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Transfer as an Accommodation: Standards from Discrimination Cases and Theory

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ABSTRACT

This article explores the conflict between the desire of an employee with a disability to transfer as an accommodation and an employer's belief that another applicant for that position is better qualified. Federal circuit courts disagree as to whether the accommodation requirements of the Americans with Disabilities Act extend to the transfer of an employee as an accommodation if the employer believes that some other person is better qualified for that position. After exploring this conflict among the courts, a review of cases where an applicant for hire or promotion has alleged discrimination provides guidance for courts reviewing the denial of a transfer as an accommodation. As in hiring and promotion cases, courts reviewing denials of transfers as accommodations should engage in an in-depth analysis of the legitimacy of the employer's reasons to resolve these claims. Social science research that supports a substantive review of employer's reasons for denying a transfer as an accommodation is also reviewed. Without objective criteria and a structured process, employers' decisions can be influenced by stereotypes and other biases which disadvantage members of protected groups.

Transfer as an Accommodation: Standards from Discrimination Cases and Theory[1]

Stacy A. Hickox[2]

An employee with a disability may become unable to perform the duties of her position and seek a transfer as an accommodation. This transfer can be essential to the continuation of her employment. Yet some courts allow an employer to deny such an accommodation if another applicant for that position is believed to be better qualified. Currently, the federal appellate courts are divided regarding the requirement that an employer transfer an employee as an accommodation where the employer believes that some other person is better qualified for that position. This article will suggest an approach to resolve this dispute between federal circuit courts regarding the reasonableness of such an accommodation for an employee with a disability.

Under the accommodation requirement of the Americans with Disabilities Act (ADA), employers should be required to establish that providing a transfer to a person with a disability would impose an undue hardship, rather than simply asserting that another person is more qualified for that position. This approach is supported by the affirmative requirement to accommodate included in the ADA.

A review of cases where an applicant for hire or promotion has alleged discrimination provides further insight into how courts should review the denial of a transfer as an accommodation. Like the cases involving a transfer, employers often justify their failure to hire or promote a member of a protected class based on that employer's assessment of the applicants' relative qualifications. The applicant then produces evidence that the employer's reason is a pretext for discrimination. Courts often engage in an in-depth analysis of the employer's reasons to resolve these claims, and the same type of review can be used when an employer refuses to provide a transfer as an accommodation because it believes that another applicant is better qualified. This same type of analysis should be used to determine whether a transfer of an employee with a disability would impose an undue hardship on the employer.

Social science research also supports a substantive review of employer's reasons for denying a transfer as an accommodation. In the context of hiring and promotions, the research consistently shows that without objective criteria and a structured process, employers' decisions can be influenced by stereotypes and other biases which disadvantage members of protected groups.

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I. Legal Requirement to Accommodate

The Americans with Disabilities Act of 1990 (ADA) prohibits an employer from discriminating against an "individual with a disability" who, with "reasonable accommodation," can perform the essential functions of the job.[3] Under the ADA, "discrimination" includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[4] According to the statute, a reasonable accommodation "may include . . . reassignment to a vacant position."[5]

The ADA specifies that preferences in the form of accommodations will sometimes be necessary to achieve the Act's basic equal opportunity goal. The Act requires such preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.

Under the ADA's scheme, it is discriminatory for a covered employer to decline to take reasonable steps to accommodate an employee's disability, unless the steps in question "would impose an undue hardship on the operation of the business" of the employer. The ADA also provides a definition of the term "reasonable accommodation."

The term "reasonable accommodation" may include "reassignment to a vacant position."[6] Despite the right to accommodation, a person with a disability must meet the threshold test of being a "qualified individual with a disability" in order to invoke the ADA. The ADA defines a "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.[7]

The House Committee on Education and Labor that reported out the bill that became the ADA stated:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the

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[3] 42 U.S.C. §§ 12112(a) and (b) (1994 ed.).

[4] § 12112(b)(5)(A).

[5] § 12111(9)(B).

[6] 42 U.S.C. § 12111(9) (emphasis added).

[7] 42 U.S.C. § 12111(8) (emphasis added).

> 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.[8]

In discussing reassignment, the House Report says:

> Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered.[9]

Commentators recognize that the ADA provides something more than equal treatment for persons with disabilities. One article explains this preference as follows:

> The concept of reasonable accommodation, accordingly, represents Congress's recognition that "in order to treat some persons equally, we must treat them differently." Therefore, as a purely statutory matter, Congress's decision to define discrimination to include a failure to reasonably accommodate justifies the affirmative action taken in favor of disabled individuals.[10]

A. EEOC Guidance

Further explanation of the accommodation requirement comes from the Equal Employment Opportunity Commission (EEOC). Its regulations state that "reasonable accommodation means . . . . modifications or adjustments . . . that enable a qualified individual with a disability to perform the essential functions of [a] position."[11] According to the regulations, the term "reasonable accommodation" includes "modifications or adjustments that enable a

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[8] H.R. Rep. No. 101-485(II), at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345.

[9] H.R. REP. No. 485(II), 101st Cong., 2d Sess. at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 345; see also S. REP. No. 116, 101st Cong., 1st Sess. at 6 (1989).

[10] Stephen F. Befort & Tracey Holmes Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both? 57 WASH & LEE L. REV. 1045 (2000).

[11] 29 C.F.R. § 1630(o)(ii) (2001) (emphasis added). See also H. R. Rep. No. 101-485, pt. 2, at 66; S. Rep. No. 101-116, at 35 (discussing reasonable accommodations in terms of "effectiveness," while discussing costs in terms of "undue hardship").

covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[12]

An employer should first try to keep the employee in his or her existing job if a reasonable accommodation would enable the employee to perform the essential job duties of that position.[13] According to the EEOC, reassignment should be considered only when accommodations within the individual's current position would pose an undue hardship. The Smith v. Midland Brake court interpreted this Guidance to mean that the employer must determine that no reasonable accommodation could be made to keep the disabled employee in his present position.[14] Only then should the employer move to the alternative accommodation of reassignment.

If keeping the employee in their previous position is not possible, the EEOC Interpretive Guidance explains that a reasonable accommodation may include reassignment to a vacant position.[15] The Commission has specifically stated that "[t]he employee [with a disability] does not need to be the best qualified individual for the position in order to obtain it as a reassignment."[16] Rather, the "[e]mployer should reassign the individual to an equivalent position, in terms of pay, status, etc., … if the individual is qualified, and if the position is vacant within a reasonable amount of time."[17]

According to the Smith v. Midland Brake decision, the term "reassignment to a vacant position" indisputably indicates more than just an alteration to the employee's existing job. The court read

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[12] 29 C.F.R. § 1630.2(o) (2001) (emphasis added). See also 29 CFR pt. 1630, App. § 1630.9, p. 364 (2001) ("reasonable accommodation requirement is best understood as a means by which barriers to . . . equal employment opportunity . . . are removed or alleviated").

[13] See H.R. Rep. No. 101-485(II), at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345 ("Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered."); 29 C.F.R. Pt. 1630, App. § 1630.2(o) ("In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship [to the employer]."); EEOC Guidance, at 39 ("Reassignment is the reasonable accommodation of last resort.").

[14] Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

[15] EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o) (1998).

[16] Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Enforcement Guidance No. 915.002 (Oct. 17, 2002).

[17] 29 C.F.R. Part 1630, App. §1630.2(o).

Sections 12111(8) and (9) of the ADA together to conclude that a reasonable accommodation may include a reassignment from the employee's current job to one that he or she desires.

The Smith court reviewed the interpretative guidance's use of the word "considered," and concluded that the term does not minimize the employer's obligation to reassign. The Smith court recognized that

> Only through consideration in a reasonably interactive way can it be determined whether an employee desires reassignment; whether there are vacant positions available at an equivalent or lesser position; whether such positions are truly vacant; whether reassignment would interfere with the rights of other employees or important business policies of the company, etc. The right to reassignment after all is not absolute. It requires deliberative consideration, and depending upon many factors, may or may not rise to a right to reassign. On the other hand, after considering all of the relevant factors, it may very well be determined that reassignment is a reasonable accommodation under all of the circumstances. If it is so determined, then the disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment.

In explaining its own guidance, the EEOC asked the question: "Does reassignment mean that the employee is permitted to compete for a vacant position?" and answered that reassignment means that the employee gets the vacant position if s/he is qualified for it.[18] The EEOC pointed out that "otherwise, reassignment would be of little value and would not be implemented as Congress intended."

The legislative history of the ADA also provides some guidance. That history shows that reasonable accommodations for existing employees who become disabled on the job do not fall within the broader ban against preferences for employees with disabilities.[19] That history states that

> If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker.") (emphasis added).

The Circuit Court for the District of Columbia explained that had Congress intended that disabled employees be treated exactly like other job applicants, there would have been no need for the report to go on to explain that "'bumping' another employee out of a position to

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[18] EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act ("EEOC Guidance"), at 44 (1999) (emphasis in original).

[19] H.R. REP. No. 485(II), 101st Cong., 2d Sess., at 56 and 63 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 338, 345.

create a vacancy is not required," and that "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," id.; there would have been no danger that an employee would be "bumped," or that a job would go to a disabled employee with less seniority.[20]

The EEOC still provides some limits on the duty to reassign. The Enforcement Guidance defines a vacancy as a position that is either available when the employee requests a reasonable accommodation or one that the employer is aware will become available within a reasonable time. The regulations further explain that a position is considered vacant "even if an employer has posted a notice or announcement seeking applications for that position." An employer is not required to "bump" another employee in order to create a vacancy, nor is an employer required either to create a new position for a disabled employee or to promote a disabled employee to a higher graded position.

Even if a position "vacancy" exists, an employer need not reassign a disabled individual unless he or she is "qualified" for the new position. Stated otherwise, the disabled employee must demonstrate that he or she satisfies the requisite job requirements and is capable of performing the position's essential functions with or without reasonable accommodation.

In addition, an employer has no obligation to reassign a disabled employee if doing so would result in an undue hardship. Taken together, these measures limit the potential reach of the reassignment accommodation and cushion its potential negative impact on both the employer and other employees.

B. Guidance from Supreme Court Decisions

Even before the passage of the ADA, the Supreme Court interpreted the non-discrimination provision of the Rehabilitation Act of 1973[21] to require transfer of persons with disabilities to alternative positions. The Court clearly stated that employers "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."[22] This standard has been interpreted to require an employer to transfer an employee with a disability to another existing position if he or she can perform the duties of that position.[23]

In trying to resolve the question of whether an employee must compete for a transfer requested as an accommodation, courts and commentators have looked to more recent

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[20] Aka v. Washington Hosp. Center, 156 F.3d 1284 (D.C. Cir. 1998).

[21] 29 U.S.C. §794.

[22] School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n. 19 (1987).

[23] Stone v. City of Mount Vernon, 118 F.3d 92 (2d Cir. 1997).

Supreme Court decisions on other accommodation issues. The Court's decision in U.S.Airways, Inc. v. Barnett provides some guidance as to whether the duty to accommodate extends to transfers of less qualified employees with disabilities.[24] That Court reviewed the denial of an accommodation where the requested accommodation conflicted with the rules of a seniority system, and the employer argued that the accommodation was not "reasonable." The Court concluded that such a conflict will entitle an employer to summary judgment unless the employee presents evidence of special circumstances that make "reasonable" a seniority rule exception in that particular case.

Robert Barnett had asked US Airways to accommodate his disability-imposed limitations by making an exception to the seniority system that would allow him to remain in a mailroom position which he could perform with his disability. After permitting Barnett to continue his mailroom work for five months while it considered the matter, US Airways eventually decided not to make an exception and Barnett lost his job. The District Court in Barnett had concluded that any significant alteration of the seniority policy would result in undue hardship to both the company and its non-disabled employees. The Ninth Circuit reversed, holding that "[a] case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer."

