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NOTES

Living In Harmony?
Reasonable Accommodations, Employee Expectations and US Airways, Inc. v. Barnett

"Today we’re here to rejoice in and celebrate another ‘Independence Day,’.... [E]very man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom."¹

I. INTRODUCTION

In 1990, forty-three million Americans were found to have one or more physical or mental disabilities.² Disabled individuals faced constant discrimination in every aspect of their lives. Accordingly, the Americans with Disabilities Act ("ADA")³ was enacted to ensure that the disabled receive full opportunity and participation in society, independent living and economic self-sufficiency.⁴ It is within this context that a battle has been waged in the courts to reconcile the competing interests of the disabled employee, the employer and the workforce at large.⁵ In the 2001–2002 term alone, the Supreme Court

¹. President’s Remarks on Signing the Americans with Disabilities Act of 1990, 26 PUB. PAPERS 1162 (July 26, 1990).
². 42 U.S.C. § 12101(a)(1) (2002). According to the U.S. Census Bureau, in 2002 this statistic had risen to 49.7 million individuals with disabilities. Press Release, U.S. Census Bureau, 12th Anniversary of Americans with Disabilities Act (July 12, 2002), available at http://www.census.gov/Press-Release/www/2002/cb02ff11.html. Of these individuals, 5.2 million were between the ages of 5 and 20 (8%), 30.6 million were between the ages of 21 and 64 (57% of which were employed), and 14 million were 65 and over (42%). Id.
⁴. 42 U.S.C. § 12101(a)(8).
issued five decisions in its continuing effort to clarify the scope and coverage of the ADA.\(^6\) The proper application of the ADA has been called into question when it impacts other statutory rights or creates an oppressive burden on an employer or his employees.\(^7\) While some tangential impact is

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6. Barnes v. Gorman, 122 S. Ct. 2097, 2103 (2002) (holding that punitive damages may not be awarded in suits brought under \$ 202 of the ADA); Chevron U.S.A. Inc. v. Echazabal, 122 S. Ct. 2045, 2053 (2002) (holding that harm to self regulation does not exceed the scope of permissible rulemaking under the ADA); EEOC v. Waffle House, Inc., 122 S. Ct. 754, 766 (2002) (holding that regardless of an arbitration agreement between the employer and employee, the EEOC may still seek victim specific relief on behalf of the employee in enforcing the ADA); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”); \textit{Barnett}, 535 U.S. at 394 (holding that an accommodation is not ordinarily reasonable when it conflicts with a seniority system, yet, plaintiff may show evidence of special circumstances which warrant the accommodation to be reasonable).

7. Compare EEOC v. Sara Lee Corp., 237 F.3d 349, 355 (4th Cir. 2001), Boersig v. Union Elec. Co., 219 F.3d 816, 822 (8th Cir. 2000), Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000) (holding that the disabled employee’s reasonable accommodation request did not have to be honored because it contravened with the seniority rights of another employee), EEOC v. Humiston–Keeling, Inc., 227 F.3d 1024, 1028-29 (7th Cir. 2000), Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000), Smith v. Midland Brake, Inc., 180 F.3d 1154, 1176 (10th Cir. 1999) (acknowledging that employers need not violate employee’s legitimate seniority expectations in order to comply with the ADA), Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997), Wernick v. Fed. Reserve Bank, 91 F.3d 379, 384-85 (2d Cir. 1996) (determining that Congress intended for the disabled to be treated similarly to other qualified candidates), and Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (holding that the ADA does not require preferential treatment for the disabled), with Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999), Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1120-21 (8th Cir. 2000), Garcia-Ayala v. Lederle Parenterels, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (holding that the ADA can impose an obligation on an employer to grant, as an accommodation, a leave beyond that allowed under the employer’s own leave policy), Gile v. United Airlines, Inc., 213 F.3d 365, 374 (7th Cir. 2000) (finding that the employee was not required to adhere to the employer’s bidding and transfer policy), Davoll v. Webb, 194 F.3d 1116, 1134 (10th Cir. 1999) (finding that an employer is not excused from accommodating disabled employees even if the employer’s policy does not provide accommodations for nonhandicapped employees), Hendricks–Robinson v. Excel Corp., 154 F.3d 685, 695 (7th Cir. 1998) (finding that the employer did not meet his accommodation obligation because his medical layoff and reinstatement policy excluded certain vacant jobs), Woodman v. Runyon, 132 F.3d 1330, 1347 (10th Cir. 1997) (noting that reassignment is a reasonable accommodation when it is not directly contradicted by a collectively bargained agreement), Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (holding that the employer’s internal application procedure was insufficient to provide an accommodation to an employee who requested assistance), Fedro v. Reno, 21 F.3d 1391, 1396 (7th Cir. 1994) (stating that a “reasonable accommodation may even include a requirement that an employer alter existing policies or procedures that it would not change for nonhandicapped employees”), and Buckingham v. United States, 998 F.2d 735, 741 (9th Cir. 1993) (holding that an accommodation would not violate a collectively bargained agreement due to unusual circumstances surrounding the request).
inevitable, the most serious quandaries arise when the ADA directly conflicts with established workforce policies.\(^8\) US Airways, Inc. v. Barnett\(^9\) addressed such a scenario by determining what impact the ADA mandate of reasonably accommodating a disabled employee would have on workplace seniority systems.\(^10\) The Court analyzed to what extent the seniority system was entrenched in the workplace and whether employee expectation of consistent treatment under the seniority system was sufficiently low as to warrant the reasonable accommodation of reassignment.\(^11\) In issuing this decision, the Supreme Court added to an already ambiguous landscape for disabled employees, fellow coworkers and employers alike.\(^12\)

The ADA offers limited guidance as to whether reassignment for the disabled is reasonable when an employee with a greater seniority right also qualifies for the same vacant position.\(^13\) A circuit split existed as to an effective solution which also maintains the integrity of the ADA.\(^14\) Some courts focused on the seniority rights of a disabled employee's coworkers, whereas, other courts implemented a balancing test in which seniority would be only one factor in the reasonable accommodation analysis.\(^15\) In attempting to reconcile these two divergent approaches, the Supreme Court decided to raise the requisite level of employee expectation and still allow a disabled employee to be reassigned.\(^16\) This holding properly acknowledged that a balance had to

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8. For example, minor changes in the operation of a seniority system can yield to serious consequences for all employees on the seniority list, increasing litigation and resentment in the workplace. Bertulli v. Indep. Ass'n of Cont'l Pilots, 242 F.3d 290, 296 (5th Cir. 2001).


10. Id. at 393-94.

11. Id. at 405-06.

12. Prior to the Supreme Court's decision in Barnett, the circuits were split on the issue of whether an accommodation was reasonable when it contravened seniority rights. Id. at 396. The majority of circuits held that accommodating a disabled employee would be per se unreasonable when it contravenes a bona fide seniority system. See, e.g., Sara Lee Corp., 237 F.3d at 355; Aldrich v. Boeing Co., 146 F.3d 1265, 1271 n.5 (10th Cir. 1998); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Willis v. Pac. Mar. Ass’n, 162 F.3d 561, 566-68 (9th Cir. 1998); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997); Foreman, 117 F.3d at 810; 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). The minority of circuits held for a case-by-case, fact-intensive analysis to determine whether reassignment would be an undue hardship to the employer. See, e.g., Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 (9th Cir. 2000), rev’d sub nom. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1303 (D.C. Cir. 1998) (in banc).

13. See infra Part III.

14. See cases cited supra note 12.

15. See cases cited supra note 12.

be struck between the rights of the disabled employee and the rights of his coworkers. However, the Court seemingly failed to create a standard which truly embodied the intent and purpose of the ADA.\(^7\)

This note argues that the *Barnett* decision falls short of providing clear guidance for both employers and employees in resolving the conflict between reasonable accommodations and seniority rights. Additionally, it suggests an alternative method that should be employed by future courts to cure this ambiguity. Part II is an introduction to the ADA, focusing on its purpose, reasonable accommodations and reassignment to a vacant position. Furthermore, both collectively bargained and unilaterally imposed seniority systems are explained and examined.

Part III establishes the background leading up to *Barnett* and explains the fundamentals of the decision. In particular, this Part focuses on the reasoning of the Ninth Circuit and the Supreme Court in *Barnett* and how the Supreme Court relied on inapplicable precedent in arriving at its decision. The *Barnett* court incorrectly limited the scope of its decision, inaccurately applied precedent from both the Rehabilitation Act of 1973 (“Rehabilitation Act”)\(^8\) and Title VII of the Civil Rights Act of 1964 (“Title VII”)\(^9\) and improperly interpreted the congressional intent of the ADA.\(^2\) Additionally, Part III explains why the Supreme Court’s adoption of a rebuttable presumption in favor of seniority rights places an inordinate amount of emphasis on employee expectation of the seniority system. Finally, this Part shows how *Barnett* is out of context with the fundamental structure of the ADA namely the interactive process between employer and employee. Part IV sets forth a proposed standard for lower courts applying *Barnett*, which will lead to a more equitable outcome.

17. The Supreme Court held reassignment to be unreasonable in “the run of cases” when it trumps a seniority system. *Id.* at 403. Yet the disabled employee remains free to show special circumstances as to why his reassignment would be reasonable. *Id.* at 405. This does not comply with the purpose of the ADA, which is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1) (2002) (emphasis added). The Supreme Court’s failure to clearly define “special circumstances” will lead to further litigation and will not provide a clear or comprehensive national mandate. See *Barnett*, 535 U.S. at 391-406.


