.\textsuperscript{24} Rather, they simply include restructuring facilities to make them more accessible and user-friendly to handicapped people,\textsuperscript{25} and restructuring the job, the schedule, and the equipment, or providing readers or interpreters.\textsuperscript{26} In addition, the guidelines for interpreting whether an accommodation is an undue hardship are also listed.\textsuperscript{27}

The repetitiveness of the requirement of reasonable accommodation suggests its importance, but one must wonder why it was not included in the language of the statute. Nevertheless, although other similar accommodations were allowed,\textsuperscript{28} it seems as though the legislature did not count on employers and courts to be so lit-
eral. As the following cases will show, reassignment was permitted as a reasonable accommodation, but was never required.

C. Sample Cases of Reasonable Accommodation Under the Rehabilitation Act

In *Carter v. Tisch*, the plaintiff was a custodian in a post office who began to experience bouts of asthma, from which he suffered since childhood, but was able to keep under control. The plaintiff was assigned to temporary light duty, which included duties that reduced the aggravation of his asthma. Several months later, the plaintiff requested to be placed in a permanent light duty position, but his request was denied. The reasons for the denial were that there were no permanent light duty positions available in the plaintiff’s type of employment, and that a collective bargaining agreement only allowed employees who have served five years to become eligible for permanent light duty positions. The postal service later terminated the plaintiff’s employment, after determining that he could no longer perform the essential functions of his job as a custodian.

The plaintiff requested a hearing on the basis of handicap discrimination. The EEOC ultimately found no discrimination, so the plaintiff sued in federal district court. The district court agreed with the EEOC, and granted summary judgment against the plaintiff for the same reasons which the postal service initially fired him.

On appeal, the plaintiff argued “that the postal service was required to assign him to another position, that of a permanent light duty laborer-custodian, as a ‘reasonable accommodation’ of his handicap.” However, the court firmly restated the current law of the time: that an employee is not required to assign a handicapped

29. 822 F.2d 465 (4th Cir. 1987).
30. See id. at 466.
31. See id.
32. See id.
33. See id.
34. See id.
35. See 822 F.2d at 466.
36. See id.
37. See *Carter v. Tisch*, 822 F.2d 465, 466 (4th Cir. 1987).
38. See id. at 466-67.
39. Id. at 467.
employee to another job if he cannot do the job he is currently in.\textsuperscript{40} The court then added that the refusal to reassign the plaintiff was even stronger in this case because the employer was bound by a collective bargaining agreement, and the plaintiff did not meet its terms.\textsuperscript{41}

As further support for its argument, the court relied on dicta from a U.S. Supreme Court case\textsuperscript{42} to determine that an employer only has to reassign a disabled employee if the employer normally does so under existing policies.\textsuperscript{43} Therefore, since the post office would not have normally assigned this light duty position to the plaintiff because he served less than five years, there was no discrimination.\textsuperscript{44} The court also relied on other various cases that reasserted the lack of an obligation to reassign a disabled employee who cannot perform the essential functions of his current job, especially if it would adversely affect a collective bargaining agreement.\textsuperscript{45} Even if there were a duty to reassign, the plaintiff would have to show that the collective bargaining agreement "had the effect or intent of discrimination."\textsuperscript{46}

The Carter case dealt with a collective bargaining agreement that would have prevented the plaintiff from being reassigned to a vacant position.\textsuperscript{47} However, the following case confirmed that the law did not require reassignment under the Rehabilitation Act at all.