Even though the Supreme Court's decision in Barnett concluded that the seniority system was entitled to a presumption of deference, the Court also recognized that

> [b]y definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. [25]

The Court explained the purposes of the ADA in broad terms:

> The statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace. These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike. [26]

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[24] 535 U.S. 391 (2002).

[25] Id. at 397.

[26] Id. at 401 (referencing §§ 12101(a) and (b)).

The Court also recognized that the ADA's objective "will sometimes require affirmative conduct to promote entry of disabled people into the workforce," as long as those actions are reasonable.[27]

The Barnett Court upheld the denial of an accommodation when it would conflict with the employer's seniority system based on case law that "has recognized the importance of seniority to employee-management relations." The Court looked to cases decided under Title VII's accommodation requirements in religious discrimination cases, which had held that an employer need not adapt to an employee's special worship schedule as a "reasonable accommodation" where doing so would conflict with the seniority rights of other employees.[28] A seniority system was given special consideration because the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment. These benefits include "job security and an opportunity for steady and predictable advancement based on objective standards," and "an element of due process," limiting "unfairness in personnel decisions." And they consequently encourage employees to invest in the employing company.[29]

The Barnett Court was concerned that to require the typical employer to prove undue hardship, rather than just 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. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules.[30]

The Court was concerned that case by case decisions would include "inevitable discretionary elements." The Court could "find nothing in the statute that suggests Congress intended to undermine seniority systems in this way."[31]

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[27] Id.

[28] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79-80 (1977), Eckles v. CONRAIL, 94 F.3d 1041, 1047-1048 (7th Cir. 1996); Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987); Jasany v. United States Postal Service, 755 F.2d 1244, 1251-1252 (6th Cir. 1985).

[29] 535 U.S. at 403 (citing Gersuny, Origins of Seniority Provisions in Collective Bargaining, 33 LAB. L. J. 518, 519 (1982)).

[30] 535 U.S. at 404.

[31] Id. at 405.

The Barnett decision still allows an employee to show that special circumstances warrant a finding that, despite the presence of a seniority system, the requested "accommodation" is "reasonable" on the particular facts. This proof is allowed "because special circumstances might alter the important expectations" of other employees who would benefit from the enforcement of the seniority system.[32]

The Barnett decision provides less guidance on the question of burden of proof. The Ninth Circuit, in overturning the judgment for U.S. Air, had rejected U.S. Air's argument that Mr. Barnett bore the burden of demonstrating the availability of a reasonable accommodation.[33] That court found that "To put the entire burden for finding a reasonable accommodation on the disabled employee or, effectively, to exempt the employer from the process of identifying reasonable accommodations, conflicts with the goals of the ADA.

The Circuit Court had recognized that "the interactive process is at the heart of the ADA's process and essential to accomplishing its goals." Placing the entire burden of proving the existence of an available position for a transfer would conflict with this interactive process requirement, since "employees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have."[34] Under the interactive process requirement, the Circuit Court held that employers who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. The court also stated that that "an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process."

The Circuit Court in Barnett went on to recognize that "any per se rule barring reassignment because of conflicts with a seniority system would sharply limit the range of available accommodations without any required showing of an undue burden on the employer. In many cases this would eliminate the most effective or the only effective reasonable accommodation." The court also recognized that 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.

The Barnett Circuit Court concluded that a seniority system is not a per se bar to reassignment, but that a seniority system is a factor in the undue hardship analysis. Under this reasoning, a case-by-case fact intensive analysis would be required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees.

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[32] Id.

[33] Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000).

[34] 228 F.3d at 1113.

To fully understand the Ninth Circuit's discussion, one must look to the decision of the same court which that court overturned. Two years prior, the same court had held in the same case that the "prima facie burden on the plaintiff-employee includes the burden of showing the existence of a reasonable accommodation."[35] Even that court held that once the employee points to at least one specific reasonable accommodation that was available to the employer, the burden switches to the defendant to show that this accommodation would constitute an undue hardship.[36]

In contrast to the majority opinion, Justice Scalia would allow an employer to refuse a transfer based on an employer's policy of hiring the best qualified person, as well as deferring to an employer's seniority system. In his view, an employer's policy of filling vacancies on the basis of qualifications is not a disability-related barrier that necessitates an accommodation.[37]

C. Some Burden of Proof on Employer

Before Barnett was decided by the Supreme Court, several circuit courts heard cases involving employees with disabilities who were denied a transfer as an accommodation based on the employer's determination that the employee with a disability was not the "best qualified" person for that position. One of the first of these decisions from the Court of Appeals for the District of Columbia held that summary judgment for the employer was inappropriate. The court remanded for the trial court to determine whether the employer had an obligation under the ADA to reassign the employee to a vacant position, including whether a vacant position for which he was qualified was available, and whether reassigning Aka would have been an undue hardship.[38]

In that case, the plaintiff Aka had requested as an accommodation a transfer to a pharmacy technician job at the hospital operated by the employer. The hospital claimed that it hired someone else because he was more qualified than Aka. In recognizing the factual dispute as to their relative qualifications, the court noted that "in a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call."[39] The court went on to explain:

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[35] Barnett v. U.S. Air, Inc., 196 F.3d 979 (9th Cir. 1998).

[36] Id. at 984 (quoting 42 U.S.C. § 12112(b)(5)(A)).

[37] Cheryl L. Anderson, "Neutral" Employer Policies and the ADA: The Implications of US Airways, Inc. v. Barnett Beyond Seniority Systems" 51 DRAKE L. REV. 1 (2002).

[38] Aka, 156 F.3d 1284.

[39] Id. at 1294.

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate--something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture. [40]

Summary judgment in this case was denied based on the court's assessment that a reasonable factfinder could conclude both that the balance of qualifications weighed markedly in Aka's favor, and that there was other evidence calling the hospital's explanation into question. First, the court found that a reasonable jury could find that Aka's ability to do the less skilled parts of the pharmacy job was at least comparable to the person selected.

The Aka court noted that **"**courts traditionally treat explanations that rely heavily on subjective considerations with caution. Particularly in cases where a jury could reasonably find that the plaintiff was otherwise significantly better qualified than the successful applicant, an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination." An employer's reliance on disputed subjective assessments may not create a jury issue in every employment discrimination case if, for example, the reliance is modest and the employer has other, well-founded reasons for the employment decision.

The Aka court also rejected the hospital's argument that the ADA can never require an employer to violate collectively bargained rights, and that therefore Aka had no right to reassignment. The court read the ADA to require that employers reasonably accommodate disabled employees unless they can demonstrate that such reassignment "would impose an undue hardship on the operation of the business of such covered entity."[41] Under this approach, the court rejected the hospital's claim that a disabled employee is never entitled to any more consideration for a vacant position than an ordinary applicant, because according to the disabled employee any kind of help would be a prohibited preference.

The Aka court specifically held that the word "reassign" must mean more than allowing an employee to apply for a job on the same basis as anyone else.[42] In interpreting the statutory language, the court held that he core word "assign" implies some active effort on the part of the employer. ADA's reference to reassignment would be redundant if permission to apply were all it meant. The Aka court recognized that even though the ADA's legislative history warns against "preferences" for disabled applicants, it also makes clear that reasonable

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[40] Id.

[41] Id. at 1303 (citing 42 U.S.C. § 12112(b)(5)(A)).

[42] Id. at 1304.

accommodations for existing employees who become disabled on the job do not fall within that ban.[43]

With respect to the employer's interests in not giving preference to an employee requesting a transfer as an accommodation, the Aka court noted that treating a disabled employee who is no longer able to perform his existing job somewhat differently from other applicants for the same position need not always be highly disruptive to an employer's operations or seriously infringe the interests of other employees. The court pointed out that moving a disabled employee to a new position necessarily creates a job vacancy, which may well be more desirable to third parties than was the position to which the employee was reassigned.

In another decision recognizing an affirmative obligation to transfer an employee as an accommodation, the Smith court started with its interpretation that the term from the ADA "qualified individual with a disability" includes a disabled employee who desires and can perform with or without reasonable accommodation an available reassignment job within the company.[44]

In reviewing the duty to transfer as an accommodation, the Smith court specifically rejected the employer's argument that the reassignment duty imposed by the ADA is no more than a duty merely to consider without discrimination a disabled employee's request for reassignment along with all other applications the employer may receive from other employees or job applicants for a vacant position. The court rejected that interpretation "both because it does violence to the literal meaning of the word reassignment and because it would render the reassignment language in 42 U.S.C. § 12111(9) a nullity."

The court held, like the Court in Aka, that "'reassignment' must mean something more than the mere opportunity to apply for a job with the rest of the world." Explaining in more detail the justification for this position, the court recognized that the ADA separately prohibits an employer from discrimination against a disabled person in his or her application for a vacant job.[45] Thus, the reassignment language in the statute would add nothing to this duty to not discriminate, if the reassignment language merely requires employers to consider on an equal

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[43] H.R. REP. No. 485(II), 101st Cong., 2d Sess., at 56 and 63 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 338, 345.

[44] 180 F.3d 1154, 1162 (10th Cir. 1999).

[45] Id. at 1164 (citing 42 U.S.C. § 12112(a) :"No covered entity shall discriminate against a qualified individual with a disability . . . in regard to job application procedures, the hiring ...").

basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position.[46]

Based on this reasoning, the Smith court concluded that "reassignment of an employee to a vacant position is one of the range of reasonable accommodations which must be considered and, if appropriate, offered if the employee is unable to perform his or her existing job." Explaining further, the court stated that

> reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.[47]

The court supported its decision based on several other decisions which concluded that accommodation requires "something more than treating a disabled employee like any other job applicant."[48]

The Smith court discussed how the employer's interests are still protected under this standard, since the employee still must be "qualified" for the vacant position:

> Although the statute does not require that the employee be the "best qualified" employee for the vacant position, it at least ensures the employer that it need not make the reassignment unless the employee is truly qualified to do the job.

The Tenth Circuit clarified its position in EEOC v. Dillon Companies Inc.[49] That employer had argued that it need not grant a transfer as an accommodation if it would conflict with its "well-established policy mandating that the employees within a particular store or geographic area have the right to any vacancy within that store or geographic area before anyone from the

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[46] Id. (*citing* Aka, 156 F.3d at 1304). The court noted that statutory redundance is to be avoided, and we are to give meaning to every word of a statute where possible. *See* Ratzlaf v. United States, 510 U.S. 135, 140,(1994).

[47] 180 F.3d at 1169.

[48] Id. (citing Gile v. United Airlines, Inc., 95 F.3d 492, 496-99 (7th Cir. 1996); Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114-15 (8th Cir. 1995); Aka, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1187 (6th Cir. 1996); Ransom v. State of Arizona Board of Regents, 983 F. Supp. 895, 902-03 (D. Ariz. 1997); and Community Hosp. v. Fail, 969 P.2d 667, 678 (Colo. 1998).

[49] 310 F.3d 1271, (10th Cir. 2002).

outside can be considered." The court clarified that "an employer's mere assertion of an entrenched employment policy should [not] be determinative of whether a given position is or is not vacant for labor-dispute purposes.[50] A well-entrenched seniority system may "take off the table" a position that might otherwise serve as a reasonable accommodation, but that determination depends on a "context-specific inquiry that cannot be resolved in an informational vacuum, based only on the say-so of the employer."[51]

In support of its interpretation of the ADA, the court referenced the Supreme Court's holding in Barnett that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, in and of itself, automatically show that the accommodation is not 'reasonable."[52] But the court would not allow an employer to turn a summary subpoena-enforcement proceeding into a mini-trial by allowing it to interpose defenses regarding its policies that are more properly addressed at trial.