20. See *infra* Part III.C.1.a-c.
II. THE AMERICANS WITH DISABILITIES ACT

A. Purpose and Scope of the ADA

Historically, society has isolated and segregated individuals with disabilities.21 Despite some improvements, disabled individuals continued to face discrimination in all areas of life.22 Areas such as employment, housing, education and transportation continued to lack the requisite legislation to accommodate this class of people.23 Unlike discrimination based on race, color, sex or religion, the disabled often had no legal recourse.24 In addition to the lack of opportunity and fairness encountered by the disabled, the United States incurred expenses amounting to billions of dollars in avoidable costs directly attributed to their dependency and non-productivity.25 As a result, the federal government was faced with the problem of resolving the often outright intentional exclusion of disabled individuals from society.26 Congress responded to the plight of the disabled on July 26, 1990 by enacting the Americans with Disabilities Act.27 This groundbreaking legislation provides a clear and comprehensive national mandate for the elimination of various forms of discrimination against the disabled.28 The ADA ensures the federal government maintains a central role in enforcing the standards set forth in the Act.29

On July 26, 1992, exactly two years from its inception, Title I of the ADA went into effect prohibiting discrimination against individuals with disabilities in respect with any term, condition or privilege of employment.30 To have standing under the ADA one must be either a

22. Id. § 12101(a)(3), (a)(5).
23. Id. § 12101(a)(3).
24. Id. § 12101(a)(4).
25. Id. § 12101(a)(9).
27. 42 U.S.C. §§ 12101-12213. Officially known as the Equal Opportunity for Individuals with Disabilities Act, but popularly referred to as the Americans with Disabilities Act of 1990. The ADA is comprised of four sections. Title I is geared towards discrimination in the workplace. Id. §§ 12111-12117. Title II limits discrimination of the disabled in their ability to utilize public services. Id. §§ 12131-12165. Title III is aimed at private entities such as restaurants, theaters and transportation. Id. §§ 12181-12189. Title IV lists miscellaneous provisions, which expand on the aims of the ADA. Id. §§ 12201-12213.
29. Id. § 12101(b)(3).
30. Id. § 12112(a).
qualified individual with a disability or a covered entity. To fit the definition of a qualified individual with a disability, one must meet the two requirements of having a covered disability and being able to perform the essential functions of the position.

The ADA's primary purpose is to prohibit discrimination on the basis of a disability. The ADA defines discrimination to include "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." In other words, unless an accommodation would impose an undue hardship on the operation of the employer's business, the ADA requires an employer to reasonably accommodate an employee's disability.

B. Reasonable Accommodations

One of the ADA's primary vehicles for integrating disabled employees into society is by furnishing them with reasonable accommodations. In the employment context, these accommodations attempt to ensure that disabled employees are able to perform the essential functions of the position. The ADA defines reasonable accommodations to include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) 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

31. Id. § 12111(2), (8). A covered entity means "an employer, employment agency, labor organization or joint labor-management committee." Id. § 12111(2).
32. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2).
33. A qualified individual refers to "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." Id. § 12111(8).
34. Id. § 12102(b)(1)-(4).
35. Id. § 12112(b)(5)(A).
36. Id.
38. Id. § 12111(8).
readers or interpreters, and other similar accommodations for individuals with disabilities.39

The employer is required to engage in a direct interactive process by consulting with the disabled employee to determine the appropriate accommodation.40 This process was designed to precisely recognize the limitations resulting from any given disability and identify possible accommodations to overcome those limitations.41 Determining an acceptable reasonable accommodation is essential to providing placement for the disabled, yet, an employer is not always required to do so.42 In the event of an undue hardship to the employer, the employer is not required to provide a reasonable accommodation for the disabled employee.43 An undue hardship consists of "an action requiring significant difficulty or expense, when considered in light of factors."44 These factors include, but are not limited to, the nature and cost of the accommodation, the overall financial resources of the facility and the covered entity and the type of operation of the covered entity.45

C. Reassignment as a Reasonable Accommodation

One type of reasonable accommodation listed by the ADA and the Equal Employment Opportunity Commission ("EEOC")46 is reassignment to a vacant position.47 A disabled employee who wishes to

39. Id. § 12111(9)(A)-(B) (emphasis added).
41. 29 C.F.R. § 1630.2(o)(3) (2002).
42. 42 U.S.C. § 12112(b)(5)(A).
43. Id. § 12111(b)(5)(A). The ADA’s reasonable accommodation and undue hardship provisions work together to best accommodate the disabled worker while not overburdening the employer. This relationship results in several benefits. By engaging in the interactive process, the employee is better situated to evaluate his reasonable accommodation, while the employer may more easily assess whether a particular accommodation will cause him an undue hardship.
44. Id. § 12111(10)(A).
45. Id. § 12111(10)(B)(i)-(iv).
46. The EEOC works in conjunction with the ADA in issuing regulations to implement the Act. Id. § 12116. The Supreme Court’s instruction regarding the interpretive guidance of the EEOC states that while the EEOC is not controlling, it does “constitute a body of experience and informed judgment to which courts and litigants may properly resort to [for] guidance.” Gile v. United Airlines, Inc., 95 F.3d 492, 497 (7th Cir. 1996) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976))).
47. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
be reassigned to a vacant position must be able to perform the essential functions of that position.\textsuperscript{48} Congress, the EEOC and courts have applied limits on the employer's duty to reassign a disabled employee. For example, an employer does not have the responsibility of assigning a disabled employee to a position if a current vacancy does not exist.\textsuperscript{49} As a result, there is no requirement to create a new position or eliminate anyone from his existing position.\textsuperscript{50} Reassignment is only mandated if that position is vacant within "a reasonable amount of time . . . in light of the totality of the circumstances."\textsuperscript{51} Furthermore, if the employer does not maintain the salaries of non-disabled employees, then he is not required to do so for the reassigned individual with a disability.\textsuperscript{52} Reassignment is further limited because an employer has no obligation to promote a disabled employee for the purpose of placement.\textsuperscript{53} Finally, before an employer considers reassignment, he must first attempt to accommodate the disabled employee in his current position.\textsuperscript{54} If an employer is not subject to one of the above restrictions, he is mandated to reassign the disabled employee unless he can prove a legitimate undue hardship defense.\textsuperscript{55}

\section*{D. Seniority Systems}

The ADA has no specific language defining the operation of a bona fide seniority system\textsuperscript{56} as an automatic bar to a reasonable accommodation.\textsuperscript{57} However, prior to Barnett, all circuits held that a bona fide seniority system was at least a factor in determining whether

\begin{itemize}
\item 48. 42 U.S.C. § 12111(8).
\item 49. 29 C.F.R. app. § 1639.2(o), at 356 (2002).
\item 50. \textit{Id}.
\item 51. \textit{Id}, (emphasis omitted).
\item 52. \textit{Id}.
\item 53. \textit{Id}.
\item 54. 29 C.F.R. app. § 1639.2(o), at 356.
\item 55. 42 U.S.C. § 12112(a), (b)(5)(A) (2002).
\item 56. Seniority rights must be established as bona fide or legitimate before they may be assessed as an undue hardship. In order for a seniority system to be bona fide it must be created for legitimate purposes, rather than for the purpose of discrimination. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1046 n.7 (7th Cir. 1996). This legitimacy stems from the ADA itself, which states that it is unlawful to "participate in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter." 42 U.S.C. § 12112(b)(2). One of the types of discrimination prohibited by this Title is not to reassign a qualified employee. 42 U.S.C. § 12111(9)(B).
\item 57. See 42 U.S.C. § 12111(10)(B)(i)-(iv). This is similar to Title VII. See 42 U.S.C. § 2000e-2(a) (2002).
\end{itemize}
reassignment was proper. In the workplace, there are two main types of bona fide seniority systems: seniority rights contained in collectively bargained agreements and seniority rights unilaterally imposed by the employer.

Circuit courts have most often analyzed reassignment in light of collectively bargained seniority rights. The National Labor Relations Act ("NLRA"), the federal statute governing the relationship between unions and employers, provides conditions for collective bargaining agreements. The majority of collectively bargained agreements include a type of seniority system. Typically, the system allows an employee to acquire seniority through his length of service with his employer. Seniority systems are often incorporated in a collectively bargained agreement ("CBA") since it provides a means of allocating limited


59. There are two types of employment settings, unionized and non-unionized settings. In the context of a union setting, the union and the employer agree on a collectively bargained agreement, which almost always contains a seniority provision. In the nonunion setting, the employer imposes a seniority system on his workforce and each employee would take his rightful place in the seniority hierarchy.

60. Aldrich v. Boeing Co., 146 F.3d 1265, 1272 n.5 (10th Cir. 1998); Cassidy, 138 F.3d at 634; Feliciano, 160 F.3d at 786-87; Foreman, 117 F.3d at 810; Kralik, 130 F.3d at 81, 83; Eckles, 94 F.3d at 1051; Benson, 62 F.3d at 1114; Milton, 53 F.3d at 1125.


62. See 29 U.S.C. §§ 151-169 (explaining the purpose of the NLRA, listing the obligations of the employer to acknowledge the recognized bargaining unit, stating fair representation must be provided by the union, and requiring all the parties to bargain and negotiate in good faith). The NLRA lists numerous statutory criteria as to the duty to bargain collectively, including the requirement of good faith dealings with respect to wages, hours and other terms of employment. Id. § 158. Additionally, the NLRA requires parties to confer in good faith regarding any questions arising under a collective bargaining process between them. Id.


benefits amongst the employees. Seniority systems are particularly beneficial because they prevent the employer or his supervisors from arbitrarily granting preferential treatment to one employee over another. Including a seniority system in a CBA maintains a reliable structure in the work environment and fairly allocates superior positions and benefits. Accordingly, courts recognize the affirmative effects of seniority systems in the workplace and treat them favorably. While seniority systems first came to the forefront in collectively bargained agreements, they have long been fixed in nonunion environments as well. Unlike a CBA, a federal statute does not govern unilaterally imposed seniority rights. Due to the advantages to employer and employee alike, seniority has become a prevalent feature in both union and nonunion workplaces.

