

**“SENIORITY RULES”: DISABLED EMPLOYEES’ RIGHTS
UNDER THE ADA GIVE WAY TO MORE SENIOR
EMPLOYEES – U.S. AIRWAYS, INC. V. BARNETT**

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I. INTRODUCTION

In 1990, Congress enacted one the century’s most significant pieces of civil rights legislation. The Americans with Disabilities Act (“ADA”)¹ ambitiously seeks equal opportunity and full participation in society for disabled individuals.² Title I of the ADA focuses specifically on equal opportunity and full participation in the

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1. 42 U.S.C. §§ 12101-12117 (2000).

2. 42 U.S.C. § 12101(a)(8) (2000).

workplace.³ To achieve its laudable goals, the ADA, among other things, places an affirmative obligation on employers to make reasonable accommodations for individuals with known disabilities.⁴ Reasonable accommodation includes reassignment to a vacant position, job restructuring, modified work schedules, and other similar accommodations.⁵

The ADA's reasonable accommodation provision is a powerful and unique tool for disabled individuals.⁶ It not only requires employers to treat disabled and non-disabled employees alike, but also requires the employer to make individualized changes to its workplace.⁷ Unfortunately, over time, the reasonable accommodation provision has lost its effectiveness through judicial decisions.⁸ This note specifically discusses how courts have undermined the ADA by allowing seniority systems to trump reasonable accommodation.

While seniority systems play a significant role in the American workplace,⁹ their purpose clashes with anti-discrimination legislation, such as the ADA and Title VII¹⁰ of the Civil Rights Act of 1964 ("Title VII").¹¹ Seniority systems seek to retain employees long-term by giving employees increasing job security and preferential employment treatment directly proportional to seniority accrued.¹² Such a system maintains the historical status quo of relegating and excluding minorities and disabled individuals from the workplace. Conversely, anti-discrimination legislation seeks to redress historical discrimination of minorities and disabled individuals by eliminating physical barriers and biases.¹³ Realizing this dissonance, Congress decided to limit the deference afforded to seniority systems and collective bargaining

3. Title I aims to "remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities." 29 C.F.R. pt. 1630, app. at 350 (2000).

4. 42 U.S.C. § 12112(b)(5)(A) (2000).

5. 29 C.F.R. § 1630.2(o)(2) (2001).

6. See S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603, 608-09 (2001).

7. See *id.*

8. See discussion *infra* Part II.C.

9. See discussion *infra* Part II.A.

10. 42 U.S.C. §§ 2000e – 2000e-17(2000).

11. See discussion *infra* Parts II.A, II.C.3.

12. See discussion *infra* Part II.A.

13. See 42 U.S.C. §§ 12101(a), 2000e-4(h)(2) (2000).

agreements under the ADA.¹⁴

The majority of courts, however, have routinely ignored Congress's intent when interpreting the conflict between the ADA's reasonable accommodation provision and seniority systems.¹⁵ Instead, they have imprudently based their decisions on the historical significance of non-legally binding seniority systems in the American workplace, as well as legal precedent from other anti-discrimination legislations – notably Title VII.¹⁶

While Title VII shares in the revolutionary spirit of the ADA, its purpose of eliminating discrimination targets a different class of individuals and utilizes means designed for that particular class.¹⁷ Title VII also does not mandate “reasonable accommodation,” and more importantly, it expressly exempts employment actions made pursuant to bona fide seniority systems.¹⁸ Congress rejected such an exemption in the ADA and stated that a seniority system is only a *factor* in the “reasonable accommodation” analysis.¹⁹ The courts' failure to appreciate these differences between Title VII and the ADA thwarts Congress's goal of eliminating workplace discrimination against disabled individuals. Moreover, it exacerbates the burgeoning challenges disabled individuals face when they enter a courtroom.