In Guillot v. Garrett,\textsuperscript{48} the plaintiff was a civilian computer specialist employed by the United States Navy as part of the Naval Intelligence Processing System Support Activity ("NIPSSA"),

\begin{enumerate}
\item See id.
\item See id.
\item See Carter, 822 F.2d at 467.
\item See id. at 466-67.
\item See id. at 467-68 (citing Jasany v. U.S. Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that an employer was not required to accommodate a handicapped employee by restructuring a job in a way which would usurp the legitimate rights of other employees under a collective bargaining agreement); Daubert v. U.S. Postal Serv., 733 F.2d 1367, 1370 (10th Cir. 1984) (holding that the Postal Service could rely on a collective bargaining agreement to discharge an employee); Carty v. Carlin, 623 F. Supp. 1181, 1189 (D. Md. 1985) (holding specifically that the Postal Service was not required to reassign a handicapped employee to another position)).
\item Carter, 822 F.2d at 469.
\item See text accompanying notes 42 to 46.
\item 970 F.2d 1320 (4th Cir. 1992).
\end{enumerate}
which was a division of the Naval Intelligence Command ("NAVINTCOM"). This division gathered, coordinated and interpreted naval defense intelligence information. The plaintiff was required to submit Statements of Personal History, as part of a Special Background Investigation Periodic Reinvestigations, to enable him to retain his clearance to access Sensitive Compartmented Information ("SCI").

During one of these periodic reviews, the plaintiff failed to disclose his then current addictions to alcohol and cocaine, in a Statement of Personal History and at two separate subsequent interviews. Approximately two months after his interviews, the plaintiff checked himself into a rehabilitation program, and three days later, NIPSSA revoked the plaintiff's SCI clearance. The plaintiff appealed the decision a number of times to higher authorities, but was always denied due to his failure to disclose his dependencies. During one of the plaintiff's appeals, NIPSSA "adopted a policy that all civilian Computer Specialists must have SCI clearance." After the several failed appeals, plaintiff's employment was terminated by the Navy for failing to have SCI clearance. That decision was upheld by the Merit Systems Protection Board and the EEOC, and the plaintiff brought suit in the United States District Court. The district court granted summary judgment for the Navy, holding that it had no jurisdiction to review the Navy's decision in this case, and that the Navy was not obligated to transfer the plaintiff to another position "because he was not 'qualified' for the position he held at the time of his termination..." In reviewing the case, the Court of Appeals affirmed the lower court's ruling that the individual security classification decisions were not subject to judicial review under section 501 of the Reha-

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49. See id. at 1321.
50. See id. at 1321-22.
51. See id.
52. See id.
53. See id.
54. See Guillot, 970 F.2d at 1321-22.
55. See id.
56. See id. at 1322.
57. See id.
58. See id.
59. See id. at 1323.
60. See Guillot, 970 F.2d at 1323.
61. Id.
The court then examined the plaintiff's claim that the Navy should have reassigned him to a different position. The plaintiff based his claim on a footnote from a U.S. Supreme Court case, which stated in dictum that:

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

The court felt that the footnote was ambiguous and could mean one of two things. It could mean, as this court believed, "that an employer is required by regulation to reasonably accommodate an employee's handicap so as to enable him to perform the functions of the position he currently holds." Alternatively, it could have meant that "an employer may not forbid an employee who is unqualified for the position he currently holds from availing himself of other 'employment opportunities' (i.e., transfer or reassignment) that are available under the employer's 'existing policies.'" In either case, the court stated, "an employer is not required as a matter of reasonable accommodation to transfer or reassign an employee who is not otherwise qualified for the position he then holds." Thus, since no form of reasonable accommodation would have allowed the plaintiff to perform the essential functions of his position because his clearance was denied, and the Navy was not required to reassign him to a non-sensitive position, the district court's grant of summary judgment was affirmed.

Under the ADA, both *Carter* and *Guillot* would probably have been decided differently. It would have made no difference that, as

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62. See id. at 1326.
63. See id. at 1326-27.
64. See id. at 1326.
65. School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n.19 (1987)(dictum) (referring to note 17; 45 C.F.R. § 84.12 and Appendix A, pp. 315-316 (1985)). In *Arline*, a schoolteacher afflicted with tuberculosis was held to be a handicapped individual under the Rehabilitation Act. See id. at 289.
66. See *Guillot*, 970 F.2d at 1326-27.
67. Id. at 1326.
68. Id. at 1327.
69. Id. (emphasis added).
70. See id. at 1327.
in *Carter*, the employer’s policy did not allow such transfers even if the plaintiff was not disabled. Both cases would have required the employer to reassign the disabled worker to a vacant position, rather than terminating the employee.