III. US AIRWAYS, INC. V. BARNETT

Prior to the Supreme Court's decision in Barnett, two approaches had emerged from the circuit courts regarding how to treat the reassignment of a disabled employee in the presence of a bona fide seniority system. The majority of circuits held that greater seniority

65. Schoen, supra note 64, at 1400.
66. Id.
67. Id.
70. While CBAs are enforceable under federal labor law, unilaterally imposed seniority rights "exist as 'rights' only to the extent made so by contract." Brief of Amici Curiae American Federation of Labor and Congress of Industrial Organizations at 17-18, US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250) (citing ELKOURI & ELKOURI, HOW ARBITRATION WORKS 809 (1997)). Courts have held that an employer's policies and promises to nonunion employees create enforceable contract obligations under state law. Demasse v. ITT Corp., 111 F.3d 730, 731 (9th Cir. 1997); White v. Nat'l Steel Corp., 935 F.2d 474, 482-83 (4th Cir. 1991) (allowing employees to seek damages for breach of a promise when the employer refused to rehire them with seniority); Anderson v. Ford Motor Co., 803 F.2d 953, 957 (8th Cir. 1986) (permitting state law claims for employees who were promised that they would not be bumped by laid-off individuals on a preferential hiring list).
72. See cases cited supra note 12.
rights are be a per se bar to the reassignment of a disabled employee.\textsuperscript{73} A per se bar prohibits any claims by a disabled employee against his employer for failing to provide proper accommodations.\textsuperscript{74} A minority of circuits adopted a balancing test where the court considers an employee's seniority rights as a factor in determining the need to provide a reasonable accommodation.\textsuperscript{75}

A. Facts

Robert Barnett worked for US Airways as a customer service agent for ten years.\textsuperscript{76} In 1990, Barnett injured his back on the job and took disability leave.\textsuperscript{77} Upon returning from his leave, Barnett was physically unable to continue the rigors of handling freights in the cargo area.\textsuperscript{78} Barnett utilized his seniority to transfer to a less physically demanding position in the mailroom.\textsuperscript{79} After two years of working in the mailroom, two coworkers with greater seniority threatened to bump Barnett out of his current position.\textsuperscript{80} In an effort to maintain his job, Barnett wrote several letters to management requesting to stay in the mailroom as a reasonable accommodation and even suggested alternative means of accommodating his disability in the cargo facility.\textsuperscript{81} US Airways denied each of Barnett's requests and placed him on job injury leave.\textsuperscript{82} Barnett filed formal charges claiming that US Airways failed to accommodate his disability under the ADA.\textsuperscript{83} After the EEOC issued a formal determination that US Airways had discriminated against Barnett,
Barnett filed an action in the district court. The district court granted US Airways’ motion for summary judgment and found that disrupting a bona fide seniority system to reasonably accommodate Barnett would create a sufficient undue hardship for the employer. In his appeal to the Ninth Circuit, Barnett claimed that US Airways: (1) failed to engage in the interactive process; (2) failed to reassign him to the mailroom; (3) failed to provide other reasonable accommodations; and (4) retaliated against him.

B. Procedural History: The Ninth Circuit’s Holding

1. US Airways’ Failure to Engage in the Interactive Process

The Ninth Circuit referred to the ADA’s legislative history, the EEOC’s interpretation of the ADA and other circuit decisions in analyzing whether US Airways failed to engage in the interactive process. Both the ADA’s legislative history and the EEOC make it clear that an employer is mandated to engage in an interactive process with the disabled employee to reach a reasonable accommodation. The Ninth Circuit concurred in holding that the interactive process is a mandatory requirement under the ADA. The employer, upon his own initiative or on the disabled employees’ request, must attempt in good faith to accommodate the employee. Further, an employer’s failure to

84. Id.
85. Id.
86. Id. We will combine the failure to reassign and the failure to provide other reasonable accommodations into a single analysis. Barnett’s retaliation issue will not be discussed further as it is not relevant to the current discussion; however, the Ninth Circuit held that the district court was correct in granting summary judgment for US Airways on this point. Barnett, 228 F.3d at 1121. Further, the Ninth Circuit was the first circuit to confront the issue of whether a disabled employee’s right to reassignment is trumped by an employer’s unilaterally imposed seniority system. Id. at 1118. Every other circuit has addressed the issue of whether reassignment to a vacant position is a reasonable accommodation in the context of collectively bargained agreements. See cases cited supra note 60.
87. Barnett, 228 F.3d at 1111-14.
88. Id.
89. Id. at 1114.
90. Id. at 1114-15. To demonstrate good faith, the employer can illustrate helpful behavior which encourages the identification of a reasonable accommodation. Id. at 1115. For instance, he can meet with the disabled employee, request information about the disability, ask the employee his objectives from the interactive process, seriously consider proposed accommodations and offer alternative accommodations when the proposed accommodations are too burdensome. Barnett, 228 F.3d at 1115 (citing Taylor v. Principal Fin. Group Inc., 93 F.3d 155, 317 (3d Cir. 1999)).
engage in the interactive process in good faith subjects him to potential liability and bars him from prevailing at the summary judgment stage.\(^9\)

In *Barnett*, the duty to engage in the interactive process was triggered when Barnett identified and requested possible accommodations.\(^9\) US Airways failed to engage in the interactive process by not seriously considering Barnett’s suggestions and by failing to personally communicate with Barnett.\(^9\) Instead, US Airways rejected his proposed accommodations by letter, delayed and failed to communicate with Barnett about his recommended accommodations and offered Barnett the opportunity to bid for positions he already had a right to.\(^9\) The Ninth Circuit found that a triable issue of fact existed as to whether US Airways engaged in the interactive process and whether Barnett’s reassignment request could have been reasonably accommodated without an undue hardship.\(^9\)

2. Barnett’s Reassignment Requests

The Ninth Circuit adopted the EEOC guidelines and the ADA’s legislative history, finding that seniority is not a *per se* bar to a disabled employee’s reassignment when a unilaterally imposed seniority system exists.\(^9\) Rather, the existence of a seniority system should be one factor to consider in determining whether the transfer request would pose an undue hardship.\(^9\) In granting US Airways’ motion for summary

\(^91\). *Id.* at 1116.

\(^92\). *Id.*

\(^93\). *Id.* at 1116-17.

\(^94\). *Id.* The Ninth Circuit found at least one of Barnett’s proposed accommodations reasonable. According to the court, US Airways did not seriously consider providing Barnett with a low-tech mechanical lifting device in order for him to remain in the cargo position, which was a potential reasonable accommodation. *Barnett*, 228 F.3d at 1117.

\(^95\). *Id.*

\(^96\). *Id.* According to the EEOC, when considering reassignment, disabled employees should have priority over non-disabled employees even when transfers are normally not allowed. *Id.* The EEOC states that:

The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.

*Id.* (citing EEOC Enforcement Guidance, EEOC Compl. Man. (BNA) at 5454).

\(^97\). *Barnett*, 228 F.3d at 1119-20. “A *per se* bar conflicts with the basic premise of the ADA, which grounds accommodation in the individualized needs of the disabled employee and the specific burdens which such accommodation places on an employer.” *Id.* at 1120. The EEOC
judgment, the Ninth Circuit found that the district court failed to consider the reasonableness of Barnett's proposed accommodations. 98 Reassigning Barnett to the mailroom as a reasonable accommodation was a triable issue of fact, even though it would eliminate one position from the seniority bid process. 99

C. An Analysis of US Airways, Inc. v. Barnett: Was the Court Correct?

The Supreme Court granted certiorari solely on the issue of whether seniority should act as a per se bar to reassignment. 100 In vacating the opinion of the Ninth Circuit, the Supreme Court added to an already ambiguous description of how to provide reasonable accommodations under the ADA. 101 The Court was composed of a splintered five member

98. Id. at 1118. (quoting EEOC Enforcement Guidance, EEOC Compl. Man. at 5456 (“Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.”)).

99. Id. at 1120. The Ninth Circuit held differently than a majority of its sister circuits. The majority of circuits held that there is a per se bar to reassignment as a reasonable accommodation when it contravenes a bona fide seniority system. Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998); 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, 83 (3d Cir. 1997); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996); Wernick v. Fed. Reserve Bank, 91 F.3d 379, 384 (2d 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); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987).


101. Prior to the Supreme Court's opinion in Barnett, the circuit courts were split on the appropriate manner to allocate the quantum of proof necessary to establish a reasonable accommodation claim. See, e.g., Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001) (finding that in order to be reasonably accommodated, the plaintiff must prove that he can perform the essential functions of the position and the employer would then have the opportunity to show that the proposed accommodation would impose an undue hardship); Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 728 (6th Cir. 2000); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 950-51 (8th Cir. 1999); Walton v. Mental Health Ass'n, 168 F.3d 661, 670 (3d Cir. 1999); Willis v. Conopco, Inc., 108 F.3d 282, 285-86 (11th Cir. 1997); Vande Zande v. Wis. Dept’ of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995); White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995); cf. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (holding that the burden of persuasion would shift from plaintiff to defendant, with the plaintiff only responsible to show the existence of a reasonable accommodation, which is facially cost-beneficial). Barnett resolves this dichotomy by outlining the proper approach that should be undertaken to identify whether an accommodation is reasonable or not. Barnett, 535 U.S. at 401-02. The Court held that the disabled employee, would have to show a method of accommodating his request that is reasonable in most cases. Id. at 402. Once that is shown the employer must then show circumstances that rise to the level of being considered an undue hardship. Id. While not every court that addressed
majority which held that reassigning a disabled employee to a vacant position when it contravenes a seniority system would be facially unreasonable in "the run of cases."\(^{102}\) Employers are ordinarily entitled to summary judgment as seniority systems are presumptively a bar to reassignment.\(^{103}\) However, if a disabled employee presents evidence of special circumstances then the employer's motion for summary judgment would be defeated.\(^{104}\) To show special circumstances, a disabled employee is required to demonstrate that his coworkers have low expectations of consistent uniform treatment under the company's seniority system.\(^{105}\) The Court held that the effects of violating seniority are similar whether the system is unilaterally imposed or contained within a CBA.\(^{106}\) Both seniority systems create the same expectations for nondisabled employees.\(^{107}\)

1. Is Reassignment Unreasonable in the Run of Cases?

In arriving at its conclusion, that the proposed accommodation would ordinarily be unreasonable, the Court utilized the rationale of the majority of circuits.\(^{108}\) First, the Supreme Court referred to Title VII and the Rehabilitation Act for guidance in interpreting the ADA's reasonable accommodation provision.\(^{109}\) Second, the Court referred to the legislative history and congressional intent of the ADA to determine its scope and purpose.\(^{110}\) However, these rationales are themselves flawed; ultimately placing *Barnett* on potentially weak logic.

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102. *Id.* at 394. The five-member majority consisted of Justice Breyer, who wrote the majority opinion, joined by Justice Kennedy and Chief Justice Rehnquist, and Justices Stevens and O'Connor who each wrote concurring opinions. *Barnett*, 535 U.S. at 394.

103. *Id.*

104. *Id.*

105. *Id.* at 405-06.

106. *Id.* at 404.


108. *Id.* at 403-05 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999); Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998); Eckles v. Consol. Rail Corp., 94 F.3d 1041 (7th Cir. 1996); Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987); Jasuny v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985)).

109. *Id.* at 403.