For several years now, the circuit courts have divided on the issue of whether a seniority system trumps the reasonable accommodation provision of the ADA.²⁰ After the Ninth Circuit rejected this notion, the Supreme Court reviewed the issue in *U.S. Airways, Inc. v. Barnett*.²¹ As part of its trilogy of pro-employer ADA cases decided that same term,²² the *Barnett* Court created a

14. See discussion *infra* Part IV.C; see also H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

15. See discussion *infra* Part II.C; see also *infra* note 96.

16. See discussion *infra* Parts II.C.1, IV.A.

17. See discussion *infra* Part II.B.

18. See discussion *infra* Part II.B; see also 42 U.S.C. § 2000e-2(h) (2000).

19. See discussion *infra* Part II.C.

20. See discussion *infra* Part II.C.

21. 535 U.S. 391, 122 S. Ct. 1516 (2002); see discussion *infra* Part III.C. At the time that this article was published *U.S. Airways, Inc. v. Barnett* had not been published in the United States Reports, therefore the article will use the Supreme Court Reporter when citing *Barnett*.

22. *Chevron v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045, 2046 (2002) (holding that employers can consider direct threats to an employee's own health and safety in determining whether to remove the employee); *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002) (making it more difficult for employees to prove they are disabled).

confusing and burdensome rule for disabled employees.²³ The Court created a presumption that the mere presence of a seniority system was ordinarily sufficient to show that an accommodation is not reasonable.²⁴ This presumption can only be overcome if the plaintiff can show special circumstances—normally within the ambit of the employer's knowledge—that warrant a finding that the requested accommodation is nonetheless reasonable on the particular facts.²⁵ Consequently, employers can hide behind unilaterally imposed seniority systems when making employment decisions involving accommodation requests by disabled employees.

This note examines the history of seniority systems and anti-discrimination legislation in the United States.²⁶ Specifically, this note addresses Title VII and the ADA; both of which seek to redress historical discrimination in the workplace, but approach seniority systems differently.²⁷ The third section details the judicial history of *U.S. Airways, Inc. v. Barnett*, beginning with the Ninth Circuit's analysis through the Supreme Court's divided opinions.²⁸ Part VI analyzes and criticizes the majority's problematic approach and analyzes the remaining opinions and their merits. This note concludes that the Court's ruling rests on a shaky foundation based on custom and unpersuasive legal precedent, and ignores the plain language and legislative intent of the ADA.²⁹

II. HISTORY OF SENIORITY SYSTEMS AND ANTI-DISCRIMINATION LEGISLATION IN THE U.S.

A. *Seniority Systems' Customary Role*

In times of economic downturn, job security becomes a priority, ahead of wages.³⁰ In the American workforce, job security is often based on seniority—the length of time the employee has

23. *Barnett*, 122 S. Ct. at 1505; see discussion *infra* Part IV.

24. *Barnett*, 122 S. Ct. at 1525.

25. *Id.*

26. See *infra* Part II.

27. See *infra* Parts II.B-C.

28. See *infra* Part III.

29. See *infra* Part V.

30. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 658 (4th ed. 1998).

worked for an employer.³¹ There are two main types of seniority: benefits seniority and competitive seniority.³² The former grants employees increasing eligibility for benefits based on length of service and involves relations between the employee and employer.³³ The latter describes priority systems for allocation of scarce employment conditions and involves relationships among employees.³⁴ Competitive seniority is more contentious, as it is most often implicated in bidding systems for job transfers and last-hired, first-fired layoff actions.³⁵

Although there are no legal requirements for seniority systems,³⁶ they have become a deeply ingrained concept in the American employment system.³⁷ This custom has important consequences for employees and employers. For employees, their job security is directly proportional to seniority accrued.³⁸ In addition to giving employees a measure of expected job security, seniority plays a dominant role in making employment decisions.³⁹ Employees with greater seniority gain preferential treatment with respect to certain employment decisions, including promotions, wages, and work-shifts.⁴⁰ Employers who utilize seniority systems promote an environment of teamwork and training.⁴¹ Because skills are often acquired on the job, employers need senior employees to train new recruits.⁴² However, without a seniority system employees realize that every new employee could result in a