It is apparent from the changes made in the ADA, that Congress did not want employers to eliminate the use of reassignment solely because it was not explicitly required.

IV. REASSIGNMENT UNDER THE ADA

The change in standards of reasonable accommodation as between the Rehabilitation Act and the ADA was significant. The ADA clearly has more specific language included directly in the wording of the statute. To understand the change, one needs to look at the plain language of the statute regarding “reasonable accommodations,” “essential functions,” and “undue hardship,” as well as the policy behind including these provisions.

A. Reasonable Accommodation

1. Statutory Language

The definition of “reasonable accommodation” is the first of the three pieces of the puzzle needed to qualify under the ADA for reassignment to a vacant position. The ADA states that an employer must make “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

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73. The focus of this Note is on the reassignment to a vacant position as a reasonable accommodation, so the analysis of “essential functions” and “undue hardship” will be cursory.

The similarity to the wording of the DHHS is particularly noteworthy.

In general, an accommodation is a modification to the work environment or particular workplace practices which enable a person with a disability to do the job. The analysis of whether a reasonable accommodation can be made is non-specific and must be conducted on a case by case basis utilizing the human resource professional’s business judgment and available company and community resources, often including input from the individual with a disability.

It would seem that the plain language of the ADA is designed to require reasonable accommodations to allow disabled individuals to be considered as qualified individuals under the statute, since the accommodation will allow the disabled employee to perform the essential functions of the job. The ADA even lists several suggestions for reasonable accommodations:

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and,
- 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.

In addition, according to the legislative history, the reasoning behind implementing the reasonable accommodation requirements into the statute was to “provide a meaningful equal employment opportunity . . . [that is] an opportunity to attain the same level of performance as is available to non-disabled employees having similar skills and abilities.”

76. See 45 C.F.R. § 84.12(a) (1997).
78. See supra note 3, and accompanying text.
2. Interpretive Guidance for Reasonable Accommodations

As the administrative agency that is given the power to enforce the charges of employment bias in the ADA, the EEOC has established a set of guidelines to assist in the interpretation of the ADA. Relating to reassignment, the EEOC states: "An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation." The EEOC even takes a further step in saying that if there is a lower graded position for which the individual is qualified, then the employer should reassign the disabled employee to that position.

Although this is merely an interpretation by the EEOC, the Supreme Court instructed that although the EEOC guidelines are not controlling, they can be used for guidance as persuasive authority. Courts have relied upon this section of the EEOC to require employers to reassign disabled employees to other types of vacant positions, since those employees cannot remain in their current position.

Notably, courts have held that an employer does not have to provide a disabled employee with the best accommodation, or even the one which the employee prefers, because the employer need only make a reasonable accommodation. The employer is also not required to (1) lower qualifications of a job which are based on good faith business judgment; (2) require another employee to

82. See id. § 1630 & app.
83. Id. at app. § 1630.2(o).
84. See id.
87. See generally Schmidt v. Methodist Hosp., 89 F.3d 342, 344 (7th Cir. 1996) (holding that a hearing-impaired nurse was not a qualified individual with a disability under the ADA, and was properly discharged since he refused the reasonable accommodation offered by the hospital).
88. See generally Southeastern Community College v. Davis, 442 U.S. 397 (1979) (holding that a college was not required to modify its nursing program where it would
perform an essential function of the disabled employee’s job;\(^8\) (3) change an essential function of the job;\(^9\) or (4) bump a different employee from a position or create a new position for the disabled employee.\(^9\)

### B. Essential Functions

#### 1. Statutory Language

When the ADA prohibits discrimination and requires reasonable accommodations to a disabled employee, that employee must be a “qualified individual with a disability”\(^9\) to be protected by the statute.\(^9\) This means that the employee must be 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.\(^9\) However, the ADA does not specifically delineate guidelines to determine what the essential functions of a job are, but it states that “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing an applicant for the job, this description shall be considered evidence of the essential functions of the job.”\(^9\)

#### 2. Interpretive Guidance For Essential Functions

Once again the EEOC steps in to provide that “[t]he term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the

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\(^8\) See 29 C.F.R. § 1630.2(o) (1997).