110. *Id.* at 403-04 (citing Smith, 180 F.3d at 1175; Feliciano, 160 F.3d at 787; Eckles, 94 F.3d at 1047-48). These circuits have similar holdings though they differ in their reasoning.
a. The Court's Reliance on Title VII

The Barnett court cited to Trans World Airlines v. Hardison,\textsuperscript{111} Title VII precedent, as the first means for supporting the conclusion that reassignment is generally unreasonable.\textsuperscript{112} In Hardison, the Court addressed the issue of whether an employer has an obligation to accommodate an employee's religious practices under Title VII.\textsuperscript{113} The Supreme Court rejected the positions of Hardison and the EEOC in holding that a reasonable accommodation does not supersede the collectively bargained seniority rights of other employees.\textsuperscript{114} In Hardison, the Supreme Court stated that "[w]ithout a clear and express indication from Congress," a reasonable accommodation cannot include infringing upon the seniority rights of other employees.\textsuperscript{115} Hardison held that if an accommodation violates a nondiscriminatory seniority system then the accommodation would impose more than a de minimis hardship on the employer.\textsuperscript{116} Similar to Title VII, the ADA does not provide a clear indication from Congress that a reasonable

\textsuperscript{111} 432 U.S. 63 (1977).
\textsuperscript{112} Barnett, 535 U.S. at 403. Barnett cites to Hardison as a useful source in understanding the meaning of a reasonable accommodation. Id. Title VII, like the ADA, contains a duty of providing reasonable accommodations for those covered under the Act. 42 U.S.C. § 2000e(j) (2002). Title VII, a federal anti-discrimination and anti-harassment statute, prohibits discrimination on the basis of race, sex, religion, color or national origin. Id. § 2000e-2(a)(1)-(2). According to Title VII, an employer must reasonably accommodate the religious observances and practices of his employees unless the accommodation would cause the employer an undue hardship. Hardison, 432 U.S. at 66 (citing 42 U.S.C. § 2000e(j)).
\textsuperscript{113} Hardison, 432 U.S. at 66. The Hardison decision is also cited by the Seventh Circuit in Eckles as one of the three main rationales for adopting a per se bar to reassignment. Eckles, 94 F.3d at 1048. The Eckles court relies on the parallel language of Title VII to interpret the reasonable accommodation provisions in the ADA. Id. While the Barnett Court seems to follow the Seventh Circuit's reasoning in this regard, unlike the other two rationales in which Barnett cites to Eckles for support, the Court here fails to cite to the court's reasoning in Eckles for utilizing Title VII precedent to interpret the ADA. Barnett, 535 U.S. at 403.
\textsuperscript{114} Hardison, 432 U.S. at 79. If the Court were to allow the religious accommodation, the collectively bargained seniority provision of the airline would be violated. Id. at 81.
\textsuperscript{115} Id. at 79. The Eckles court qualifies its use of both the Rehabilitation Act and Title VII by recognizing that the ADA specifically included reassignment to a vacant position as an "expected form of reasonable accommodation" and therefore "reject[ed] a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was never required." Eckles, 94 F.3d at 1048. Nevertheless, the court recognized that these previous holdings were helpful in understanding the basic meaning Congress had for these terms. Id. at 1049.
\textsuperscript{116} Hardison, 432 U.S. at 84. The Court interpreted Title VII to not require employers to implement any accommodation that would create more than a de minimis hardship on them because it may result in undue hardship. Id.
accommodation trumps the collectively bargained seniority rights of other employees.117

The Barnett court erred in applying the religious accommodation analysis under Title VII to interpret the reasonable accommodation provision of the ADA. Similar to the Hardison decision, the Barnett Court failed to refer fully to the appropriate Act's legislative history when analyzing a reasonable accommodation.118 Upon enacting the ADA, both the Senate and House Reports rejected the more than de minimis cost standard adopted in Hardison.119 The House Report states, "[b]y contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in Hardison."120 Both the Senate and House Reports contain the statement that "the principles enunciated by the Supreme Court in [Hardison] are not applicable to this legislation."121 Applying Hardison to construe the ADA is a clear deviation from congressional intent.122 Nevertheless, the

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118. Barnett, 535 U.S. at 403; Hardison, 432 U.S. at 73-75. The dissent in Hardison pointed out that the Court seemed "almost oblivious of the legislative history of the 1972 amendments to Title VII" in arriving at their conclusion. Hardison, 432 U.S. at 88 (Marshall, J., dissenting). The history of Title VII was far more instructive than the Court acknowledged. Id. At least two courts issued decisions questioning whether the EEOC guidelines were consistent with Title VII. Id. (citing Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided Court 402 U.S. 689 (1971); Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972)).

When Congress was reviewing Title VII in 1972, Senator Jennings Randolph informed the Congress of these decisions which, he said, had 'clouded' the meaning of religious discrimination. He introduced an amendment, tracking the language of the EEOC regulation, to make clear that Title VII requires religious accommodation, even though unequal treatment would result. The primary purpose of the amendment, he explained, was to protect Saturday Sabbatarians like himself from employers who refuse 'to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.' His amendment was unanimously approved by the Senate on a roll-call vote, and was accepted by the Conference Committee, whose report was approved by both Houses. Yet the Court today, in rejecting any accommodation that involves preferential treatment, follows the Dewey decision in direct contravention of congressional intent. Id. (citations omitted).

119. H.R. REP. No. 101-485, at pt. 2, at 68; S. REP. No. 101-116, at 36. In its holding, the Barnett Court failed to refer to both the House and Senate Reports, which reject the Hardison decision in the ADA's application. Barnett, 535 U.S. at 403.
121. Id.; S. REP. No. 101-116, at 36.
b. Utilizing the Rehabilitation Act to Interpret the ADA

The Barnett court found further support for its decision by referring to the Rehabilitation Act, which is linguistically similar to the ADA. The term reasonable accommodation in the ADA was modeled after the regulations issued by the EEOC in implementing the Rehabilitation Act. To a great extent the employment provisions of the ADA address a private employer’s duties, which are similar to the duties imposed on federal agencies and contractors under the Rehabilitation Act. Due to their common origin, courts rely on decisions analyzing the Rehabilitation Act to interpret the ADA. The Barnett court cited several decisions, which unanimously rejected the claim that a reasonable accommodation under the Rehabilitation Act requires trumping the seniority rights of other employees to reassign a disabled

123. Barnett, 535 U.S. at 403. As previously noted, Barnett failed to cite Eckles to support this proposition. Id. While the court in Eckles specifically addressed this apparent conflict between Hardison and the Senate and House Reports, it is unclear from Barnett whether the lack of deference to Eckles’ reasoning was an intentional deviation from this resolution or if the Court would resolve it in another way. See Leading Cases: III. Federal Statutes and Regulations: A. Americans with Disabilities Act, 116 HARV. L. REV. 342, 349-50 (2002) [hereinafter Leading Cases] (questioning the Court’s use of Title VII for guidance).


125. Title I of the ADA was modeled after the Rehabilitation Act. 29 U.S.C. §§ 791-794 (2002). The term reasonable accommodation in the ADA was seemingly taken from the regulatory language issued by the EEOC in implementation of the Rehabilitation Act. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996) (citing Vande Zande v. Wis. Dep’t of Admin., 44 F.3d 538, 542 (7th Cir. 1995); 29 C.F.R. § 1613.704 (2002); H.R. REP. No. 101-485, pt. 2, at 62; S. REP. No. 101-116, at 31). Moreover, the ADA directly refers to the Rehabilitation Act when it states, “nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.” 42 U.S.C. § 12201(a) (2002) (citation omitted) (emphasis added).

126. The Rehabilitation Act covers the U.S. Postal Service or any executive agency administering a federally assisted program or activity and prohibits discrimination based on a disability. 29 U.S.C. § 794(A).

127. Eckles, 94 F.3d at 1047-48 (citing Shea v. Tisch, 870 F.2d 786, 789-90 (1st Cir. 1989)); Mason v. Frank, 32 F.3d 315, 319-20 (8th Cir. 1994); Carter v. Tisch, 822 F.2d 465, 467-69 (4th Cir. 1987); Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985); Daubert v. United States Postal Serv., 733 F.2d 1367, 1370 (10th Cir. 1984)). It should be noted that the ADA intentionally departed from the language of the Rehabilitation Act. The ADA specifically stipulated that the existence of a CBA is but one factor in determining whether an undue hardship is present, not the determinative factor. H.R. REP. No. 101-485, pt. 2, at 63 (1990).
employee. However, these decisions should not have been utilized in the context of reassignment, as they are inapplicable in interpreting the meaning of reassignment within the ADA.

The Barnett court cited Carter v. Tisch, which held that the Rehabilitation Act does not require a disabled employee to be reassigned in contravention of a CBA’s seniority provision. However, the primary reason for the Carter court’s holding was actually “the overwhelming weight of authority” illustrating that reassignment is never a means of reasonably accommodating a disabled employee under the Rehabilitation Act. The Barnett court continued to rely on inapplicable precedent in Jasany v. United States Postal Service. This Sixth Circuit decision primarily focused on the fact that the employee was not a disabled individual under the Rehabilitation Act. Only after the Court decided that Jasany was not a disabled individual, did the Court discuss the issue of seniority rights and reasonable accommodations. The Sixth Circuit’s discussion of reassignment was only dicta and not controlling on the issue of whether a CBA is a per se bar to a disabled employee’s reasonable accommodation. Yet, the Barnett court cited to this decision as if it was controlling on the issue of whether a disabled employee’s reassignment is appropriate.

While the majority in Barnett was correct in looking to the Rehabilitation Act for guidance as to the term reasonable accommodation, they incorrectly applied its case precedent. The Barnett court failed to realize that there are substantial distinctions between the ADA and the Rehabilitation Act. The Rehabilitation Act precedent was inapplicable because it either did not require reassignment under any conditions, or held that the employee did not fall within the protection

128. Barnett, 535 U.S. at 403 (citing Eckles, 94 F.3d at 1047-48 (collecting cases); Shea, 870 F.2d at 790; Carter, 822 F.2d at 469; Jasany, 755 F.2d at 1251-52).
129. 822 F.2d 465 (4th Cir. 1987).
130. Id. at 469.
131. Id. at 467-69.
132. 755 F.2d 1244 (6th Cir. 1985).
133. Id. at 1248-50.
134. Id. at 1251-52.
of the Act. Under the Rehabilitation Act, even if there were a vacan
t position available, reassignment for a disabled employee would still be
denied as an unreasonable accommodation. The ADA expressly
includes "reassignment to a vacant position" as a reasonable
accommodation, which is a clear deviation from the Rehabilitation
Act. The ADA, unlike the Rehabilitation Act, does not carve out an
exception for bona fide seniority systems. Congress’ omission reflects
its intent to deviate from the Rehabilitation Act precedent when defining
reassignment to a vacant position under the ADA.