31. *Id.* at 659.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. In fact, seniority is often exempted from legislation providing leave of absence provisions. *See id.* at 660 (“The Vietnam Era Veterans’ Readjustment Assistance Act, 38 U.S.C. §§ 2021-2026 (2000), provides that persons who, as a consequence of being inducted into the United States military, must leave permanent positions of employment, have a right to be reinstated to their former positions, or to positions of like seniority, status, and pay, upon their return.”). However, veterans are not entitled to accrue seniority. *See* Family and Medical Leave Act of 1993, 29 U.S.C. § 2614(a)(3)(A) (2000) (“Nothing in this section shall be construed to entitle any restored employee to . . . the accrual of any seniority . . . benefits during any period of leave.”).

37. ROTHSTEIN, *supra* note 30, at 660.

38. Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 AM. U. L. REV. 339, 342 (1986).

39. *Id.*

40. *Id.*

41. ROTHSTEIN, *supra* note 30, at 660.

42. *Id.*

greater probability of being fired in times of economic downturn.⁴³ This may cause a senior employee to seek a monopoly of knowledge and refuse to share this knowledge.⁴⁴ A seniority system promotes training and teamwork by assuring the senior employee that the new recruit will be fired first in the event of a layoff.⁴⁵

Theoretically, seniority affects employees regardless of race, gender, religion, national origin, or disability.⁴⁶ However, in reality, seniority has deleterious effects on the employment opportunities and expectations of minority groups.⁴⁷ Historically, employers used seniority rules to exclude minorities from higher paying and respectable jobs, relegating them to less desirable and lower paying jobs.⁴⁸ Because non-minorities have not been the targets of past discriminatory practices, they often have more seniority than minorities. Consequently, the application of seniority rules to jobs formerly restricted to non-minorities seriously undercuts the job security of newly admitted minority workers.⁴⁹

This disparity between minorities and non-minorities is further exacerbated by legislative and judicial exemptions of seniority systems from important legislation aimed at eradicating the discriminatory effects of employment decisions based on race, color, religion, gender, national origin,⁵⁰ age,⁵¹ and disability.⁵² Consequently, and ironically, it may be *lawful* for employers to

43. *Id.*

44. *Id.*

45. *Id.*

46. Hernandez, *supra* note 38, at 342.

47. *Id.* at 342-43.

48. *Id.* at 343 n.22.

49. *Id.* at n.17.

50. Title VII prohibits employers from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2000). However, section 703(h) permits employers to use different standards of compensation and terms and conditions of employment decisions pursuant to a bona fide seniority system. *Id.* at § 2000e-2(h).

51. The Age Discrimination in Employment Act (ADEA) makes it unlawful for an employer to fail or refuse to hire, to discharge any individual, or to otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of an individual's age. 29 U.S.C. § 621-634 (2000). However, section 623(f) states that it is not unlawful for an employer to discriminate on the basis of age in order to observe the terms of a bona fide seniority system that is not intended to evade the purposes of the ADEA. *Id.* at § 623(f).

52. The Supreme Court ruled, in *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1525 (2002), that seniority systems will generally *trump* the Americans with Disabilities Act's reasonable accommodation provision.

discriminate if the decision is made pursuant to or in observance of the terms of a seniority system.

B. Title VII and Seniority

Title VII ranks among the century's most notable pieces of anti-discrimination legislation. The Act makes it unlawful for employers to discriminate in hiring, firing, compensation, and terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.⁵³ The Act proscribes intentional discrimination, as well as practices that are facially neutral but adversely affect the Act's protected classes.⁵⁴

Some congressional leaders feared that the Act's broad sweep would give preferential treatment to newly hired minorities over more senior whites.⁵⁵ Consequently, section 703(h) was added permitting employers to use different standards of compensation, terms, privileges, and conditions of employment pursuant to a bona fide seniority system.⁵⁶ Section 703(h) reads:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.⁵⁷

In interpreting section 703(h), the courts have consistently increased its protection of seniority systems by expanding its reach to unlawful seniority systems adopted *before and after* the passage of the Act.⁵⁸ Courts achieved this by limiting the definition of unlawful seniority systems to only those that are implemented with an intent to discriminate, rather than those that have a disparate impact.⁵⁹

53. 42 U.S.C. §§ 2000e-2, e-16 (2000).