\(^9\) See generally Durning v. Duffens Optical, Inc., No. 95-1093, WL 67640 (E.D. La. 1996) (holding that an employer was not required to change the essential functions of a job for a salesman who suffered a stroke and could not perform the essential functions of his job or any other reasonable accommodation).

\(^9\) See generally Riley v. Weyerhauser Paper Co., 898 F. Supp. 324 (W.D.N.C. 1995) (holding that an employer did not have to change the essential functions of a job or realign an employee who was diagnosed with multiple sclerosis and could not operate or work around machinery).


\(^9\) See id.


\(^9\) Id.
position. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation. The EEOC also suggests certain facts that an employer may consider in determining if a particular function is essential or not:

1. the employer's fair judgment;
2. the written job description used before anyone was interviewed;
3. how much time the function takes during overall job performance;
4. what the consequences would be if the person did not have to perform that particular function;
5. any particular terms of a collective bargaining agreement;
6. the experience of past workers of the same position; and
7. the experience of current workers in the same or similar positions.

In general, the employer has been the one to determine what a job is and what functions are needed to perform it, but the courts have not remained completely out of the picture. For example, in Hall v. United States Postal Service, the court noted that an employer's determination of essential job functions "should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved."

C. Undue Hardship

1. Statutory Language

The ADA defines an undue hardship as an "action requiring significant difficulty or expense." This vague definition can leave
employers at a loss for determining when an accommodation is an undue hardship. However, the ADA does provide the following factors that employers should take into account:

(i) The nature and cost of the accommodation needed . . . ;
(ii) The overall financial resources of the facility or facilities involved in provision of the reasonable accommodation; the number of persons employed at the facility; the effect on such expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) The type of operation or operations of the covered entity, including the composition, structure, and function of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.103

2. Interpretive Guidance For Undue Hardship

In addition, the EEOC regulations add that an employer may also consider “the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.”104 One such impact has included the assessment of safety, and checks for loss of efficiency.105 Legislative history also suggests that if the undue hardship is a cost, the employer must pay for a reasonable portion of that cost.106 Also, an employer is required to investigate and obtain any possible public funding that is available for an accommodation.107

Although these guidelines are provided to assist employers, it is unclear if the courts will defer to the business judgment rule,108 or

103. Id. § 12111(10)(B)(i)-(iv).
105. See Dexler v. Tisch, 660 F. Supp. 1418, 1428 (D. Conn. 1987) (holding that an employee who had achondroplastic dwarfism did not have to be reassigned since any reasonable accommodation would reduce the efficiency of the business).
107. See id.
108. “It is a presumption that in making a business decision, the directors of a corporation act on an informed basis, in good faith and honest belief that the action taken was in the best interests of the corporation.” Moore Corp. Ltd., Inc., v. Wallace Computer Serv., Inc., 907 F. Supp. 1545, 1554 (D. Del. 1995).
will be more stringent in this area, and perhaps disagree with the employer's conclusion. Another question is whether an employer can set aside a certain amount for accommodations, and use that on a first-come first-serve basis, thus possibly denying accommodations later on.

D. Sample Cases of Reassignment Under the ADA

In a number of recent cases, the courts have used various reasons to support their decisions of requiring employers to reasonably accommodate a disabled employee, when that employee cannot perform the essential functions of his or her current job.