The Americans with Disabilities Act should not be interpreted to
apply a lesser standard than the Rehabilitation Act. When analyzing
the ADA, the Rehabilitation Act should be construed as a minimum
level of protection, not the ultimate standard. In other words, the
Rehabilitation Act should be viewed as a building block, which the
ADA incorporates and expands on to build an increasing scope of
protection for the disabled. The ADA includes more extensive
regulations and legislative history, granting courts greater guidance in
applying its rules and regulations. Relying on the strictly construed
Rehabilitation Act precedent would ignore the ADA’s intention to go
above and beyond the Rehabilitation Act when interpreting a disabled
employee’s reassignment to a vacant position.

Rehabilitation Act does not require reassignment as a reasonable accommodation); Davis v. United
Act, there is no requirement to reassign a disabled employee as a reasonable accommodation).

138. Jasany, 755 F.2d at 1244; Daubert, 733 F.2d at 1367 (holding that regardless of any
conflict with the CBA, the disabled employee failed to meet the criteria for Rehabilitation Act
protection).

139. See cases cited supra note 137.


141. Boyle, supra note 135, at 1030; see also William J. McDevitt, Seniority Systems and the
Americans with Disabilities Act: The Fate of “Reasonable Accommodation” After Eckles, 9 St.
Thomas L. Rev. 359, 372 (1997); Brian P. Kavanaugh, Note, Collective Bargaining Agreements
and the Americans with Disabilities Act: A Problematic Limitation on “Reasonable

142. See sources cited supra note 141.

143. 42 U.S.C. § 12201(a).

144. Id.

Boyle, supra note 135.

146. For further criticism of the Court’s use of the Rehabilitation Act, see Leading Cases,
supra note 123, at 350; Schoen, supra note 64, at 1414-15; sources cited supra note 141.
c. Interpreting the ADA’s Legislative History

The Barnett court cited several circuits, which all reached a similar conclusion though differed in their reasoning, in dealing with seniority and the ADA. In this regard, there have been three main lines of reasoning adopted in various degrees by these circuits, which analyze the ADA’s text, intent and legislative history. The Supreme Court, in rejecting the positions of US Airways, eliminated the rationales upon which the circuits argued that a per se bar was appropriate based on the text and intent of the ADA. By process of elimination, the Court’s reasoning relies on the lower courts’ interpretation of the legislative

147. Barnett, 535 U.S. at 403-04 (citing Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996)).

148. Id.

149. Id. at 399. US Airways argued that “reassignment to a vacant position” had a specialized meaning that precluded reassignment when confronted with seniority. Id. at 398. This reasoning was rejected as the Court saw no specific meaning behind the word vacant. Id. at 399.

150. US Airways argued that Congress’ intent in drafting the ADA was not to require reassignment when confronted with seniority. Barnett, 535 U.S. at 397-99. Numerous circuits interpreted the goal of the ADA as simply preventing discrimination against qualified individuals with disabilities, “no more no less.” Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995) (holding that the ADA did not require “affirmative action in favor of individuals with disabilities”); see also Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998) (stating that they had been unable to find in the ADA or Rehabilitation Act “a single ... case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate ... policy of the employer”); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (holding that the employer had no duty to reassign when the employer has “a business policy against the pertinent kind of transfer”); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 805 (5th Cir. 1997); Wernick v. Fed. Reserve Bank, 91 F.3d 379, 384 (2d Cir. 1996) (stating that the employer only had an obligation to treat the employee similar to other qualified candidates) (citing Sch. Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987) and Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035-36 (2d Cir. 1993) as primary support). The Barnett court explicitly rejects this rationale as it fails to recognize that the ADA sometimes requires preferences to achieve its goal of equal opportunity. Barnett, 535 U.S. at 397-98. For instance, accommodations such as changing existing facilities to make them useable by disabled individuals, job restructuring, modified work schedules and reassignment to a vacant position must be made available to disabled employees and not to nondisabled employees. 42 U.S.C. § 12111(9) (2002). Sometimes it is necessary to provide preferential treatment to eliminate discrimination. Barnett, 535 U.S. at 398 (stating that providing a preference in the form of an accommodation is not, by itself, enough to make the accommodation unreasonable). The preferential treatment required by the ADA is evident in the role reasonable accommodations play throughout the employment process. For example, the ADA requires employers to engage in a two-step analysis: (1) the employer must identify the essential functions of the job; and (2) the employer must determine whether the individual would be able to perform those essential functions with or without reasonable accommodations. 42 U.S.C. § 12111(8). An employer’s failure to provide a reasonable accommodation, without a showing of an undue hardship, would result in a violation of the ADA. 42 U.S.C. § 12112(b)(5)(a).
These circuits concluded that the legislative history of the ADA intended to exclude seniority rights when it stated bumping an employee from his position to create a vacancy for the disabled employee is not required for reassignment. Barnett's implicit endorsement of the lower court's interpretation of the legislative history is questionable.

The circuits utilized the ADA's legislative history to identify the scope of reassignment. A primary source of the ADA's legislative history is contained within the Congressional House Report, which concisely discusses its scope and terms. Eckles v. Consolidated Rail Corp., one of the cases cited by the Barnett decision, focused on the three paragraphs within this report, which specifically addressed reassignment as a reasonable accommodation.

152. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999); Feliciano v. Rhode Island, 160 F.3d 780, 787 (1st Cir. 1998); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996).
153. See, e.g., Smith, 180 F.3d at 1175; Eckles, 94 F.3d at 1047.
155. 94 F.3d at 1041.
156. Id. at 1049. We turn to the court's rationale in Eckles in interpreting the legislative history of the ADA, as it most thoroughly examines the approach adopted by the majority of circuits, and was implicitly adopted by the Supreme Court in Barnett. The relevant sections from the House Report state in full:

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of a disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered. The Committee also wishes to make clear [that] reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.

The section 504 regulations provide that 'a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.' The policy also applies to the ADA. Thus, an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job related and consistent with business necessity could be challenged under this Act.

The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if 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.

The first paragraph of the House Report lists reassignment as a possible reasonable accommodation, and then continues by stating *bumping* an employee out of a position to create a vacancy is never required to fulfill this accommodation.\(^{157}\) The *Eckles* court concluded that the House Committee stated that reassigning a disabled worker is never acceptable if it requires *bumping* another employee.\(^{158}\) According to this interpretation of the House Report, *bumping* occurs when an employee with a right to a particular position, either through seniority or by already occupying the position, is removed from the position by a disabled employee with lesser seniority.\(^{159}\) Consequently, the *Eckles* court held that the committee’s language prohibiting *bumping* reflects its intention to place a *per se* bar on a disabled employee’s reassignment when it implicates legitimate seniority rights.\(^{160}\)

Upon closer analysis, construing the legislative history as imposing a *per se* bar to reassignment when confronted with seniority rights leaves significant questions as to *Eckles’* and *Barnett’s* reasoning. Congress actually intended for there to be a case-by-case analysis utilizing seniority rights as one of the factors in assessing the reasonableness of reassignment. The *bumping* rationale presented by *Eckles* and adopted by other circuits is facially incorrect.\(^{161}\) The *Eckles* court’s willingness to change and underemphasize the most pertinent section of the legislative history is troublesome.\(^{162}\) The House Report attempts to make clear what role, if any, a seniority system would have on performing reasonable

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158. *Eckles*, 94 F.3d at 1050.

159. *Id.*

160. *Id.*

161. The court’s reasoning in *Eckles* is suspect from the outset. In *Eckles*, the court held that no preferential treatment was required on behalf of the disabled. *Id.* at 1051-52. In contrast to *Eckles*, the *Barnett* Court implies that some level of preferential treatment is necessary. US Airways, Inc. v. Barnett, 535 U.S. 391, 397-98 (2002). In imposing a *per se* bar to reassignment, the *Eckles* court failed to note that if Congress intended for a disabled employee to be treated similar to other employees, it would not have been necessary to inform employers that they need not *bump* another employee out of a position in favor of a disabled employee. *Eckles*, 94 F.3d at 1050. The prohibition against *bumping* should have suggested to the *Eckles* court, as it has to other courts, that some level of preferential treatment is necessary to accommodate a disabled employee by reassigning him. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302-03 (D.C. Cir. 1998) (in banc). Disabled employees should be given some level of preferential treatment compared to their non-disabled coworkers when competing for positions. *Id.* at 1304.

162. *Eckles*, 94 F.3d at 1050.
accommodations in favor of a disabled employee.\textsuperscript{163} Congress stated that seniority systems could be a relevant factor when determining whether an accommodation is reasonable.\textsuperscript{164} In particular, the ADA directly refers to seniority systems by stating:

[I]f a collectively bargained 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.\textsuperscript{165}

The \textit{Eckles} court construed Congress’ instruction for the agreement to “not be determinative on the issue” as addressing a topic outside of the paragraph within which it is contained.\textsuperscript{166} The Seventh Circuit concluded that this clause is actually dealing with the prohibition of utilizing collectively bargained agreements to circumvent the ADA, instead of using the clause to assess the reasonableness of an accommodation.\textsuperscript{167} The \textit{Eckles} court maintained the emphasis of this section is on ensuring that the covered entity cannot use collectively bargained agreements to institute policies, which would otherwise be prohibited by the ADA.\textsuperscript{168}

The \textit{Eckles} court’s expansion of the ADA’s legislative history is unnecessary. Congress considered the role that a CBA would have in determining reasonable accommodations. Congress stated that “an employer cannot use a [CBA] to accomplish what it otherwise would be prohibited from doing under this Act.”\textsuperscript{169} There is no indication from Congress that a CBA would exclusively determine whether it is discriminatory in its terms.\textsuperscript{170} Removing the non-determinative language to apply to this circumstance would be superfluous.\textsuperscript{171} When read as a whole, it is clear that Congress intended for the non-determinative language to have a definite impact. The paragraph within which this

\begin{itemize}
  \item \textsuperscript{163} H.R. REP. NO. 101-485, pt. 2, at 63.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. (emphasis added). To view this section in full, see \textit{supra} note 156.
  \item \textsuperscript{166} \textit{Eckles}, 94 F.3d at 1050.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} H.R. REP. NO. 101-485, pt. 2, at 63.
  \item \textsuperscript{170} \textit{See generally} H.R. REP. NO. 101-485, pt. 2.
  \item \textsuperscript{171} It is already discriminatory for a covered employer to decline to take reasonable steps to accommodate an employee’s disability or use a CBA to accomplish this goal. 42 U.S.C. § 12112(b)(5)(A) (2002).
\end{itemize}
clause is contained pertains to reasonable accommodations.\textsuperscript{172} Within this context, Congress intended to clarify that a seniority system is merely one factor which needs to be weighed when assessing whether a reasonable accommodation would impose an undue hardship.\textsuperscript{173} Without a clarification by Congress, an employee’s seniority rights might have been thought to automatically bar reassignment as a reasonable accommodation. The legislative history clearly points out that seniority systems are a relevant factor in determining whether reassignment is a reasonable accommodation, but are not necessarily determinative.\textsuperscript{174}

Viewed as a whole, the \textit{Barnett} court’s conclusion that reassignment will almost always be unreasonable appears highly flawed. Whether it is the Court’s misapplication of the Rehabilitation Act or Title VII precedent, or their implicit reliance on a questionable interpretation of the legislative history, the Court utilized precedent which it should have rejected as logically unsound. At the very least, the \textit{Barnett} court should have analyzed its holding that reassignment is unreasonable most of the time with a clear explanation of its rationale. It is in this context that the Court’s ultimate holding, a rebuttable presumption in favor of seniority systems, is improper. In addition, focusing reassignment requests on undefined employee expectation levels seems suspect from the outset.