Similarly, the Tenth Circuit held in 2007 that an employee has established a claim of failure to accommodate if he "requested the employer reasonably to accommodate his . . . disability by reassignment to a vacant position," "he was qualified, with or without reasonable accommodation, to perform the essential functions of the desired job; and the employer did not offer reassignment.[53] The employer must then "present evidence either (1) conclusively rebutting one or more elements of [the] prima facie case or (2) establishing an affirmative defense." Summary judgment for the employer is then appropriate unless the employee then presents evidence establishing a genuine dispute regarding the affirmative defenses and/or rehabilitating any challenged elements of the prima facie case."

This standard was applied in Wiechelt v. UPS**,** in which the court reviewed the claim of an employee who sought transfer to a part-time administrative position in the Office of Human Resources.[54] The position had the same job description as her previous position and was consistent with her physical limitations. UPS never informed plaintiff of the position, and assigned it instead to a non-disabled person. The court held that a jury could reasonably conclude that the new position was an existing vacant position for which the plaintiff was qualified. The court specifically referenced the appellate standard that "the ADA does not

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[50] Id. at 1276.

[51] Id.

[52] Id. (citing U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002)).

[53] Bundy v. Chaves County Bd. of Com'rs, No. 06-2154, 215 Fed. Appx. 759; 2007 U.S. App. LEXIS 2825 (10th Cir. 2007) (citing Smith, 180 F.3d at 1179).

[54] No. 03-CV-345A, 2007 U.S. Dist. LEXIS 71056; 19 Am. Disabilities Cas. (BNA) 1487 (W.D.N.Y. September 21, 2007).

allow an employer to reject a disabled applicant for reassignment solely on the ground that another candidate is better qualified."[55]

In some courts, an employee can survive a motion for summary judgment if the employer fails to offer alternative placement. For example, the court denied summary judgment for an employer where the record did not adequately address whether there were vacant positions in the hospital for which the employee seeking an accommodation was qualified.[56] The court concluded that a trial was necessary to adduce certain material facts including whether: (1) a vacant position existed; (2) the employee was qualified for any such vacant position; and (3) reassigning the employee would have caused the employer undue hardship.

Under the relatively employee-friendly rule of Smith, an employee still may have a difficult time meeting his burden of proof. One court granted summary judgment for an employer because the employee failed to present any evidence that specific jobs were available within the company at the time a request for reassignment or transfer would have been made, had he been given the opportunity to make that request.[57] The employee proved that he was willing and able to perform various other jobs, including certain non-assembly line jobs, including a clerical position and an engineering position.

This district court held that the employer would prevail in the absence of evidence that such positions were actually available at or about the time plaintiff's request would have been made had he been provided the opportunity to make a request. Judgment was granted even though the employer had refused to respond to interrogatories and requests for production of documents concerning vacant positions during the relevant time frame, and the employee claimed that the employer's refusal had placed him at an "extreme disadvantage" for purposes of summary judgment.

In a broader context, other circuit courts have placed the burden on the employer to show that a requested accommodation is unreasonable. The Second Circuit, for example, has held that an employee must first meet her burden of proving that an accommodation exists that permits her to perform the job's essential functions.[58] This court stated that placing the initial burden on the plaintiff to show that a vacancy exists was supported by recent decisions of its sister circuits.[59] With respect to the reasonableness of the accommodation requested, it is enough

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[55] Id. at *7 (citing Smith, 180 F.3d at 1167).

[56] Terrazas v. Medlantic Healthcare Group, Inc. , 45 F. Supp. 2d 46 (D.D.C. 1999).

[57] Manning v. General Motors, 529 F. Supp. 2d 1282 (D. Kan., 2008).

[58] Jackan v. N.Y. State Dept. of Labor, 205 F.3d 562 (2d Cir. 2000).

[59] Id. at 567 (citing Aka, 156 F.3d 1284, 1304 n.27 (D.C. Cir. 1998) (en banc) (an ADA plaintiff "ha[s] an obligation to demonstrate that there existed some vacant position to which he could have been reassigned"); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1165 (7th Cir.

for the employee to produce evidence suggest "the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."[60] If the employee meets that burden, the burden of persuasion shifts to the employer to show that the accommodation is unreasonable.[61]

The Sixth Circuit has also held generally that the employee bears the initial burden of showing that he is capable of performing the identified position in question despite his disability, either with or without a proposed reasonable accommodation by the employer.[62] If reassignment is appropriate, that court has stated that an employer "should reassign [an] individual to an equivalent position … if the individual is qualified, and if the position is vacant within a reasonable amount of time."[63]

The Third Circuit summed up the burden shifting as follows:

> If the accommodation is shown to be a type of accommodation that is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case. On the other hand, if the accommodation is not shown to be a type of accommodation that is reasonable in the run of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.[64]

1997) ("The plaintiff bears the burden of showing that a vacant position exists and that the plaintiff is qualified for that position."); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286 (11th Cir. 1997) (holding that the burden of production and persuasion regarding the existence of a plausible accommodation both lie with the plaintiff); Mengine, 114 F.3d 415, 420 (3d Cir. 1997) ("[T]he employee has the duty to identify a vacant, funded position whose essential functions he is capable of performing.").

[60] 205 F.3d at 567.

[61] Id.

[62] Thompson v. E.I. DuPont Denemours and Co., No. 01-1854, 70 Fed. Appx. 332; 2003 U.S. App. LEXIS 14816, (6th Cir. July 23, 2003)(citing Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1186 (6th Cir. 1996)).

[63] Kiphart v. Saturn Corp., 251 F.3d 573, 586 (6th Cir. 2001) (quoting 29 C.F.R. § 1630.2(o) app. at 358).

[64] Shapiro v. Township of Lakewood, 292 F.3d 356, 13 AD Cases 106 (3d Cir. 2002).

This burden on the employer is appropriate since the employer possesses the relevant information and makes a determination about the relative qualifications of the person with a disability seeking a transfer as compared to other applicants or employees seeking that position.

D. Theoretical Support for Providing an Accommodation

Commentators have taken the position that a person with a disability should be placed in a vacant position as an accommodation even if the employer believes that another person is better qualified. For example, Befort and Donesky argue that the accommodation requirement of the ADA prohibits an employer from refusing to transfer a person with a disability into a vacant position, if the person meets the position's basic qualifications. [65] In response to the concerns of employers, they argue that "the undue hardship defense provides an adequate escape valve for employers who are able to demonstrate that their business operations will suffer if they cannot place better-qualified employees into desired positions."[66]

In contrast to these opinions, some commentators have focused on the interests of other employees or applicants who may be seeking the position desired as an accommodation. Alex Long has pointed out, for example, that requiring employers to reassign a person with a disability as an accommodation "impose real burdens on employers and other employees."[67] Long found that in the context of Title VII, "courts have been highly reluctant to allow one employee's pursuit of his or her statutory rights to unduly impact another employee's interests in moving into a new position or continuing to work under roughly the same conditions."[68]

Long suggests that to resolve this conflict of interests, a transfer as an accommodation would not be considered reasonable "when it would violate the contractual rights of another employee or otherwise result in an adverse employment action … for a non-disabled employee."[69] If the accommodation did not result in an adverse employment action in a particular case, the undue hardship defense would be sufficient to resolve whether an employer must provide the accommodation.

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[65] Befort & Donesky, supra note 8.

[66] Id. *See also* John E. Murray and Christopher J. Murray , Enabling the Disabled: Reassignment and the ADA, 83 MARQ. L. REV. 721 (2000).

[67] Alex B. Long, The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties," 68 MO. L. REV. 863, 899 (2003).

[68] Id. at 900.

[69] Id. at 901.

In contrast to Long's proposal, other commentators have recognized that the ADA was specifically intended to give affirmative rights to persons with disabilities, even if those rights infringed on the interests of other, nondisabled employees. In criticizing the Barnett decision, Nicole Porter has stated that "the main argument one can make in support of treating seniority systems differently is that they have an effect on other employees in that the nondisabled employees have expectations to be treated in accordance with the rules of the seniority system. However, most accommodations have an effect on other employees; some effects are just more subtle."[70]

Porter would not place any limitations on a transfer as an accommodation, because a transfer accommodation is the same as any other type of accommodation: it simply eliminates the subordination of the disabled caused by designing workplaces around the bodies of the able-bodied, and plays an important role in promoting equality of opportunity for individuals with disabilities.[71]

These scholars support the position of those appellate courts which require that an employer provide a transfer as an accommodation even if the employer believes that another applicant is better qualified for the position.

I. Current Disagreement Between Courts

The legislative history of the ADA, the guidance from the EEOC and the Supreme Court, and earlier decisions from the appellate courts have not fully clarified the requirement for an employer to transfer an employee as an accommodation. Instead, the appellate courts take different approaches to the conflict between a request for a transfer by an employee with a disability and an employer's desire to fill a vacancy with the "most qualified" applicant. Some courts take the position that an employer can fill the position based on its assessment of the qualifications of the applicants, even if one of those applicants seeks the position as an accommodation. Other courts require that an employer provide an accommodation to an employee who at least meets the minimum qualifications for that position.

A. Cases Requiring No Accommodation

Despite this support for providing a transfer as an accommodation even if another applicant is more qualified for the open position, several appellate courts have refused to require an accommodation in those circumstances. Not only do these decisions refuse to place any burden

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[70]Nicole B. Porter, Reasonable Burdens: Resolving the Conflict Between Disabled Employees and their Coworkers, 34 FLA. ST. U.L. REV. 313, 330 (2007).

[71] Id. at 343, 358.

of showing undue hardship on the employer, but they also fail to engage in any substantive review of the employer's proposition that the employee seeking a transfer as an accommodation is less qualified than the person placed in the open position.

The issue of accommodation for employees deemed to be less qualified was addressed by the Court of Appeals for the Eighth Circuit in 2007. The U.S. Supreme Court had decided to review this decision before it was settled. The Eighth Circuit had held in Huber v. Wal-Mart Stores, Inc., that Wal-Mart did not provide a transfer as an accommodation because it believed that another person was more qualified for that vacant position.[72] Ms. Huber worked for Wal-Mart as a dry grocery order filler earning $ 13.00 per hour. After sustaining an injury at work, she could no longer perform the essential functions of that job.

Ms. Huber then requested, as a reasonable accommodation, reassignment to a router position, which was a vacant and equivalent position under the ADA. Under its policy of hiring the most qualified applicant for the position, Wal-Mart required Huber to apply and compete for the router position with other applicants. Wal-Mart then filled the job with a non-disabled applicant and instead of Ms. Huber. Ms. Huber was placed in a maintenance associate position, at $6.20 per hour, which the court found was a reasonable accommodation.

The Eighth Circuit began with the notion that the ADA is not an affirmative action statute. The court then concluded that the ADA does not require an employer to reassign a qualified disabled employee to a vacant position when the employer believes someone else is the most qualified candidate for the position. The court opined that this conclusion was supported by the Supreme Court's decision in U.S. Airways, Inc. v. Barnett,[73] which held that an employer ordinarily is not required to give a disabled employee a higher seniority status to enable the disabled employee to retain his or her job when another qualified employee invokes an entitlement to that position conferred by the employer's seniority system. Relying on the Seventh Circuit, the court held that to require such an accommodation would be "affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group."[74]

In this case, the appellate court overturned the decision of the trial court, which had distinguished the reasoning in US Airways, Inc. v. Barnett.[75] The Huber district court recognized that the Barnett Court rejected the creation of a per se rule in favor of employers,

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[72] 486 F.3d 480 (8th Cir. 2007).