In one of the recent cases, Gile v. United Airlines, Inc., the plaintiff was diagnosed with a mental disorder, which her position as a night shift data entry operator was aggravating, and she eventually could not perform her job. Gile was placed on unpaid authorized leave after she requested United to move her to any position that did not require working the night shift. Gile then sued United under the ADA for failing to reasonably accommodate her after she informed them of her disability.

On this issue, the court decided that the obligation for an employer to reasonably accommodate a disabled employee, even though that employee was not able to perform the essential functions of the job, could be inferred from the interpretive guidance of

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111. See generally Shiring v. Runyon, No. 95-3547, 1996 WL 417636, at *4 (3d Cir. July 26, 1996) (stating that the change in the Rehabilitation Act which made it more similar to the ADA included that an employer has to reassign a disabled employee even if they cannot perform the essential functions of the job); Pedigo v. P.A.M. Transp., Inc., 891 F. Supp. 482, 485-87 (W.D. Ark. 1994) (stating that legislative history makes it apparent that Congress wanted to have the ADA require employers to reassign disabled employees more often than had been done under the Rehabilitation Act).

112. 95 F.3d 492 (7th Cir. 1996).

113. See id. at 494.

114. See id.

115. See id.
ADA regulations by the EEOC. The EEOC guidelines state that "reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship." In addition, the court relied on the legislative history of the ADA, which states:

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

After considering the ADA, its regulations, the EEOC, as well as a recognition of such similar decisions in other cases, the court decided that, as long as an employee meets all of the other criteria established in the ADA, because of the language of "reassignment to a vacant position," there may be an obligation for an employer to reassign a disabled employee as an accommodation even where that employee can no longer perform the essential functions of his or her current job. In this case, the court felt that United Airlines, Inc. should have considered reassigning Gile to a shift outside of her department, even though she could not perform the essential functions of her current job on the night shift.

The results in most of these similar types of cases have worked in favor of the disabled employee, where wrongful treatment by the employer was found. However, it is possible for the laws of the ADA to apply in favor of the employer. For instance, in Karbusicky v. The City of Park Ridge, the plaintiff was a police officer who had lost the ability to hear from his left ear. As a result of an annual performance report, and from other officers' evaluations, the police department permitted the plaintiff to use a hearing aid, which allowed him to continue his duties.

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116. See id. at 497-98.
117. 29 C.F.R. app. § 1630.2(o) (1997).
118. See Gile v. United Airlines Inc., 95 F.3d 492, 498 (7th Cir. 1996).
122. See Gile, 95 F.3d at 498.
123. See id. at 499.
124. See id. at 499.
125. See id. at 879.
device to improve his hearing. However, the plaintiff felt that the hearing device was not helping, leading to the police department offering to pay for a more expensive hearing aid, but the plaintiff refused to try it.

A commission heard testimony from other police officers and various doctors, and were going to discharge the plaintiff since “a police officer’s ability to hear is important for the officer’s own safety and for the safety of citizens and other police officers.” However, that decision was withheld when a Deputy Chief accommodated the plaintiff by assigning him to a position as a Community Service Officer. In this position, the plaintiff maintained the same salary that he had as a police officer with the proper increases, as well as membership to the local union.

Nevertheless, the plaintiff was not happy with this transfer, and he filed a complaint alleging that the police department had violated the ADA. The court held that based on the evidence and admissions by the plaintiff, he would have difficulty hearing in certain situations that are more than likely to occur as a police officer, which could endanger himself as well as others. Therefore, the court felt that the plaintiff could not perform an essential function of the job. In addition, the plaintiff could not offer any other reasonable accommodation that would allow him to remain in the position of a police officer, so the department’s decision to transfer him to the position of a Community Service Officer was a reasonable accommodation.

Although the court found that the plaintiff was not a qualified individual under the ADA, it based its decision on Gile and on the EEOC’s interpretive guidance.