2. An Employee’s Expectation of Consistent Uniform Treatment

Once the \textit{Barnett} court found that seniority would be a bar to reassignment in “the run of cases,” it preceded to clarify when exceptions may be possible.\textsuperscript{175} The disabled employee now has the burden of showing special circumstances that warrant the requested accommodation in his particular case.\textsuperscript{176} These special circumstances consist of the disabled employee demonstrating that his coworkers have a sufficiently low expectation of consistent, uniform treatment of the seniority system.\textsuperscript{177} The majority’s emphasis on the coworkers’ expectations of seniority rights left a number of questions unanswered:

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  \item \textsuperscript{172} H.R. REP. NO. 101-485, pt. 2, at 63.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{176} Id. at 405 (citing Woodman v. Runyon, 132 F.3d 1330, 1343-44 (10th Cir. 1997); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 137 (2d Cir. 1995)).
  \item \textsuperscript{177} Id. The expectation of seniority would have to be reduced to the point where one more departure to accommodate a disability would not likely make a difference. Id. The court laid out a number of benefits involved in the typical seniority system, such as job security, steady and
\end{itemize}
(1) By adopting what amounts to a rebuttable presumption in favor of the legitimacy of seniority systems, what will constitute a lowered employee expectation?

(2) Should the courts look to the administrative policies in place or their implementation?

(3) Can an employer reserve himself the right to make exceptions to the seniority system but still not have lowered employee expectations of the seniority system enough to grant a disabled employee’s reassignment request?

(4) Who will be situated appropriately to determine if an exception does in fact exist?

(5) How will this coexist with the employer’s mandatory obligation under the ADA to partake in an interactive process?

(6) In light of Barnett, will an employer ever be inclined to state that an exception does in fact exist?

These questions fall into two categories: what constitutes a lowered employee expectation as required by Barnett and how the Court’s decision affects the ADA’s interactive process. In its effort not to impose a per se bar to reassignment when a seniority system exists, the Barnett Court permitted the disabled employee to illustrate special circumstances which were intended as a benefit in providing him with an opportunity to be reassigned. However, a more thorough analysis of each of these concerns will reveal that the Court created a standard which is difficult to implement, conflicts with other provisions of the ADA and will ultimately lead to less accommodations for the disabled than intended by Congress.

a. Would One More Exception Make a Difference?

An example of what constitutes special circumstances is an employer who frequently exercises his right to alter the seniority system. The employer would have to exercise his right, to the point where one more exception to the seniority system, such as predictable advancement, limiting unfairness in employment decisions, and encouraging employees to invest in the company. Id. at 404. “Most important for present purposes, to require the typical employer to show more than the existence of a seniority system might well undermine the employees’ expectations of consistent, uniform treatment—expectations upon which the seniority system’s benefits depend.” Barnett, 535 U.S. at 404.

178. For instance, in Barnett, US Airways reserved the right to make exceptions to its seniority policy. Id. at 399.
179. Id. at 405.
180. Id. at 405-06.
accommodating the disabled, would not likely make a difference.\textsuperscript{181} This standard does not accurately allow the employer to assess when his employees’ expectations are actually lowered.\textsuperscript{182} It places the focus of the inquiry on the coworker’s view of his rights to a particular position, rather than focusing on how the seniority right was created or how exceptions are made to the policy.\textsuperscript{183} Justice O’Connor’s concurrence suggests a different focus.\textsuperscript{184} In addressing whether the condition of “reassignment to a vacant position” is satisfied, Justice O’Connor refers to the legally enforceable right an employee has to a position.\textsuperscript{185} A position is considered vacant if no employee has a legally enforceable contractual right to that position.\textsuperscript{186} An employee would not have a legally enforceable right to a position in a workplace with an unenforceable seniority policy.\textsuperscript{187} In such a circumstance, a position would be considered vacant which would fulfill the disabled employee’s request for reassignment.\textsuperscript{188}

While Justice O’Connor conceded her opinion on the definition of the appropriate means to reassignment in order to achieve a majority in this case,\textsuperscript{189} the approach she employed raises an interesting quandary: when does an employee’s expectation of seniority truly become affected? When an employer specifically reserves the right to unilaterally change the seniority system, an employee should view his rights to any position as limited or nonexistent.\textsuperscript{190} For example, US Airways’ seniority policy states that it is not a contract nor does it create any legally enforceable obligations.\textsuperscript{191} Furthermore, US Airways reserved the right to “change any and all of the stated policies and procedures . . . at any time, without advance notice.”\textsuperscript{192} Implicit in the

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\item \textsuperscript{181} \textit{Id.} at 405.
\item \textsuperscript{182} An employee is not similarly situated to the employer in efficiently recognizing the following: whether exceptions have been made, how frequently, and to what extent; the reaction of the workforce; and ultimately, whether the employee expectation was sufficiently affected.
\item \textsuperscript{183} \textit{Barnett}, 535 U.S. at 404-05 (focusing on whether the “employee’s expectation of consistent, uniform treatment” would be undermined).
\item \textsuperscript{184} \textit{Id.} at 408-11 (O’Connor, J., concurring).
\item \textsuperscript{185} \textit{Id.} at 409-10.
\item \textsuperscript{186} \textit{Id.} at 409.
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Barnett}, 535 U.S. at 410 (O’Connor, J., concurring).
\item \textsuperscript{189} \textit{Id.} at 41. Justice O’Connor joined the Court’s opinion even though she was troubled by the majority’s reasoning, because it is “important that a majority agree on a rule when interpreting statutes” and her standard would often yield the same results as the Court. \textit{Id.}
\item \textsuperscript{190} It is based on this principle that this note argues for an alternate approach to be adopted by courts in interpreting \textit{Barnett}.
\item \textsuperscript{191} \textit{Barnett}, 535 U.S. at 410.
\item \textsuperscript{192} \textit{Id.}
\end{itemize}
majority’s holding is that this particular clause would not be sufficient to diminish employee expectation; actual exceptions to the policy would have to be implemented by the employer.\textsuperscript{193}

Additionally, the Court fails to note any benefits to employees from reassignment to a vacant position, which might mitigate an employee’s expectation of seniority.\textsuperscript{194} Any employee may potentially become disabled and fall within the protection of the Act.\textsuperscript{195} The ADA provides reassignment for current employees, not job applicants.\textsuperscript{196} Reassignment to a vacant position was designed to benefit all employees. For example, Barnett was a fully functioning employee before he was injured.\textsuperscript{197} Any benefit he would have received by way of a reasonable accommodation would come to him as both a disabled person and current employee.\textsuperscript{198} To view the benefits of reassignment as not part of the overall expectation of another employee would be to view it against a potential future interest of that employee.\textsuperscript{199}

Furthermore, the Supreme Court, in arriving at the standard articulated in \textit{Barnett}, seems to contravene its own decision in \textit{Franks v. Bowman Transportation Co.}\textsuperscript{200} In \textit{Franks}, a Title VII case, the Court held that seniority provisions in CBAs should not be the only factor considered when determining an accommodation.\textsuperscript{201} The Supreme Court found that while accommodating the racially discriminated employee would have some detrimental impact on his coworkers’ interests, “employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.”\textsuperscript{202} The public policy of ending racial discrimination merited infringing upon a seniority system.\textsuperscript{203} Similarly, when the \textit{Barnett} court was faced with the conflict between the ADA and seniority systems, the Court

\textsuperscript{193} See \textit{id.} at 405.
\textsuperscript{194} \textit{Id.} at 404 (noting the benefits of seniority systems on the workforce).
\textsuperscript{195} See, e.g., \textit{id.} at 394; Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1043 (7th Cir. 1996).
\textsuperscript{196} 29 C.F.R. app. § 1630.2 (o), at 356 (2002).
\textsuperscript{197} \textit{Barnett}, 535 U.S. at 394.
\textsuperscript{198} Further, the Court fails to consider other scenarios in which a reasonable accommodation will benefit the disabled employee as well as his coworkers. For instance, moving a disabled employee to a new position necessarily creates a vacancy, which may be more desirable to a coworker with greater seniority than the position to which the disabled employee was reassigned. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1305 n.29 (D.C. Cir. 1998) (in banc).
\textsuperscript{199} The Court fails to recognize the appropriate level of employee expectation based on the benefits of reliable workplace policies with the benefits potentially due to any member of the workforce who might potentially call on the ADA to accommodate him.
\textsuperscript{200} 424 U.S. 747 (1976).
\textsuperscript{201} \textit{Id.} at 778-79.
\textsuperscript{202} \textit{Id.} at 778.
\textsuperscript{203} \textit{Id.} at 779.
should have assessed the totality of the situation and not exclusively focused on the coworkers’ view of their seniority rights.

The history of individual employee rights supports the view that such a high level of employee expectation is not an appropriate standard. Individual employee rights until the 1970s primarily stemmed from traditional contract law. An employee negotiated terms, such as job security and benefits, directly with the employer. Due to lack of leverage, most employees were unable to place themselves in a position to negotiate with their employers on equal terms, and often received rights more out of an employer’s benevolence than bargaining strength. Consequently, through the 1970s, employees were almost always on the losing side of these traditional contract principles. To a lesser degree, this policy continues today. Courts have expanded these traditional contract principles to meet an employee’s rising expectation of protection. Still, there remains a lack of uniformity under various state laws in determining the requirements of an enforceable promise in an at-will setting. This is evidenced by the fact that comparable factual situations often yield different outcomes.