[73] 535 U.S. at 406.

[74] 486 F.3d at 484 (citing Humiston-Keeling, 227 F.3d at 1029.

[75] Huber v. Wal-Mart Stores, Inc., Case No. 04-2145, 2005 U.S. Dist. LEXIS 40251; 17 Am. Disabilities Cas. (BNA) 720 (W.D. Ark. December 7, 2005).

instead holding that ordinarily a seniority system will trump a reassignment as a reasonable accommodation. Further, the district court held that "an employer's policy to hire/transfer the best qualified person is distinguishable from an employer's seniority rules, based on the benefits gained from adherence to a seniority system. Those benefits include:

> 1) creation and fulfillment of "employee expectations of fair, uniform treatment";
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> 2) an element of due process, limiting unfairness in personnel decisions; and
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> 3) "encourag[ing] employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years."

The trial court also noted that in Barnett, the Supreme Court ruled that "the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach."[76] According to the trial court, comparing a unilateral seniority system with a collective bargaining seniority system is a completely different endeavor than comparing a "best qualified" transfer policy with a collective bargaining seniority system.

The Huber trial court recognized that "[b]y definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially."[77] Without such an affirmative requirement, the court found that the employer "could merely go through the meaningless process of consideration of a disabled employee's application for reassignment and refuse it in every instance."[78] The court did not believe that Congress intended such a hollow promise with it listed reassignment as one of the specific reasonable accommodations.

Based on these findings, the trial court concluded that to require Ms. Huber, a qualified disabled employee, who was requesting a transfer to an equivalent, vacant position as a reasonable accommodation, to be forced to compete with other applicants to satisfy the employer's "best qualified" policy clearly violates the ADA.[79] To hold otherwise "would

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[76] Id. at *13 (citing 122 S.Ct. at 1521).

[77] Id. at *14 (citing 122 S.Ct. at 1521).

[78] Id. at *15-16.

[79] Id. at *14-15 (citing Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999); Aka v. Washington Hospital Center, 332 U.S. App. D.C. 256, 156 F.3d 1284 (D.C. Cir. 1998)).

essentially vitiate the employer's express statutory obligation to employ reassignment as a form of reasonable accommodation."[80]

The Court of Appeals in Huber rejected the lower court's reasoning in favor of a per se rule that if an employer claims that the person with a disability is not the "best qualified" person for the position they seek as an accommodation, the employer need not provide that accommodation. In adopting this rule, the employee is given no opportunity, as part of the accommodation process, to challenge the employer's determination that she is not the best qualified person.[81]

Like the Eighth Circuit, the Court of Appeals for the Seventh Circuit has adopted the position that an employer need not give "preference" to an employee with a disability who seeks a transfer.[82] That court reviewed the claim of Ms. Houser, who had worked as a picker in a warehouse, which required frequent lifting of as much as five pounds. After an accident, she was not longer able to lift.

The Seventh Circuit first recognized that an employer has a duty to find if possible a "reasonable accommodation" of its employee's disability that would enable her to remain in the company's employ, including reassignment to a vacant position.[83] In that case, the company had several vacant clerical positions for which Ms. Houser was qualified in the sense of having at least the minimum qualifications for the position. She applied for these positions but in each case was turned down in favor of another applicant. The company had a bona fide policy, consistently implemented, of giving a vacant job to the best applicant rather than to the first qualified one.

The applicants chosen for those vacant positions were admittedly "better" than Houser in the sense of being likely to be more productive. In upholding the employer's denial of a transfer, the court rejected the EEOC's interpretation of the "reassignment" form of reasonable accommodation to require that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show "undue hardship."

The Seventh Circuit refused to require employers to give "bonus points to people with disabilities." Since Houser's disability had nothing to do with the office jobs for which she applied and her disability that put her at no disadvantage in competing for an opening in an

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[80] Id. at *19 (citing Midland Brake, Inc., 180 F.3d at 1176).

[81] In an earlier decision, the Eighth Circuit went one step farther and refused to require a transfer as an accommodation for an employee based solely on her lack of qualifications. Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003).

[82] EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000).

[83] Id. at 1026 (citing 42 U.S.C. § 12112(b)(5)(A)).

office job, the court held that she was not entitled to be given more consideration than nondisabled workers.

The court recognized that the reassignment provision still requires that an employer must "consider the feasibility of assigning the worker to a different job in which his disability will not be an impediment to full performance, and if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory."[84] The court concluded that a policy of giving the job to the best applicant is legitimate and nondiscriminatory.[85] This recognition ignores the fact that any employee, including one with a disability, would have the right to apply for other positions regardless of her disability and without the ADA.

Judge Posner characterized the requested accommodation as "requiring employers to hire inferior (albeit minimally qualified) applicants" because they have a disability.[86] The court continued:

> That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation ….

The court concluded that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant."[87]

Like its decision in Humiston-Keeling, Inc., the Seventh Circuit subsequently held that a Veterans Administration hospital did not violate reasonable accommodation duty under the Rehabilitation Act of 1973 when it reassigned nurse with lifting restrictions due to back injury to a clerical job.[88] Her request for an administrative nursing job was found to be unreasonable because she was not as qualified as competing applicants for those jobs. The court held that if there were better-qualified applicants, the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her.

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[84] 227 F. 3d at 1027.

[85] Id.

[86] Id. at 1028-29.

[87] Id.

[88] Mays v. Principi, 301 F.3d 866 (7th Cir. 2002).

These decisions of the Seventh Circuit are consistent with its earlier opinion in Dalton v. Subaru-Isuzu Automotive, Inc., in which the court held that an employer is not required "to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.[89] Similarly, that court held in Malabarba v. Chicago Tribune Co. , that "the ADA does not mandate a policy of 'affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled person be given priority in hiring or reassignment over those who are not disabled."[90]

The Seventh Circuit's Daugherty case has been referenced in support of the position that an employer need not transfer a less qualified person as an accommodation. Mr. Daugherty was a part time driver who was placed on leave without pay after his diagnosis with diabetes.[91] However, that case involved a person who was placed on leave without pay and was not placed in another part time position because there were very few available and full-time employees were given priority over part-time employees such as Daugherty. In addition, a part-time employee could move to a full-time position only after taking an original exam or a promotional exam. That case did not involve a denial of a transfer as an accommodation because another applicant for that same position was deemed to be more qualified.

The Seventh Circuit has since applied the principles set forth in Daugherty to an employee who was deemed to be less qualified than other for the transfer she sought.[92] The employee with a disability sought a nursing job which did require patient contact. The court held that because the employer believed that there were better-qualified applicants, the employer did not violate its duty of reasonable accommodation by giving the job to them instead of to her.[93] The court believed that its decision was "bolstered" by the Supreme Court's decision in U.S. Airways, Inc. v. Barnett**,** by substituting "better qualified" for "more senior" as used in that case.

These cases illustrate the courts' failure to place any burden of proof on an employer which has refused a transfer as an accommodation. In addition, these courts have failed to look beyond the employers' general determination that someone else is more qualified for the position desired by the person with a disability. This allows for the possibility that the employer's determination of relative qualifications is merely a pretext for discrimination based on disability.

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[89] 141 F. 3d 667, 679 (7th Cir. 1998).

[90] 149 F.3d 690, 699-700 (7th Cir. 1998). See also Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1196 (7th Cir. 1997)(ADA does not command affirmative action in hiring or firing).

[91] Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995).

[92] Mays, 301 F.3d 866 .

[93] Id. (citing Daugherty, 56 F.3d at 700; Williams v. United Insurance Co. of America, 253 F.3d 280, 282 (7th Cir. 2001)).

B. Effects of Best Qualified Standard

Allowing an employer to deny a request for a transfer as an accommodation can have devastating effects on the rights of the employee with a disability. The effect of these decisions can be seen in a more recent decision from the Seventh Circuit, which continued to deny transfers as accommodations for employees with disabilities because the employer deemed that another person was "better qualified" for that position. The court extended its reasoning to its interpretation of the Rehabilitation Act, which prohibits discrimination against federal employees. In Craig v. Potter**,** the court held that the Rehabilitation Act did not require the employer to make Craig a permanent postmaster as a form of reasonable accommodation.[94]

As in the earlier case, the employer had a policy to hire only the best-qualified applicant to fill a position as permanent postmaster. Even though Craig was at least minimally qualified to be a postmaster, he could not prove that he was the best qualified. His claim was therefore dismissed because forcing the employer to abandon its policy of hiring the best-qualified applicant to accommodate an employee with a disability would be unreasonable.[95] As in Huber, Craig was given no opportunity to challenge the employer's determination as to his qualifications for the requested position.

Craig was unsuccessful even though the employer's policies also provided for noncompetitive hiring of "persons with severe disabilities, as defined by its handbook. The court held that he failed to produce evidence that would allow a jury to conclude that he was a "person with a severe disability" as defined by the handbook. Therefore, Craig's contention that he was entitled to a postmaster position under one of the Service's exceptions to the best-qualified rule therefore failed.

Another court relied on the appellate court decision in Huber to find that an employer had no duty to accommodate an employee with a disability by automatically transferring him into a position for which he met the minimum requirements.[96] Even though that employee interviewed for those positions, the employer argued that other candidates were hired because the employer determined that they were more qualified for the jobs. The employee explained why he disagreed with those hiring decisions. However, the court granted summary judgment for the employer because "the ADA does not require [an employer] to turn away superior applicants in order to award any particular position to the plaintiff, and it is the employer's

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[94] No. 1:01-CV-406, (N.D. Ind. May 12, 2003), affirmed, No. 03-2529, 90 Fed. Appx. 160; 2004 U.S. App. LEXIS 3443 (7th Cir. February 20, 2004).

[95] Id. (citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028-29 (7th Cir. 2000); see also Gile, 213 F.3d at 375 (stating that the obligation to accommodate reasonably does not mean that employers must "bump" another employee or create a new position)).

[96] Willnerd v. First National of Nebraska, Inc., 8:05CV482, 2007 U.S. Dist. LEXIS 69837 (D. Neb. September 19, 2007).

role--not the court's role--to identify the strengths that constitute the best qualified applicant."[97]

Where an employer can deny an accommodation based on questions about the employee's qualifications for the position he or she seeks, the employee may find it difficult to obtain that accommodation. In one case, an employee with a disability sought a transfer because he could no longer perform the duties of his previous position.[98] Several of the managers declined to accept this employee as a transfer employee because of his "checkered employment and attendance history." The employer argued that the employee's direct supervisor had expressed substantial criticism of his job performance and attendance. Even though the employee disagreed with this assessment of his performance, summary judgment was granted for the employer because he did not "attribute to [his supervisor] any discriminatory motive for that assessment, or offer any evidence to show that she did not honestly believe that assessment."

This court turned an accommodation case into a typical discrimination case, and granted summary judgment for the employer because the employer had a "legitimate, nondiscriminatory reason" for not transferring the employee to another vacant position "based on his subpar job performance record."[99] In considering the allegations regarding past performance, the court referenced the Seventh Circuit's position that the ADEA "is not a mandatory preference act."[100]

C. Showing that the Employer's Denial was Discriminatory

The burden on an employee to show that she is the most qualified person for a transfer is difficult to meet. For example, one employee with a disability had managerial experience at his previous employment, which could have qualified him for a food service manager position he sought as an accommodation.[101] This employee considered himself qualified for that position. However, the court held that an employee's "own opinions about his … qualifications [do not] give rise to a material factual dispute."[102] Despite the employee's

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[97] Id. (citing Kincaid v. City of Omaha, 378 F.3d 799, 805 (8th Cir. 2004)).