126. See id. at 880. 
127. See id. 
128. Id. at 881. 
129. See id. at 882. 
130. See Karbusicky, 950 F. Supp. at 882. 
131. See id. 
132. See id. at 884. 
133. See id. 
134. See id. at 884-85. 
135. See id. at 884. 
136. See Karbisocky, 950 F. Supp. at 883-84.
V. THE PROBLEMS THAT REMAIN FOR EMPLOYERS

Reasonable accommodation in the ADA is a bold attempt at reducing discrimination against disabled employees in the workforce, and its application seems straightforward. However, the only aspect that seems clear, is that

[e]mployers should grant the request for a reassignment to a vacant position only after they have determined that the request is based on the disability and not on the employee’s inability (for reasons totally unrelated to the disability) to perform the essential functions of the job s/he presently holds with or without reasonable accommodation.

As the Gile court pointed out, the ADA and its regulations only provide for reassignment to a vacant position, but does not describe under what circumstances this should be done. For instance, can the vacant position be substantially similar, can it be in a different office or department, or can it be a different type of position in the same office, a different office or a different department?

The only other official guideline to help employers is laid out by the EEOC, in saying that employers should try to reassign disabled employees to equivalent positions for which the employee is qualified for, with or without reasonable accommodations. If that is not possible, then the employer may reassign the disabled employee to a lower graded position.

137. See Barbara Berish Brown, Reasonable Accommodation, Hardship and Employer Defenses Under the ADA, in Employer Compliance with the Americans with Disabilities Act: A Satellite Program, at 91, 95-97 (PLI Corp. L. & Practice Handbook Series No. 714, 1990). There is a four step process for providing a reasonable accommodation under the ADA. See id. Step one is to identify the barriers to performance, step two is to identify possible accommodations, step three is to assess the reasonableness of each possible accommodation, and step four is to choose from among the reasonable accommodations. See id.


139. See Gile, 95 F.3d at 497.

140. See id.


142. See id.; Pattison v. Meijer, Inc., 897 F. Supp. 1002 (W.D. Mich. 1995) (holding that the employer can reassign the employee to a lower paid position that he or she is qualified for).
In addition, there is much confusion and disagreement about the types of positions an employee is allowed to be reassigned to, and the methods that an employer may use to reassign an employee.\textsuperscript{143}

For instance, one court has held that:

[w]hile reasonable accommodation may include reassignment to a vacant position, the ADA does not impose on an employer the affirmative duty to find another job for an employee who is no longer qualified for the job he or she was doing. Rather, the ADA prohibits employers from denying an employee alternative employment opportunities reasonably available under the employer’s existing policies.\textsuperscript{144}

However, “[t]he EEOC has not indicated if an employer may apply its existing reassignment policies and procedures when accommodating a disabled individual by reassigning him or her to a vacant position.”\textsuperscript{145} If employers do not know how the courts in their jurisdiction will rule as to what degree they are responsible for reassigning a disabled employee, and the EEOC provides no guidance, employers might not know how to prepare beforehand to avoid liability. For example, will an employer be required to pay for relocation costs when it reassigns a disabled employee as an accommodation, even if that is not the employer’s standard procedure?\textsuperscript{146} It may also be logical to assume that an employer would want the best employee possible for each position. If an employer must reassign a disabled employee to a vacant position as an accommodation, must that employer do so even though that employee is less qualified than other individuals who are also interested in the same position?\textsuperscript{147}


\textsuperscript{144} Aspedon & Ricca, supra note 143, at 288 (analyzing Marschand v. Norfolk and Western R.R., 4 AD Cases 1099 (N.D. Ind. 1995), aff'd, 81 F.3d 714 (7th Cir. 1996)).

\textsuperscript{145} Thompson, supra note 143, at 54.

\textsuperscript{146} See Thompson, supra note 143, at 54.