By focusing on whether the rights of the disabled employee through his reassignment would conflict with the rights of his coworkers,

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204. There is no doubt that creating and enforcing employee rights is central to maintain an efficient and productive workplace. Brief of Amici Curiae for Air Transport Association of America, Inc. and Airline Industrial Relations Conference at 7, Barnett v. US Airways, Inc., 535 U.S. 391 (2002) (No. 00-1250) (contending that even small changes in the operation of an employer policy could lead to “significant consequences” (citing Bertulli v. Indep. Ass’n of Cont’l Pilots, 242 F.3d 290 (5th Cir 2001))). However, elevating them in the manner adopted by the Court is not supported by the reality of their enforceability.


206. FELIU, supra note 205, at 7.

207. Id.

208. Id. at 8.

209. Id. The 1990’s reflected a trend towards treating certain traditional contract doctrines, such as the employment-at-will doctrine, as a presumption that may be overcome, as opposed to a hard and fast rule. Id. at 31 (defining the employment-at-will doctrine as granting the employer the authority to terminate an employee at-will with no repercussions).

210. FELIU, supra note 205, at 31-32.

211. Id. at 35. In the nonunion setting, an employer will take seniority into account seniority, but may also arbitrarily ignore it. Brief of Amici Curiae for the American Federation of Labor and Congress of Industrial Organizations at 18, Barnett v. US Airways, Inc., 535 U.S. 391 (2002) (No. 00-1250) (citing R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 123 (1984)).
the Barnett court failed to consider all the necessary factors.\textsuperscript{212} Placing the emphasis on the employee’s view of his expectation is inconsistent with prior precedent and fails to acknowledge the benefits of reassignment to the workforce at large. Additionally, this exception leaves a vague understanding of what would properly impact employee expectation.

b. What Happened to the ADA’s Interactive Process?

Barnett is also troublesome since it appears to directly conflict with another mandatory obligation of the ADA. The ADA’s requirement of an interactive process between the employer and the disabled employee will be undermined by a reasonable accommodation analysis that focuses on the employee’s expectation of the seniority system.\textsuperscript{213} The interactive process is the core of the ADA and vital to accomplishing its goals.\textsuperscript{214} It allows the disabled employee and the employer to collaborate and reach an accommodation which suits both their needs.\textsuperscript{215} By placing the burden on employers to determine if the employee expectation has been affected, the Barnett decision actually weakens the effectiveness of the ADA in the workplace.

Both the legislative history of the ADA and the regulations issued by the EEOC set forth the framework for reaching a reasonable accommodation.\textsuperscript{216} The employer must make a reasonable effort to consult with the disabled employee regarding the appropriate

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\item \textsuperscript{212} If employee expectation is weighed as a factor, an employee with greater seniority to a position is not necessarily subject to hardship every time a disabled worker is reassigned to that position. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1305 n.29 (D.C. Cir. 1998) (in banc).
\item \textsuperscript{213} Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114 (9th Cir. 2000), rev’d sub nom. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (joining explicitly with the vast majority of the other circuits in holding that “the interactive process is a mandatory rather than a permissive obligation ... under the ADA”).
\item \textsuperscript{214} Id. at 1113. The interactive process is the first step that should be taken in the reasonable accommodation process and, as a result, it is the first step in truly eliminating discrimination against the disabled in the workplace.
\item \textsuperscript{215} Id. “While employers have superior knowledge regarding the range of possible positions and can more easily perform analyses regarding the ‘essential functions’ of each, employees generally know more about their own capabilities and limitations.” Id.
To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3) (2002).
\end{enumerate}
accommodation through a flexible interactive process.\(^{217}\) This consists of either an employee requesting that the employer accommodate his disability or the employer realizing that an accommodation is needed and begins the process of furnishing the disabled with such an accommodation.\(^{218}\) Both the employer and the disabled employee are directly involved in determining an accommodation in order to avoid an undue hardship for the employer and to overcome the disabled employee’s limitations.\(^{219}\) By working together, both the needs of the employer and the disabled employee are met as they are in the best position to know what they are each ultimately seeking from the process.\(^{220}\)

Almost all of the circuits have held an employer has a mandatory obligation to engage in the interactive process.\(^{221}\) Most notably, the Ninth Circuit decision in Barnett stressed the importance of the interactive process in holding that the ADA requires a case-by-case analysis.\(^{222}\) In particular, the Ninth Circuit found that a *per se* bar to reasonably accommodating a disabled employee when it contravenes a seniority system would eliminate the goal of the interactive process.\(^{223}\) According to the Ninth Circuit, the interactive process is “the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an ‘undue burden’ on employers. Employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have.”\(^{224}\)

\(^{217}\) Barnett, 228 F.3d at 1113.

\(^{218}\) Id. at 1112. Furthermore, the EEOC mandates an interactive process and lays out the proper steps needed to accomplish it. Id. The EEOC guidelines state:

An employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.

\(^{219}\) Id. (quoting EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compl. Man. (CCH) §902 No. 915.002, at 5459 (March 1, 1999)).

\(^{220}\) Id.

\(^{221}\) Barnett, 228 F.3d at 1113.

\(^{222}\) Id. at 1112-13 (citing Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172; (10th Cir. 1999) (en banc); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999); Bultemeyer v. Fort Wayne Cmty. Schs., 100 F.3d 1281, 1285 (7th Cir. 1996); Taylor v. Principal Fin. Group Inc., 93 F.3d 155, 165 (5th Cir. 1996). *But see* Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997)).

\(^{223}\) Id. at 1120.

\(^{224}\) Id.
On the other hand, the Supreme Court’s holding in *Barnett* completely ignores the interactive process.\(^{225}\) According to the Court, if a disabled employee can show special circumstances then the employer does not automatically win on summary judgment.\(^{226}\) An employer would be able to retain the right to make exceptions to the seniority policy and even make limited exceptions while maintaining the status of a valid seniority system that will bar reassignment.\(^{227}\) Only if an employer continuously makes exceptions would he risk invalidating the seniority system, resulting in the obligation to accommodate the disabled employee and potentially every other future disabled employee in the company.\(^{228}\) Employers will now be allowed to make exceptions at-will to their seniority system, outside the ADA context of reasonably accommodating the disabled. In addition, the employer will not willingly reassign a disabled employee in fear that the employee’s expectation of adhering to the seniority system will be lowered.\(^{229}\) This will ultimately reduce the employer’s incentive to engage in the interactive process and will eventually remove the employer’s need to fully comply with the ADA.\(^{230}\) The burden of identifying the reasonable accommodation will now be placed entirely on the disabled employee.\(^{231}\) As a result, many disabled employees will not be accommodated because they do not possess the employer’s knowledge of the workplace.\(^{232}\)

While the Supreme Court in *Barnett* only granted review of reassignment in the context of seniority and not the interactive process,


\(^{226}\) *Id.* at 406. An example of a special circumstance is where “the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability will not likely make a difference.” *Id.* at 405.

\(^{227}\) See *id.* at 405-06.

\(^{228}\) See *id*.

\(^{229}\) See *Barnett*, 535 U.S. at 405-06.

\(^{230}\) An employer will be less likely to make exceptions to the seniority system even if the accommodation may be reasonable in that particular situation. The employer will fear that if he makes one more exception, his whole seniority system may become a nullity. As a result, the employer would not whole-heartedly engage in the interactive process. According to the Ninth Circuit’s decision in *Barnett*, if the employer continually denies the proposed accommodations without valid consideration then he “is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended.” Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000), rev’d sub nom. US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

\(^{231}\) *Barnett*, 535 U.S. at 405.

\(^{232}\) Without an incentive for an employer to engage in the interactive process and inform the disabled employee of the level of employee expectation as to uniform treatment of the seniority system, most requests for accommodations will not continue past the summary judgment stage.
the Court seems to completely ignore the factual basis upon which Barnett is founded. US Airways had outright denied each of Barnett’s requests to be reassigned. During this time, the vast majority of circuits had held that there was a per se bar to reassignment if confronted with seniority rights. The Ninth Circuit held that a triable issue of fact remained as to whether US Airways violated the interactive process. The Supreme Court did not address what impact the employer’s belief that he did not have to reassign the disabled would have on his obligation to engage in the interactive process. Due to his self-interest, the employer is not in a position to determine his employees’ expectations. While the Court could have adopted a clearer standard to address the problem presented in Barnett, it chose to establish an ambiguous standard that will leave employers assuming they do not have to reassign, thereby defeating the interactive process.

IV. PROPOSED RECOMMENDATION FOR RECONCILING EMPLOYEE EXPECTATIONS AND REASONABLE ACCOMMODATIONS

While the Barnett court properly directed analysis of reassignment requests towards employee expectation, the Court has fallen short in arriving at a well reasoned, clearly defined standard. Serious inadequacies are created by setting a disabled employee’s standard of proof at such a high level. In an area of law in which the Court could have set up a number of different proof structures, the Court has set the bar in the wrong place. Disabled employees will most likely be precluded from the very accommodation, which Congress intended for them. By starting with the premise that seniority is a bar to

233. Id. at 393-94.
234. Barnett, 228 F.3d at 1116-17.
235. See cases cited supra note 12.
236. Barnett, 228 F.3d at 1117.
238. More likely than not, the employer will presume that his employees’ expectations parallel his own and not the employee’s actual expectations.
239. Prior to Barnett, courts consistently considered the rights of other workers to assess whether the provisions of the ADA must be complied with. See, e.g., Kellogg v. Union Pac. R.R. Co., 233 F.3d 1083, 1089 (8th Cir. 2000); 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).
240. The Court chose to reject the approaches adopted by the lower courts and imposed a new system of analysis. Barnett, 535 U.S. at 398-400, 406 (rejecting both US Airways’ and Barnett’s positions).
241. The Court’s view of reassignment was improperly focused. See supra Part III.
reassignment in the run of cases, the standard for overcoming that burden becomes exaggerated. Courts should not refer to an employee's expectation of the seniority policy, where one more exception to the policy is irrelevant.242 Instead, courts should look at the realities of the workplace structure and the conditions of the seniority policy itself.243 Workplace contracts and handbooks lay out whether an employer has reserved the right to make exceptions to the seniority system. The expectation of employee rights should be set at a lower level than the Court indicated and should require an undue hardship analysis in more than just a few cases.244

This approach is consistent with the principle enunciated by Congress when it required that bona fide seniority policies should not circumvent provisions of the ADA.245 Once an employer reserves the right to make exceptions, whether in a CBA or a unilaterally imposed contract, an employee should be on sufficient notice, from that point on, that the seniority policy will not always be followed. Particularly, the employee should now be aware that the employer could intentionally circumvent the seniority policy in order to comply with the ADA.246 Just as employees know the employer will have to make other reasonable accommodations for disabled employees, which are not available to the workforce at large, they will now add reassignment to

242. This view of reassignment is clearly a direct offspring of the Court's opinion that reassignment will be unreasonable in the run of cases. Barnett, 535 U.S. at 403. In almost every case an employee will be of the opinion that his seniority rights should not be further diminished regardless of previous exceptions to the policy. This would be especially true if an employee lacked legal recourse to protect his rights. In such a case, the employee would certainly try to hold on to whatever protection he could obtain and consider any additional exceptions improper.