[98] Nelson v. Potter, No. 05 C 3670, 2007 U.S. Dist. LEXIS 25772 (N.D. Ill. April 2, 2007).

[99] Id. at *28.

[100] Id. (citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000)).

[101] Hinson v. U.S.D. No. 500, 187 F. Supp. 2d 1297 (D. Kan. 2002).

[102] Id. at 1309-10 (citing Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir.1996); Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Services, 165 F.3d 1321 (10th Cir. 1999).

testimony, the court found no material question of fact, and concluded that he was not a "qualified individual" within the meaning of the ADA, and granted the employer's motion for summary judgment.

Similarly, a court granted summary judgment for an employer which failed to select an employee with a disability for a lateral transfer and instead hired someone from outside of the company for the requested position.[103] The employee with a disability argued that the reasons given by the employer for hiring someone else were pretextual. The court granted summary judgment because the only evidence she provided in support of her allegations was her own deposition testimony, without any explanation or reference to evidence.[104] Thus, the employer was able to deny the transfer as an accommodation based on its own conclusion that the applicant from outside of the company was better-suited for the position than the employee with a disability because she had more years of experience in the field.

The court justified the summary judgment for the employer by stating that "[t]he ADA is not a mandatory preference act, and thus, an employer is entitled to select better qualified employees for vacant positions instead of a disabled employee."[105] This court went so far as to state that "no reasonable fact finder could conclude that the duty to provide a reasonable accommodation includes hiring a less-qualified employee simply because that employee is disabled."[106]

The court further noted that "courts in employment discrimination cases may not act as super personnel departments, substituting judicial judgments for the business judgments of employers."[107] The case relied upon, however, concerned an applicant in a protected age category who had no entitlement to the position as an accommodation.

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[103] Castro- Medina v. Proctor & Gamble Commercial Co., 565 F.Supp.2d 343 (D.P.R. 2008).

[104] Id. at 374 ("Summary judgment cannot be defeated by relying on such conclusory allegations," citing Rios-Jimenez, 520 F.3d at 42 n. 7).

[105] Id. (citing E.E.O.C. v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir.2000)).

[106] Id. at 375 (citing Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007) (the ADA does not require an employer to reassign a qualified disabled employee to a job for which there is a more qualified applicant)).

[107] Id. at 374 (citing Arroyo-Audifred v. Verizon Wireless, Inc., 527 F.3d 215, (1st Cir. 2008) (affirming summary judgment for employer in age discrimination action brought by employee alleging wrongful denial of several promotions, where employer found the other candidates better suited for the position and the record lacked evidence that employer's decisions with respect to promotion were either pretextual or motivated by discriminatory animus or policy).

D. Looking Behind the Employer Determination

Courts have sometimes looked beyond the employer's rationale for denying a transfer as an accommodation to determine if the policy the employer has relied upon is valid. For example, one trial court looked more closely at a "best qualified" policy relied upon by an employer to deny a transfer requested by an employee with a disability. Even though summary judgment was granted for the employer, the court at least examined the employer's position that another person was more qualified than the employee requesting the accommodation.[108]

This court engaged in this analysis based on its recognition that "Congressional intent could be thwarted if an employer can refuse to reassign a disabled person by always referring to a policy of hiring the most qualified person for a job," despite its position that it is "the province of employers, not courts, to determine which applicants are most qualified for an open position."[109] Based on the facts establishing the other person's superior qualifications, the court held as a matter of law that the ADA did not require that the employee with a disability be reassigned when other candidates for that new position were objectively more qualified.

Some state courts have also recognized the need to examine an employer's denial of a transfer as an accommodation in more depth. The California Court of Appeals, for example, reversed summary judgment which had been granted an employer because there were triable issues of fact as to whether positions for which appellant was qualified were available when the employee with a disability requested a reassignment .[110] The employer had placed other employees in the positions the employee with a disability had requested. Summary judgment was denied in part because "the record [did] not adequately establish whether all of those who received these positions were as qualified as or better qualified than appellant."

III. Why Burden Should Be on Employer

The judicial treatment of discrimination cases which challenge an employer's decision regarding placement of employees or applicants established the practical justification for requiring that an employer establish a legitimate reason for refusing to transfer an employee with a disability. These decisions illustrate how difficult it is for an employee or applicant to demonstrate that a decision by an employer is a pretext for discrimination when the employer bases that decision on its perception of the relative strengths of different employees or applicants.

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[108] Chapple v. Waste Management, Inc., Civ. No. 05-2583 ADM/JSM, 2007 U.S. Dist. LEXIS 14151 (D. Minn. February 28, 2007).

[109] Id. at *33-34.

[110] Spitzer v. The Good Guys, Inc., 80 Cal. App. 4th 1376 (2000).

The showing of pretext is a difficult one for any employee or applicant. The U.S. Supreme Court recognized back in 1981, in Texas Department of Community Affairs v. Burdine, that an employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.[111]

> The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. [112]

This approach gives employers wide discretion to choose among qualified applicants.

The Supreme Court addressed the issue of qualification of applicants in Burdine. The lower court had held that despite evidence that the African American applicants' qualifications were superior to those of the two successful applicants,"[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"[113] Recognizing that qualifications evidence "may suffice, at least in some circumstances, to show pretext," the Court went on to find that the lower court's standard for using qualifications was "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."

In rejecting this test, the court referenced but did not adopt other lower courts' approaches, including the following:

1) "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"[114]

2) qualifications evidence standing alone may establish pretext where the plaintiff's qualifications are " 'clearly superior' " to those of the selected job applicant;[115]

3) the factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job."[116]

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[111] 450 U.S. 248 (1981).

[112] Id. at 259 (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1012, n.6 (1st Cir. 1979)).

[113] Ash v. Tyson Foods Inc., 546 U.S. 454 (2006).

[114] Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004).

[115] Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).

[116] Aka, 156 F.3d at 1294 (D.C. Cir. 1998) (en banc).

The effects of the discretion allowed by the Supreme Court can be seen in two recent decisions of the Seventh Circuit. In Nichols v. Southern Illinois Univ.-Edwardsville, the court upheld summary judgment for a university employer.[117] The unsuccessful applicants for promotions failed to establish even a prima facie case that the university discriminated against them based on their race. The plaintiffs failed to present evidence as to upgraded officers' qualifications other than black officers' own subjective beliefs that they were as qualified or even more qualified for upgrade than white officers were.[118]

Similarly, the Sixth Circuit held that an applicant for a promotion could not establish a prima facie case of discrimination.[119] The claimant failed to establish that she and the non-protected person who was hired for the position had at least similar qualifications. The successful male applicant had 17 years of relevant experience, including supervisory duties, compared with her seven years with this employer and no prior related experience. The Court specifically held that it was insufficient for a plaintiff in a failure to promote sex discrimination case merely to point to a man who received the job in satisfying the fourth prong. To satisfy the prima facie burden in a failure to promote case, the plaintiff must establish that she and the non-protected person who ultimately was hired for the desired position had similar qualifications. [120]

Similarly, the Eighth Circuit dismissed the claim of a female employee who was not promoted because she could not establish that she was similarly situated (based on respective qualifications and experience) to the male co- worker who received the promotion.[121]

In contrast to this burden on the applicants for promotion in these cases, the Eleventh Circuit has held that African American employees who were challenging the promotion of others should not have been required to show as part of their prima facie case that the white employee who was

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[117] 510 F.3d 772 (7th Cir. 2007).

[118] Id. at 784. See also Dandy v. United Parcel Service, 388 F.3d 263 (7th Cir. 2004) (Black female supervisor could not establish prima facie case of failure to promote, where her ratings based on her co-workers' opinions correspond to her managers' subjective assessments).

[119] White v. Columbus Metro. Hous. Auth., 429 F.3d 232 (6th Cir. 2005).

[120] Id. at 241 (citing Williams v. Columbus Metro. Hous. Auth., 90 Fed. Appx. 870, 873 (6th Cir. 2004); Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 614 (6th Cir. 2003); Nguyen v. City of Cleveland, 229 F.3d 559, 562-63 (6th Cir. 2000).

[121] Younts v. Fremont County, Iowa, 370 F.3d 748 (8th Cir. 2004). *But see* Turner v. Honeywell Federal Mfg., 336 F.3d 716 (8th Cir. 2003)(employee challenging failure to promote need not show that he was more than minimally qualified for positions which were not posted).

promoted over them was less or equally qualified.[122] The court held that the white employee's allegedly superior qualifications should have seen as rebuttal to the initial presumption of discrimination. Similarly, the Ninth Circuit held that an employee's previous performance does not enter into his ability to show a prima facie of discrimination regarding the employer's failure to promote him.[123]

In its earlier decision in EEOC v. Target Corp, the Seventh Circuit also allowed a great deal of discretion in making hiring decisions.[124] After the EEOC established a prima facie case of discrimination on behalf of the applicant, the employer was required to "explain its claimed reason for rejecting the applicant clearly enough to allow the court to focus its inquiry on whether the employer honestly believed that reason, *(citation omitted)* and to allow the plaintiff to identify the kind of evidence it must present to demonstrate that the reason is a pretext.[125] Despite this requirement on an employer, "[a]n employer's reason not to hire an applicant may be subjective, such as an applicant's poor attitude in an interview.[126]

The Seventh Circuit did adopt a requirement that the employer articulate some specific facts to explain its hiring decision.[127] In adopting this requirement, the court relied on an earlier decision of the Eleventh Circuit, in which the court required that an employer must articulate reasonably specific facts that explain how it formed its opinion of the applicant in order to meet its burden under Burdine.[128] The Seventh Circuit decided that the Eleventh Circuit's interpretation of Burdine was reasonable because an employer's assertion that it found a plaintiff-applicant "poor"

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[122] Harrington v. Disney Reg'l Entm't Inc., 276 Fed. Appx. 863 (11th Cir. 2007). *See also* Vessels v. Atlanta Indep. School Sys., 408 F.3d 763 (11th Cir. 2005) (subjective criteria have no place in prima facie case challenging failure to promote).

[123] Coghlan v. American Seafoods Co., 413 F.3d 1090 (9th Cir. 2005).

[124] 460 F.3d 946 (7th Cir. 2006).

[125] Id. at 957 (citing Patrick v. Ridge, 394 F.3d 311, 317 (5th Cir. 2004) and Burdine, 450 U.S. at 255-56).

[126] Id. (citing Millbrook v. IBP, Inc., 280 F.3d 1169, 1176 (7th Cir. 2002)(employer's reason that the applicant "had poor communication skills because he failed to make eye contact during the interview and did not seem confident in his answers" was sufficient)).

[127] 460 F.3d at 957.

[128] Id. (citing Chapman v. AI Transport, 229 F.3d 1012, 1034-35 (11th Cir. 2000)).

without any further explanation would not create a genuine issue of fact as to whether the employer honestly held that opinion.[129]

This approach still preserved the employer's ability to meet their burden using "subjective evaluation criteria."[130] Target's motion for summary judgment was only defeated because it did not give a clear statement as to which requirements the applicant lacked. The court concluded that Target should have articulated what requirements he failed to meet. Because of that lack of explanation, the EEOC could survive Target's motion for summary judgment without refuting Target's proffered reason.

In an earlier case, the Seventh Circuit similarly held that an employer's decision to hire is pretextual when it is a lie, which the court defined as a phony reason meant to cover up a disallowed reason.[131] The court stated that without such a showing, an employer's decision to favor one candidate over another can be "mistaken, ill-considered or foolish, [but] so long as [the employer] honestly believed those reasons, pretext has not been shown."[132]

That Seventh Circuit decision, like others, emphasized that the court does not "sit as a super personnel department" so that "disappointed applicants or employees can have the merits of an employer's decision replayed to determine best business practices."[133] Summary judgment was granted for the employer because the person hired had scored the highest based on the interviews, even though the employer's interviewers used their own subjective analysis of the varying traits of each applicant to score the applicants.