\textsuperscript{147} See Thompson, supra note 143, at 54.
There is also much confusion over the term "vacancy."\(^{148}\) Is a position considered vacant if an employee leaves that position, but the employer had intended to eliminate it?\(^ {149}\) How long must an employer keep a disabled employee in a position in which he or she cannot perform, while waiting for a possible position to become vacant?\(^ {150}\) Does an employer have to keep vacant positions open for a specified time to allow for the possibility of having to reassign a disabled employee?\(^ {151}\) Finally, is there any requirement for employers to post a list of vacant positions so that disabled employees will know?\(^ {152}\) These, and other questions of interpretation in regards to the essential functions and undue hardship, only compound the uncertainty which employers face with reassignment to a vacant position.

VI. Conclusion

All of the changes between the Rehabilitation Act and the ADA signify the intent by the legislature, and as an extension of society in general, to make sure that the members of the disabled population are truly equally integrated into the American social and economic mainstream.\(^ {153}\) To further bolster this conclusion, in 1992, Congress implemented the reasonable accommodation of reassignment to a vacant position provision into the Rehabilitation Act, by accepting the same standards as applied under Title I of the ADA.\(^ {154}\) So a suit brought under either statute will prevent an employer from not including reassignment to a vacant position as an option for reasonably accommodating a qualified disabled individual. However, reassignment is only available to disabled employees, and not applicants.\(^ {155}\)

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\(^ {149}\) See id. at 71.

\(^ {150}\) See Thompson, *supra* note 143, at 54.


\(^ {155}\) See 29 C.F.R. § 1630.2(o) (1997).
The only defense which employers can claim is that of undue hardship.\textsuperscript{156} Although that is not the specific focus of this Note, it is important to take a brief look at the compliance costs and possible hardships which reassignment to a vacant position might cause. The EEOC estimates that the cost of an average reasonable accommodation would come out to $261.\textsuperscript{157} At this cost, it would seem that reasonable accommodations would not be an undue hardship for some employers.\textsuperscript{158} However, the economic impact should be regarded on a grand scale. "[T]he required scope of an employer's search for alternative positions may be quite substantial depending on its size and resources."\textsuperscript{159}

The laws, by design, will allow more disabled individuals to enter into the workforce, who might require accommodations.\textsuperscript{160} The employer will have to find an accommodation for an injured employee, rather than declare him or her to be unfit for work.\textsuperscript{161} While some accommodations have a fixed cost, like the fees of an interpreter or a hearing aid, others are intangible.\textsuperscript{162} These intangible costs, especially the cost of time lost to reassigning and training a disabled employee for a vacant position, are difficult to calculate, but still "must also be borne by the employer."\textsuperscript{163} Bearing even more on this point, "[a]n employer fails to satisfy its obligation to

\begin{footnotes}
\item[156] \textit{See id.} § 1630.9(a).
\item[158] \textit{See id.}
\item[160] \textit{See} Schiff & Miller, supra note 159, at 63.
\item[161] \textit{See} Schiff & Miller, supra note 159, at 63.
\item[162] McGraw, supra note 157, at 535.
\end{footnotes}
provide reasonable accommodation if the disabled employee is assigned to a position in which he is not capable of performing."

When preparing for the requirement of reassignment to a vacant position, employers can foresee that they must readjust their job descriptions and qualifications “to ensure that they are job related and consistent with business necessity.”

The questions that remain regarding reassignment to a vacant position will lead to more problems with Worker’s Compensation laws, and, of course, litigation. Clearly, though, litigation and other costs are secondary to the overarching desire for equality in the workplace.

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164. Schiff & Miller, supra note 159, at 57 (relying on Rhone, 665 F. Supp. 734; Carter v. Bennett, 840 F.2d 63 (D.C.Cir. 1988) (inquiring whether or not disabled employees were assigned to positions they could perform)).

165. Schiff & Miller, supra note 159, at 64.

166. See generally McGraw, supra note 157, at 537-39 (exploring the ADA’s potential to raise employer costs of obtaining workers’ compensation insurance).

167. See generally McGraw, supra note 157, at 539-41 (describing the ADA’s potential to increase employer litigation costs).