243. For example, US Airways included many conditions in its seniority policy, such as providing that any actions taken as part of compliance with federal law could not be challenged. Brief for Respondent at 10-11, US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250). According to the suggested approach, an employee would have been on notice from the outset of his employment that his expectation of seniority rights may be usurped by compliance with the ADA.

244. According to the Court's standard, the appropriateness of reassignment rests more often with the disabled employee's ability to prove the requisite reasonableness. See Barnett, 535 U.S. at 406. By holding that the analysis will most likely end at the first stage, courts will no longer reach the issue of whether the accommodation would constitute an undue hardship for the employer. See id. at 403.

245. An employer is prohibited from using a CBA to accomplish what would otherwise be prohibited under the ADA. H.R. REP. NO. 101-485, pt. 2, at 63 (2002). Additionally, seniority rights must be established as either bona fide or legitimate to even be considered a bar to reassignment. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1046 n.7 (7th Cir. 1996).

246. The appropriate level of employee expectation will be established at the moment of employment and will not be subject to constant evolution.
that list.\textsuperscript{247} By reserving the right to make exceptions to a seniority policy, the employer is indicating that it is not a \textit{per se} undue hardship to make exceptions to that policy.\textsuperscript{248}

A court’s analysis would be significantly simplified by this approach. If an employer has not reserved the right to make exceptions to the seniority policy, then the employee expectation would rise to the level of necessitating summary judgment in favor of the employer. In the narrow circumstance where an employer makes exceptions to a seniority policy without having first reserved the right to do so, a court may use the following factors to determine if reassignment should be considered: (1) have the state’s employment laws created a legally enforceable right to that position for the coworker who is being displaced?\textsuperscript{249} and (2) if, the state’s employment laws do not create an enforceable right for that coworker, then the frequency of exceptions to the employer’s policy becomes relevant.

Viewing reassignment in this manner has many benefits over the Court’s current approach. Notably, it provides a definable approach to reassignment that will require employers to consider the rights they reserve in their policies and handbooks.\textsuperscript{250} The \textit{Barnett} court’s standard

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\textsuperscript{247} \textit{Barnett}, 535 U.S. at 398 (finding that an accommodation provides a preference for the disabled does not automatically mean the request is unreasonable) (citing Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 (1st Cir. 2000) (requiring leave beyond that which is allowed under the company’s own leave policy); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 699 (7th Cir. 1998) (requiring an exception to the employer’s neutral “physical fitness” job requirement)).

\textsuperscript{248} It is critical for employers to reserve the right to make exceptions to their seniority policy as they may need to utilize this right in the future. See sources cited infra note 249.

\textsuperscript{249} If the employment policy gives rise to a legally enforceable right and no exception is provided for, then the Congressional instruction to not bump an employee out of his position would be applicable. H.R. REP. No. 101-485, pt. 2, at 63 (1990). In such a case, a coworker would have an unfettered expectation of his rights, which should be viewed as insurmountable against reassignment requests. Aside from CBAs, employment policies often give rise to enforceable contract rights. Brief for Petitioner at 40, US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250) (citing EEOC v. Sara Lee Corp., 237 F.3d 349, 355 (4th Cir. 2001); 1 \textsc{Stephen P. Pepe} \& \textsc{Scott H. Dunham}, Avoiding and Defending Wrongful Discharge Claims § 2.23 (2000)).

“"The majority view is that employee handbooks and personnel manuals can... form a binding employment contract either as an implied or an express promise."” Brief for Petitioner at 40, Barnett v. US Airways, Inc., 535 U.S. 391 (2002) (No. 00-1250) (quoting 1 \textsc{Stephen P. Pepe} \& \textsc{Scott H. Dunham}, Avoiding and Defending Wrongful Discharge Claims § 2.23 (2000)). Further, retention of the right to modify a seniority policy may be enough to rebut a claim that a contract right has been created. Cheryl L. Anderson, “Neutral” Employer Policies and the ADA: The Implication of US Airways, Inc. v. Barnett Beyond Seniority Systems, 51 Drake L. Rev. 1, 31 (2002) (citing \textsc{Mark A. Rothstein et al.}, Employment Law 677-79 (2d ed. 1999)).

\textsuperscript{250} The ability to make exceptions to seniority policies is relevant to the employer and employee because both now have an increased ability to comply with the ADA. H.R. REP. No. 101-
leaves disabled employees in a state of uncertainty as to their rights that will require continuing litigation. Further, by lowering the level of requisite employee expectation, courts will be able to quickly identify whether the dispute in question has merit. The *Barnett* decision is markedly weak in that it places a heavy burden on the disabled employee. The employer, not the employee, is in the best position to evaluate employee expectation at any given time. Additionally, by establishing a more facially recognizable standard, disabled employees will easily recognize whether they meet their required burden; thereby reducing litigation and increasing reassignment opportunities when warranted.

As currently constructed, the *Barnett* decision does not maintain a natural balance of the equities in most workplaces. Ordinarily, the conflict between the employer’s need to maintain organizational flexibility and the desire to have a reliable seniority system would balance each other out. According to *Barnett*, the employer is now permitted to make exceptions to the seniority system, yet he is not obligated to reassign his disabled employees. According to the proposed approach, if the employer wants to maintain organizational flexibility, he would be obligated to reassign the disabled employee. If the employer is going to have rigid organizational inflexibility, then reassignment would not be appropriate for a disabled employee because reassignment would not be appropriate for any employee.

A triable issue of fact existed as to whether US Airways violated the interactive process, in a circumstance where they had reason to

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485, pt. 2, at 32; S. REP. No. 101-116, at 9 (finding that two-thirds of Americans between the ages of 16 and 64 with a covered disability were not working at all).

251. The Court’s decision causes uncertainty regarding the relationship between the ADA and the infinite variety of seniority programs. *Barnett*, 535 U.S. at 412 (Scalia, J., dissenting) (noting that the Court was “[i]ndulging its penchant for eschewing clear rules that might avoid litigation”) (citation omitted).

252. A broad reading of *Barnett* would make it significantly more difficult for disabled employees to obtain reasonable accommodations, including reassignment. Anderson, *supra* note 249, at 36.

253. The employer is in the best position to know if exceptions have been reserved, how frequently they have been made, the scope of the seniority policy, and the degree to which reliance has been created. Given that *Barnett* should have a detrimental effect on the employer’s willingness to engage in the interactive process, the disabled employee has been placed at a significant disadvantage. See *supra* Part III.C.2.b.

254. An example of organizational flexibility is reserving the right to make exceptions to a seniority system.

255. *See Barnett*, 535 U.S. at 405-06.
believe that they had no duty to reassign Barnett.\footnote{256} The Court’s decision, as currently constructed, did nothing to address or correct that outcome.\footnote{257} By establishing a more facially recognizable standard, an employer would be unable to hide his noncompliance with the ADA behind the belief that the reasonable accommodation is not warranted. Employers would be on notice that they must engage in the interactive process if they want to reserve the right to make exceptions to their seniority policies. Thus, lower courts should interpret \textit{Barnett} to be consistent with all facets of the ADA and to impart protection to disabled employees and coworkers alike.

\section*{V. CONCLUSION}

The Supreme Court, in \textit{Barnett}, attempted to resolve the conflict between the ADA’s provision of reassignment to a vacant position and maintaining the seniority rights of the workforce at large. The \textit{Barnett} opinion outlined the appropriate method for determining when it would be acceptable to infringe on an employee’s expectation of consistent treatment of the seniority policy. According to the Court, reassigning a disabled employee would be appropriate if the exception to the seniority system would not affect his coworkers’ expectations. This was not meant to be exhaustive of all the circumstances where reassignment would be permissible. However, the Court clearly stated that for reassignment to be acceptable there must be virtually no impact on the disabled employee’s coworkers.

The \textit{Barnett} court attempted to strike a balance between the purpose of the ADA and maintaining the rights of employees in the workplace. It would seem that the Court has failed to accomplish this goal. Not only has the reasonable accommodation of reassignment been virtually eliminated, but also the ADA’s mandate of an interactive process has been discouraged. Further, the \textit{Barnett} court adopted a level of employee expectation of seniority protection that is not supported by the language or intent of the ADA.

This note is advocating for courts, in applying reassignment as a reasonable accommodation, to effectively enforce the provisions of the ADA while still protecting employee seniority rights. The permissible

\footnote{256} Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000), \textit{rev’d sub nom.} US Airways, Inc. v. Barnett, 535 U.S. 391 (2002). US Airways outright rejected each of Barnett’s proposed accommodations and suggested only that Barnett apply for “any position for which he was qualified given his restrictions and for which he had sufficient seniority.” \textit{Id.}

\footnote{257} See generally \textit{Barnett}, 535 U.S. 391.
level of impact on employees’ expectations of their rights should be lowered. Courts should look to the terms of the seniority policy itself to determine whether exceptions should be made. If the employees are on notice that exceptions can be made to their seniority system, then their expectation of rights should be considered mitigated so as to require compliance with the ADA.

Ultimately, the Barnett decision fails to acknowledge the nature of a hierarchical competitive seniority system. With each advancement within the system, someone else will invariably be adversely affected by that advancement. The Barnett court should have acknowledged that some level of infringement, with proper notice, is both appropriate and necessary to continue to implement the worthy goal of the ADA: providing disabled employees a chance to realize their potential as fully integrated members of the workforce.

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