Like the Seventh Circuit, the Fifth Circuit has held that "an employer's subjective reason for not selecting a candidate, such as a subjective assessment of the candidate's performance in an interview, may serve as a legitimate, nondiscriminatory reason for the candidate's non-

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[129] Id. at 957-58 (citing Durkin v. Equifax Check Services, Inc., 406 F.3d 410, 415 (7th Cir. 2005) ("self-serving assertions" do not create a genuine issue of fact)).

[130] Id. at 958 (citing Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998) (stating that "subjective evaluation criteria" such as an employee's lack of "consistency, leadership, initiative, and responsibility skills" were a sufficient basis for an employer's adverse action)).

[131] Blise v. Antaramian, 409 F. 3d 861, 95 FEP Cases 1459 (7th Cir. 2005).

[132] Id. at 867 (citing Millbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002)).

[133] Id. (citing Holmes v. Potter, 384 F.3d 356, 361-62 (7th Cir. 2004); Hudson v. Chicago Transit Auth., 375 F.3d 552, 561 (7th Cir. 2004)).

selection."[134] That court denied summary judgment for the employer because it had provided no evidence that clarified or expanded upon why the applicant received a relatively low interview score.[135] The employer had not provided any evidence of the qualifications of the ten candidates selected to be hired. The court concluded that without evidence of the candidates' relative qualifications, the mere assertion that the employer hired the best qualified candidates was insufficient to satisfy its burden of production, as it does not afford the applicant "a full and fair opportunity to demonstrate pretext."[136]

In a case challenging the hiring of a community college president, the Eighth Circuit recognized that while an employer's selection of a less qualified candidate can support a finding of pretext, "it is the employer's role to identify those strengths that constitute the best qualified applicant."[137] Like other courts, the Eighth Circuit noted that "the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."[138]

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[134] Alvarado v. Texas Rangers, 492 F.3d 605, 616 (5th Cir. 2007) (citing Patrick v. Ridge, 394 F.3d 311, 317 (5th Cir. 2004)) (recognizing that McDonnell Douglas does not preclude an employer from relying on subjective reasons for its personnel decisions); Chapman v. AI Transport, 229 F.3d 1012, 1034 (11th Cir. 2000) ("It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.").

[135] Id.

[136] Id. at 618 (citing Burdine, 450 U.S. at 254-56, n.9 ("[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.") (emphasis added); Steger v. Gen. Elec. Co., 318 F.3d 1066, 1076 (11th Cir. 2003) ("A defendant may not merely state that the employment decision was based on the hiring of the 'best qualified' applicant). See also Johnson v. State of Louisiana, 351 F.3d 616, (5th Cir. 2003)(claim cannot be dismissed based on applicant's failure to meet objective qualifications for position, were selectees did not meet same qualifications).

[137] Gilbert v. Des Moines Area Community College, 495 F.3d 906, 916 (8th Cir. 2007) (citing Kincaid v. City of Omaha, 378 F.3d 799, 805 (8th Cir. 2004)).

[138] Id. (citing Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995); Arraleh v. County of Ramsey, 461 F.3d 967, 976 (8th Cir. 2006), cert. denied, 127 S.Ct. 2100 (2007); Kincaid, 378 F.3d at 805).

Despite this "hands off" standard, the Eighth Circuit based its summary judgment for the employer on specific criteria which justified the decision to hire someone else. The employer presented evidence that the African American applicant was not selected for an interview due to his low search committee score and the superior qualifications of the four finalists. The search committee considered the applicants' education, leadership, and job experience. The committee also considered each applicant's personal references, and comments regarding each candidate from the search committee. Following this process, the search committee ranked the plaintiff eleventh out of the thirteen candidates. Based on this specific factual basis for the decision, summary judgment was granted for the employer.[139]

The difficulty for an applicant to show that the employer acted with pretext is demonstrated by the reasoning of the Sixth Circuit in a case of an applicant for promotion. The court held that the applicant merely asserted a disagreement with the employer about who was the more qualified candidate.[140] The applicant need to provide evidence showing that the employer's proffered reason for hiring someone else was not supported by the facts or was not the actual basis for the decision. A disagreement with the employer's assessment of the candidates was "not a sufficient basis to establish pretext, as it is 'the employer's motivation, not the applicant's perceptions, or even an objective assessment of what qualifications are required for a particular position, [that] is key to the discrimination inquiry.'"[141] However, this employer did present substantial evidence that the person hired was the more qualified candidate, including information that he had senior-level experience and he had previous experience at other companies, as well as the plaintiff's lack of a good working relationship with other departments.[142]

IV. Standards for Reviewing Discrimination Claims

To deny a transfer as an accommodation, an employer should at the very least be required to demonstrate that its determination that another person is better qualified is legitimate. By requiring the employer an employer to support that determination with concrete evidence, that

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[139] Id. See also Ottman v. City of Independence Missouri, 341 F.3d 751 (8th Cir. 2003) (applicant for promotion unable to show pretext where candidates had significantly different qualifications and experience, under Equal Protection Clause).

[140] Martinez v. Limited Brands, 200 Fed. Appx. 571 (6th Cir. 2006).

[141] 200 Fed. Appx. At 575 (citing Browning v. Dep't of the Army, 436 F.3d 692, 697 (6th Cir. 2006)).

[142] Id.. *See also* Seay v. Tennessee Valley Authority, 339 F.3d 454 (6th Cir. 2003) (summary judgment granted for employer where selectee was "obviously better qualified" even though neither one had all posted qualifications).

employer may be able to demonstrate that placing the employee with a disability in that position as an accommodation would impose an undue hardship on that employer.

Courts reviewing the dismissal of a discrimination claim often engage in a substantive review of the employer's reasons for its decision. The First Circuit affirmed summary judgment for an employer where the African American applicant for a general foreman position with a city.[143] Without even requiring the employer to produce evidence of a legitimate business reason, the court determined that this applicant was not qualified for the position he sought. He could not show a prima facie case of discrimination because the person chosen had ten more years of experience than the other candidates, and he had more supervisory and administrative experience than them as well. Also, the selection panel determined that he had the greatest job knowledge and familiarity with the job.

After some analysis of the employer's reasons, the court found in favor of the employer. The applicant could not show pretext despite his contention that no questions during the interview that focused on education or instruction in the field of mechanics, and the lack of evidence that the City considered his performance evaluations. The applicant failed to answer several questions correctly, although he argued that the questions asked had no predictive ability for the likelihood of success as a General Foreman.[144]

Despite the "hands off" approach articulated by the Fifth Circuit, as described above, that court reversed summary judgment for a school district in favor of the claim of a female applicant for a position which closely resembled her previous position.[145] Evidence of disparities between her qualifications and those of the men who were hired was sufficient to create a factual issue regarding pretext, since she showed that "no reasonable person, in exercise of impartial judgment, could have chosen candidate selected over her." This right to a trial was based on evidence that her performance was rated as satisfactory or higher on all reviews in 20 years of employment, that she was supervisor for 10 years, with last three years as field supervisor, that this position was nearly identical to area custodial supervisor, that she had necessary skills, and that some of men who were hired did not meet minimum education and experience requirements for job.[146]

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[143] Prescott v. Higgins, 538 F.3d 32 (1st Cir. 2008).

[144] Id. at 40-41.

[145] Gillaspy v. Dallas Indep. Sch. Dist., 278 Fed. Appx. 307 (5th Cir. 2008).

[146] Id. at 313-14. See also Reilly v. TXU Corp., 271 Fed. Appx. 375 (5th Cir. 2008) (white rejected internal candidate entitled to trial where employer relied on selectee's qualifications, but he had highest score of those interviewed); Amie v. ElPaso Endep. Sch. Dist., 253 Fed. Appx.

Similarly, the Seventh Circuit engaged in a substantive review of the qualification of two applicants for promotion in denying summary judgment for an employer.[147] Factual questions existed as to whether the employer's explanation that a male candidate was chosen over the female candidate because he was qualified and had successfully served as acting regional director. The unsuccessful applicant presented evidence that the promotion process was manipulated so that male employees were selected for two regional director positions, and in part because the performance of the male selected had been criticized in the past.[148]

The Third Circuit refused to grant summary judgment for an employer which twice failed to hire a female job applicant for a locksmith position.[149] This Court first recognized that any qualification issues should not be resolved at the prima facie stage of the analysis. She met the prima facie requirement, even though neither she nor the other applicants had the desired amount of experience, because "by departing from a job posting's objective criteria in making an employment decision, an employer establishes different qualifications against which an employee or applicant should be measured for the position."

This plaintiff could go to trial based on evidence that before the first nonselection, she had completed a home study course in locksmithing and subsequently received a professional locksmithing license, while the selectee had completed no such coursework. The person chosen over her the second time had little experience in locksmithing and had completed no locksmithing coursework until after he was placed in the locksmith position.

Like these other courts, the Fourth Circuit has overturned a summary judgment for an employer where a female emergency-room registration clerk presented evidence that she was qualified for the job of registration supervisor that went to man.[150] She did not satisfy all of criteria in the written job description, but neither candidate satisfied all of the criteria. The female applicant arguably satisfied the criteria as a whole better than he did, since he had less hospital experience and lacked familiarity with relevant practices, whereas she met all of criteria listed as mandatory

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447 (5th Cir. 2007) (summary judgment granted school despite greater experience of African American applicant where experience was not sole component of qualifications).

147 Fischer v. Avanade Inc., 519 F.3d 393 (7th Cir. 2008).

148 Id. at 402-3. *See also*, Sublett v. John Wiley & Sons, 463 F.3d 731 (7th Cir. 2006) (Black employee failed to show prima facie case based on denial of promotion where selectees' qualifications were undeniably superior to hers despite her greater seniority and asserted better relations with other employees).

149 Scheidemantle v. Slippery Rock Univ., 470 F.3d 535 (3d Cir. 2006).

150 Dennis v. Columbia Colleton Medical Center, 290 F.3d 639 (4th Cir. 2002).

except for three years' job experience. His selection showed that several formal qualifications listed as required were not actually mandatory.[151]

Similarly, the Sixth Circuit allowed a job applicant to go to trial regarding his nonselection for a regional manager position.[152] Even though the employer alleged that the white female who was selected was more experienced, the African American male candidate was entitled to a trail since he was the only applicant with an MBA and had years of successful experience with that company. The employer's contention that the African American applicant came across as "aggressive" during the interview did not support summary judgment for the employer where the evaluation of an interview is "highly subjective" and the only basis for finding that he was aggressive was his questions about workforce diversity.[153]

In a reverse discrimination claim, the Eleventh Circuit reversed summary judgment that had been granted to a public employer.[154] This reversal occurred despite the court's recognition that a subjective reason for an employer's action—such as poor interview performance-can be as legitimate as any other reason.[155] The court also noted that an interview is "frequently necessary

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[151] Id. at 646-47.

[152] White v. Baxter Healthcare Corp., 533 F. 3d 381 (6th Cir. 2008).

[153] Id. at 393-94.

[154] Bass v. Bd. of County Commissioners, Orange County, Fla., 256 F.3d 1095 (11th Cir. 2001). See also Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008) (Black employee raised factual issue as to whether alleged "lack of consensus" proffered as reason for not promoting her was pretext for discrimination and retaliation, where she was considered best candidate for position); Enwonwu v. Fulton-Dekalb Hosp., 286 Fed. Appx. 586 (11th Cir. 2008) (Black hospital employee failed to establish either prima facie case of refusal to hire or that hospital's explanation that selected applicant was more qualified was pretextual, where she scored lower than two other job applicants on her evaluation form, and selected black applicant had 12 years of experience) Sringer v. Convergys Customer Mgmt. Group, 509 F.3d 1344 (11th Cir. 2007) (White employee's superior qualifications were legitimate, nondiscriminatory reason to promote her, even though black employee had four-year college degree and white employee did not, where white employee's annual ratings were consistently higher than black employee's, white employee was highly regarded by her co-workers and possessed requisite experience to substitute for college degree, and employer testified that experience was more important than education).

[155] 256 F.3d at 1105 (citing Chapman v. AI Transport, 229 F.3d 1012, 1033 (11th Cir. 2000) (en banc)).

to assess qualities that are particularly important in supervisory or professional positions, that "must be assessed primarily in a subjective fashion." For a subjective reason to constitute a legally sufficient, legitimate, nondiscriminatory reason, the employer must articulate "a clear and reasonably specific factual basis upon which it based its subjective opinion."

The reversal of the summary judgment was based in part on a statement that the employer had adopted the interview process "to create some leeway to allow us to promote minority candidates," and the employer's reliance on the interview scores alone, even though the interview score was not supposed to be determinative. Despite testimony that the white applicant did not perform well in the interview, the court found that an employer's violation of its own normal hiring procedure may be evidence of pretext.[156] The process was also suspect because the interviewers received no training or guidelines to help them evaluate which candidates were best qualified for the positions.[157]

V. Standards Used in Hiring and Promotion Decisions

These cases illustrate how an appellate court engages in an in-depth analysis to ensure that the employer has a legitimate business reason for its decision to refuse hire or promotion for a member of a protected class. A review of recent discrimination cases provides a framework to determine how a court can determine whether a transfer as an accommodation would impose an undue hardship on an employer, where the employer alleges that someone other than the person seeking the accommodation is better qualified for that position. 118 federal appellate court decisions were reviewed involving the failure to hire or promote where the unsuccessful candidate alleged that they were the victim of some type of discrimination.

In each of these cases, the employer alleged as a legitimate business reason that the person who alleged discrimination was less qualified for the position than the person selected. In 108 of these cases, the appellate court reached a finding of whether the employee showed that the reason offered by the employer to justify its decision was a pretext for discrimination. The plaintiff was successful in presenting some evidence of pretext in 35 of the cases, and the employer prevailed in 73 of the cases reviewed.

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[156] Id. at 1108 (citing Hill v. Seaboard Coast Line R.R., 885 F.2d 804, 811 (11th Cir. 1989).

[157] Id. See also, Cooper v. Southern Company, 390 F.3d 695 (11th Cir. 2004)(Black employee who was not promoted failed to raise material issue of fact that employer's reason for hiring white applicant was pretextual, where black employee lacked preferred bachelor's degree in finance and had no construction experience, while white applicant had both degree and limited experience).

An examination of the court's review of these employers' justifications for their hiring and promotion decisions can provide guidance in reviewing transfer accommodation requests. To get a general sense of the depth of the court's review of the employer's decision-making process, decisions were reviewed to determine the number of employer witnesses discussed in the court's decision. On average, the court discussed .91 employer witnesses per opinion. In cases in which the employee or applicant was successful in showing pretext to discriminate, the court discussed an average of 1.14 witnesses, whereas in cases where the employer prevailed, the court discussed an average of .82 witnesses.

The extent of the court's discussion also provides information about the depth of the court's review of the employer's decision-making process. On average, in cases where the court made a determination regarding the proof of the employer's pretext to discriminate, the court used an average of 497 words to discuss whether the legitimacy of the employer's reason for rejecting the employee or applicant who was alleging discrimination. Where the court made a positive finding for the employee or applicant on the issue of pretext, the court used an average of 638 words to discuss the employer's reason, whereas when the plaintiff was unsuccessful, the court used an average of 429 words. This statistic is a bit skewed since in 4 of the cases where the court found no evidence of pretext, it used no words to discuss the legitimacy of the employer's reason.

Even more informative is the content of the court's discussion of the legitimacy of the employer's reason for not promoting or hiring the person who alleged discrimination. Some decisions relied on more than reason to either find pretext or to dismiss the applicant's claim. Of the 118 cases reviewed, the following reasons were given by the court for its decision:

Basis for Decision	Total	Pretext	No Pretext	n/a
Belief or disbelief in employer's witnesses	16	2	13	1
Consistencies or inconsistencies in employer's evidence	33	18	13	2
Belief or disbelief in applicant's witnesses	9	7	1	1
Self assessment by applicant	18	5	12	1
Court's assessment of validity of employer's reason	42	19	20	3
Evidence (or lack) of intent to discriminate	46	24	21	1
Consistency in employer's hiring practices	23	11	12	0
Consistency in application of hiring criteria	44	17	23	4

As shown by this review, the more common bases for reviewing an employer's hiring or promotion decision was the court's own assessment of the validity of the reason, the presence or absence of direct evidence of the employer's intent to discriminate, and the employer's consistency in applying its hiring criteria to the applicants. The court's belief in the employer's witnesses and the court's unwillingness to rely on the applicant's assessment of their own attributes clearly had a positive effect on the employer's position. Inconsistencies in the employer's had a strong effect in favor of the applicant's allegations of discrimination.

B. Basis for the Decisions

A closer examination of the reasoning in some of these decisions illustrates the depth of courts' review in cases where the employee alleges that the reason given by the employer in a hiring or promotion decision is a pretext for discrimination.

Belief or disbelief in employer's witnesses: In a race discrimination claim based on the failure to promote several African American applicants, the court relied on the testimony of the employers' witnesses that explained the criteria they relied on in making the selection decisions.[158] Conversely, in a claim based on the failure to hire several African American applicants, the court found pretext to discriminate based in part on its disbelief in the employer's witnesses, where the employer could not produce documentation of the ratings resulting from the interview process and there was evidence that the employer was aware of the race of applicants who were not even interviewed.[159]

Consistencies or inconsistencies in employer's evidence: A court refused to find a pretext for discrimination in a race discrimination claim where the employer produced documentation of the complainant's attendance issues, and the relatively greater experience of the selectee for promotion.[160] In a claim alleging sex discrimination and retaliation, the court did find pretext where the court did not believe that the employer relied on interview scores and assessment of the applicants' relative skills as it alleged.[161]

Belief or disbelief in applicant's witnesses: In a race discrimination claim brought by a white applicant for a promotion, the court found evidence of pretext to discriminate based on its

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[158] Cooper v. Southern Co., 390 F.3d 695, 729-31 (11th Cir. 2004).

[159] EEOC v. Target Corp., 460 F. 3d 946, 958-61 (7th Cir. 2006).

[160] Harrington v. Disney Regional Entertainment, Inc., 276 Fed. Appx. 863 (11th Cir. 2007).

[161] Gillaspy v. Dallas Independent School District, 278 Fed. Appx. 307 (5th Cir. 2008).

recognition of the complainant's evidence challenging the validity of the employer's reasons to promote an African American applicant witness.[162]

Self assessment by applicant: In a race discrimination claim brought by a white employee seeking promotion, the applicants' "bare claims" that they were more qualified than the selectees were not sufficient to show that the employer's legitimate nondiscriminatory reasons were pretext for discrimination.[163] Conversely, in a sex discrimination claim by a woman seeking a promotion, the court found that the employer's justification for promoting a man was pretextual in part based on the female applicant's description of her qualifications.[164] Another court observed that it is "the employer's motivation, not the applicant's perceptions, or even an objective assessment of what qualifications are required for a particular position, [that] is key to the discrimination inquiry."[165]

Court's assessment of validity of employer's reason: In a race discrimination claim challenging a failure to promote, the court found that the employer's reasons given to support a motion for summary judgment were "vague" and "failed to specify the manner in which the white employees were better qualified, or the degrees of difference in the annual evaluations."[166] In contrast, another court dismissed the sex discrimination claim of an applicant for a promotion, after analyzing the candidates' relative years of experience, the quality and breadth of that experience, and the extent of their previous supervisory experiences.[167] After this review, the court concluded that the selectee had superior experience in material and relevant respects."

Evidence (or lack) of intent to discriminate: In a claim by an applicant based on her national origin and religion, pretext was established in part by the employer's references to her accent.[168] In a retaliation case, conversely, the applicant was unable to show pretext to survive a motion for

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[162] Vessels v. Atlantic Independent School System, 408 F.3d 763, 771 (11th Cir. 2005).

[163] Denney v. City of Albany, GA, 247 F.3d 1172 (11th Cir. 2001).

[164] Fischer v. Avanade, Inc., 519 F.3d 393 (7th Cir. 2008).

[165] Martinez v. Limited Brands, Inc, 200 Fed. Appx. 571 (6th Cir. 2006).

[166] Hopson v. DaimlerChrysler Corp., 306 F.3d 427 (6th Cir. 2002); decision on appeal after trial, 157 Fed. Appx. 813 (6th Cir. 2005).

[167] White v. Columbus Metropolitan Housing Authority, 429 F.3d 232, 243-44 (6th Cir. 2005).

[168] Raad v. Fairbanks North Star Borough, 323 F.3d 1185 (9th Cir. 2003).

summary judgment even though one member of the selection panel knew of the applicant's pending EEOC complaint, but claimed it did not influence his decision.[169]

Consistency in employer's hiring practices: An employer's failure to adhere to its own personnel rules did not establish a pretext for discrimination in a claim by an African American applicant for a promotion to a National Accounts Manager position.[170] In contrast, pretext was established in a race discrimination claim involving a failure to promote in part based on inconsistencies in hiring practices used by the employer.[171] The court noted that a test was devised but not used in making hiring decisions, and the complaining applicant was not allowed to take the test the first time it was available, and then was required to take the test after completing a 12 hour shift. The employer also refused to let him retake the test for subsequent openings.

Consistency in application of hiring criteria: In a race discrimination claim, the employer succeeded in supporting its justification for not transferring the complainant, where the employer relied on a compilation of evaluators' scores for the applicants' previous performance evaluations and interview performances, as well as their supervisors' skills' assessments. [172] The court specifically rejected the complainant's argument that the employer manipulated his scores based on his race.[173]

Conversely, pretext was established in a sex and age discrimination claim brought by an applicant for a teaching position, despite the business judgment rule, where the employer relied on its reasons of interview performance and lack of "familiarity with the basic competencies necessary for effective teaching," despite the complainant's many years of experience.[174]

These cases illustrate the depth of the appellate court's review of an employer's reasons given to justify a hiring or promotion decision which was challenged in a discrimination claim.

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[169] Robinson v. Potter, 453 F.3d 990 (8th Cir. 2006).

[170] Walker v. Abbott Laboratories, 416 F.3d 641 (7th Cir. 2005).

[171] Sledge v. Goodyear Dunlop Tires North America, LTD., 275 F.3d 1014 (11th Cir. 2001).

[172] Sutherland v. Michigan Dept. of Treasury, 344 F.3d 603 (6th Cir. 2003).

[173] Id. at 618.

[174] Byrnie v. Town of Cromwell, Board of Education, 243 F.3d 93 (2d Cir. 2001).

Not a Super Personnel Office

Courts which did not engage in an in depth review of the employer's reasons for not hiring or promoting an applicant often justified their limited review by stating the court's unwillingness to act as a "super personnel office" for employers. The Eighth Circuit consistently states that the court does not "sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."[175] Similarly, the Seventh Circuit Courts has stated that it does not "sit as super personnel departments to second guess an employer's facially legitimate business decisions.[176] That court has explained further that an employer is free to develop its own criteria in determining whom to promote, and it is not the court's "place to evaluate the wisdom of an employer's business decisions."[177]

These courts were not willing to review the decision of the employer as to whether it was a "good" personnel decision. Of the 118 cases reviewed, 23 of the decisions made some reference to this reluctance to review employers' decisions. In all but two of those decisions, the court either found insufficient evidence of pretext, or that the applicant failed to support a prima facie case of discrimination.

Of those 21 decisions in favor of the employer, however, only four of those courts did not engage in any critique of the employer's reasons for the hiring or promotion decision. The remainder of those courts went on to review the employers' decisions based on one or more of the factors outlined above. This analysis by the courts suggests that although they may be reluctant to do so, many discrimination claims require a review of the employer's reasons for a decision to determine whether or not they acted with an intent to discriminate.

A substantive review of hiring decisions is supporting by the EEOC's practice of determining whether a discrimination claim has merit. One study reviewing disability discrimination claims found a Merit Resolution rate of 19,527 in closed hiring allegations compared to that of 259,680

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[175]Davis v. KARK-TV Inc., 421 F.3d 699 (8th Cir. 2005) (citing Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999)).

[176] Wells v. Unisource Worldwide, Inc., 289 F.3d 1001 (7th Cir. 2002).

[177] Johnson v. Nordstrom, Inc., 260 F.3d 727 (7th Cir. 2001). *See also*, Millbrook v. IBP, Inc., 280 F.3d 1169, 1182-83 (7th Cir.), cert. denied, 537 U.S. 884 (2002); Rathbun v. Autozone, Inc., 361 F.3d 62 (1st Cir. 2004); Champ v. Calhoun Co. Emergency Mgmt. Agency, 226 Fed.Appx. 908 (11th Cir. 2007) (citing Pennington v. City of Huntsville, 261 F.3d 1262, 1267 (11th Cir. 2001)); Hux v. City of Newport News, VA, 451 F3d 311 (4th Cir 2006).

allegations aggregated from six other prevalent forms of discrimination.[178] The overall Merit Resolution rate for hiring was 26% compared to non-hiring cases at 20.6%.

Support from Research

The social science research supports the proposition that courts should engage in an in-depth review of an employer's decision-making process when denying a transfer as an accommodation because someone else is "better qualified." First, current research confirms discrimination based on disability still occurs. Of the 82,792 charges filed with the EEOC in fiscal year 2007, 17,734 or 21.4% alleged ADA violations.[179] The EEOC filed 290 lawsuits in FY 2008, with 47 including ADA claims.[180] In a United Kingdom survey of just under 700 businesses, 86% agreed that employers would pick a non-disabled candidate over a disabled candidate, while 92% said there was still discrimination against disabled people in employment and recruitment.[181]

Second, research also has long established that subjectivity in hiring and promotion decisions can still allow bias to influence those decisions. In determining whether an employer has met its burden of proof in showing an undue hardship where the employer denies a transfer as an accommodation, courts should focus on the employer's decision making process in filling an open position which is sought by a person with a disability. In reassignment cases, "it is the employers' own job-related practices and requirements, even if they are legitimate, that prevent the disabled employee who needs to be reassigned from continuing to work in his or her present position."[182] As discussed more specifically by John and Christopher Murray, an employer's policy of hiring the "most qualified" person for a position "includes a necessary element of subjectivity and risks the obliteration of the statutory obligation to reassign."[183]

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[178] McMahon, Hurley, West and Chan, "A Comparison of EEOC Closures Involving Hiring Versus Other Prevalent Discrimination Issues under the Americans with Disabilities Act." JOURNAL OF OCCUPATIONAL REHABILITATION at 106 (2008).

[179] EEOC website, Americans with Disabilities Act of 1990 (ADA) Charges, http://www.eeoc.gov/stats/ada.html.

[180] EEOC Annual Report, available at www.eeoc.gov.

[181] Jo Faragher, "Shut Out," PERSONNEL TODAY at 22 (2007).

[182] Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 987 (2004).

[183] John E. Murray and Christopher J. Murray, Enabling the Disabled: Reassignment and the ADA, 83 MARQ. L. REV. 721, 740 (2000).

The same subjectivity has been documented as an important factor in the amount of influence that discriminatory intent has had in hiring and promotion decisions. Researchers have documented that formalized personnel systems limit cognitive bias' influence in these types of decisions, and that reducing subjectivity in selection and job assignment will therefore increase women's share of managerial jobs.[184] More specifically, when organizations allow individuals latitude in selecting managers, supervisors may consciously or unconsciously take workers' sex into account.[185] According to organizational and social psychological theories, bureaucratizing personnel practices undermines ascription by reducing subjectivity in personnel decisions.[186] In contrast, where selectors for an employer are directed to consider principles of employment equity in hiring decisions, they are more willing to hire underrepresented groups members, if they are equally or more qualified than other applicants.[187]

Where formal employment practices require employers to standardize procedures and achievement criteria, managerial sex composition in organizations with highly formalized personnel practices will be less affected by ascription. Considerable empirical research indicates that formalization reduces sex-based ascription.[188] Thus, we expect the

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[184]Barbara Reskin and Debra B. McBrier. "Why Not Ascription? Organizations' Employment of Male and Female Managers." 65 AMERICAN SOCIOLOGICAL REVIEW at 210-33 (2000).

[185] Id. (citing Brian S. Mittman. "Theoretical and Methodological Issues in the Study of Organizational Demography and Demographic Change." 10 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS at 3-53, (1992).

[186] Id. (citing James N. Baron and William T. Bielby. "Bringing the Firm Back In: Stratification, Segmentation, and the Organization of Work." 45 AMERICAN SOCIOLOGICAL REVIEW at 737, 742 (1980).; William T. Bielby, "Minimizing Workplace Gender and Racial Bias." 29 Contemporary Sociology at 120-29 (2000); Madeline E. Heilman. "Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know." 10 JOURNAL OF SOCIAL BEHAVIOR AND PERSONALITY 6 at 3–26 (1995);, Jeffrey Pfeffer. "Toward an Explanation of Stratification in Organizations." 22 ADMINISTRATIVE SCIENCE QUARTERLY 553, 557 (1977)).

[187] Eddy S. Ng and Willi H. Wiesner.. "Are Men Always Picked Over Women? The Effects of Employment Equity Directives on Selection Decisions," 76 JOURNAL OF BUSINESS ETHICS 177, 183 (2007).

[188] Id. (citing Cynthia Anderson and Donald Tomaskovic Devey. "Patriarchal Pressures: An Exploration of Organizational Processes That Exacerbate and Erode Gender Earnings Inequality." 22 WORK AND OCCUPATIONS at 328-56 (1995); Jeffrey Pfeffer (1983) "Organizational Demography." Pp. 299, 314-15 in Research in Organizational Behavior, vol. 5, edited by L. L. Cummings and B. M. Slaw. Greenwich, CT: JAI Press; Jeffrey Pfeffer and Yinon

formalization of personnel practices to limit sex-based ascription and hence to be negatively associated with men's share of managerial jobs.

Barbara Reskin also has found that contextual factors that appear to minimize the likelihood of stereotyping and its biasing effects include minimizing the salience of ascribed status dimensions in personnel decisions and replacing subjective data with objective data.[189] More specifically, she noted that recollections and evaluations that are based on unstructured observations are particularly vulnerable to race or sex bias. [190] Organizations should be able to minimize race and sex bias in personnel decisions by using objective, reliable, and timely information that is directly relevant to job performance.[191] For objective measures to minimize intergroup bias, organizations must provide a detailed specification of all performance criteria along with precise information for each candidate for each criterion.[192]

There is an extensive social-psychological literature addressing how ambiguity of information may lead to the use of stereotypes and hence to discrimination.[193] Yet Peterson and Saporta found that there was little if any variation in the rates of promotion among employees of different sexes. They surmise that this lack of difference may be due to the fact that one is typically still in a position to document in a comparatively unambiguous manner the relative qualifications of those promoted and those passed over, given the promotion rules of the

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Cohen. "Determinants of Internal Labor Markets in Organizations." 29 Administrative Science Quarterly at 550-72 (1984); John R. Sutton, Frank Dobbin, John W. Meyer, and Richard W. Scott. "The Legalization of the Workplace." 99 American Journal of Sociology at 944-71 (1994);, Donald Tomaskovic-Devey, Arne L. Kalleberg, and Peter V. Marsden. "Organizational Patterns of Gender Segregation." pp. 276, 287-88, in Organizations in America, edited by A. L. Kalleberg, D. Knoke, P. V. Marsden, and J. L. Spaeth. Newbury Park, CA: Sage (1996)).

[189]Barbara F. Reskin, "The Proximate Causes of Employment Discrimination," Contemporary Sociology (March 2000).

[190] Id. See also Fiske, Bersoff, Borgida, Deaux, and Heilman. "Social Science Research on Trial Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins." 46 American Psychologist at 1049-60 (1991).

[191] Id. (citing Heilman supra note 179).

[192] Id. (citing Linda Hamilton Krieger. "The Contents of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity." 47 STANFORD LAW REVIEW 1161, 1246 (1995)).

[193] Peterson, Trond and Ishak Saporta. "The Opportunity Structure for Discrimination." 109 AMERICAN JOURNAL OF SOCIOLOGY at 852-901 (2004).

organization. Peterson and Saporta still recognize that deciding which employee is more qualified for promotion usually involves some amount of subjective judgment, on which there may be disagreements among various assessors.

Researchers have also found that evaluators tend to set higher standards of competency for high level positions when comparing women and men.[194] It has also been shown that when selectors had to justify their judgments, they were less likely to use double standards, even though male evaluators generally were more likely than females to use double standards on competency that benefitted male applicants. Similarly, for African Americans, research has shown that the possibility for barriers to employment increases with the subjectivity of the achievement rules used by the employer.[195]

Conclusion

In some areas of the country, a person with a disability can request a transfer as an accommodation so long as she meets the minimum qualifications for that position. In other areas, an employer can deny that transfer if it believes that another person is better qualified for that position. For a person with a disability who can no longer perform her previous position with the employer, this can mean the end of that employment.

Based on the legislative history of the ADA, and under the purposes of the ADA to allow more persons with disabilities to enter and remain as productive workers, employers should be required to prove that transferring a person with a disability, rather than hiring someone else, would impose an undue hardship. Simply asserting that another person is more qualified for that position should not be enough to deny that accommodation.

How can an employer establish an undue hardship? A review of cases where an applicant for hire or promotion illustrate the minimum level analysis a court should use when deciding whether an employer has met that burden. Like the cases involving a transfer, employers often justify their failure to hire or promote a member of a protected class based on that employer's assessment of the applicants' relative qualifications. In these cases, courts routinely engage in an in-depth analysis of the employer's reasons to resolve these claims, even if those courts are reluctant to act as "super personnel offices." This same type of review can be used when an employer refuses to provide a transfer as an accommodation because it believes that another applicant is better qualified.

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[194] Martha Foschi. "Double Standards for Competence," 26 ANNUAL REVIEW OF SOCIOLOGY at 21-42 (2000).

[195] Elsie L. Harper-Anderson."Benchmarks and Barriers: African American Experiences in the Corporate Bay Areas's New Economy Sector of the 1990's," 27 JOURNAL OF PLANNING EDUCATION AND RESEARCH at 483, 496 (2008).

Social science research also supports a substantive review of employer's reasons for denying a transfer as an accommodation. In hiring and promotion decisions, employers have shown that without objective criteria and a structured process, employers' decisions can be influenced by stereotypes and other biases which disadvantage members of protected groups.

If the Supreme Court has an opportunity to resolve the conflict between the circuit courts regarding transfers as accommodations, the Court should look to this research and courts' analysis of an employer's reason for denying a protected class applicant. This well-established systemic review can guide courts to provide important opportunities to remain employed for employees with disabilities.