54. Hernandez, *supra* note 38, at 344.

55. *Id.* at 345 (citing George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1613 (1969)).

56. *Id.*

57. 42 U.S.C. § 2000e-2(h) (2000).

58. See discussion *infra* Parts II.B.1, II.B.2.

59. *Id.*

1. *Title VII's Limited Protection of Seniority Systems*

Initially, courts interpreted Title VII broadly, by limiting section 703(h)'s protection of seniority systems and expanding Title VII's scope to intentional and facially neutral practices of discrimination. The courts first delineated two types of discrimination under Title VII: disparate treatment and disparate impact.⁶⁰ The former refers to intentional discrimination and the latter refers to facially neutral policies⁶¹ that have a disproportionate effect on minorities.⁶² Next, the courts distinguished discriminatory acts and practices occurring before the passage of Title VII from those occurring after the Act's passage.

Just a few years after Title VII's enactment, a circuit court and district court found that section 703(h)'s protection of seniority systems did not extend to pre-Act seniority systems that *intentionally* perpetuated the effects of past discrimination.⁶³ However, it was

60. There are two different types of discrimination proscribed by Title VII: disparate treatment and disparate impact.

Disparate treatment... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical... Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity... Proof of discriminatory motive... is not required under a disparate impact theory.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

61. In a landmark case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court invalidated *facially neutral practices* that had a disproportionate and deleterious effect on Title VII's protected classes. *Id.* at 431 (holding that Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification."). The Court found that facially neutral policies that perpetuated discrimination violated the spirit of Title VII. *Id.* ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). Accordingly, an employer's facially neutral policy and lack of bad faith could not overcome a showing that its policies disfavored a protected group. *See id.* at 432. *Griggs*, however, did not address seniority systems. *See id.*

62. *See supra* note 61.

63. Local 189, *United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.

not until 1976 that the Supreme Court addressed seniority systems in conflict with Title VII. In *Franks v. Bowman Transportation Co.*, the Court permitted retroactive seniority to victims of discrimination.⁶⁴ This allowed victims to obtain their deserved status in the hierarchy of an employer's seniority system.⁶⁵ The Court found that even though the practice of retroactive seniority relief may adversely impact incumbent employees, the relief could be granted if it furthered the objectives of Title VII.⁶⁶ As a result, victims of discrimination were permitted to obtain their "rightful place."⁶⁷

These first few decisions sought to balance the rights of minorities and non-minorities. In an effort to follow the revolutionary spirit of Title VII, the courts prohibited employers from filling *future* vacancies on the basis of unlawful seniority systems and supported corrective action that would end the "status quo."⁶⁸ However, the courts rejected the bumping of non-minority incumbent workers, thus forcing victims of discrimination to remain in their inferior positions until vacancies occurred.⁶⁹

2. Title VII's Increasing Protection of Seniority Systems

In 1977, the Supreme Court began to expand the protections of section 703(h). In *International Brotherhood of Teamsters v. United States*,⁷⁰ the Court found that a seniority system that perpetuated the effects of pre-Act discrimination was lawful, because section 703(h) provided an exemption for *bona fide* seniority systems.⁷¹ As a result, a plaintiff must establish *actual intent* to discriminate in order to show that a seniority system violates Title VII.⁷² It was no longer enough to show discrimination by demonstrating that a facially neutral policy had a disparate impact on protected classes.⁷³

1968).

64. 424 U.S. 747, 767-68 (1976).

65. *Id.*

66. *Id.* at 774-75.

67. *Id.* at 768. In addition, the Court noted that section 703(h) defined unlawful employment practices, but did not limit the relief that could be awarded when an unlawful practice was found. *Id.* at 758.

68. See Hernandez, *supra* note 38, at 349.

69. See *id.*

70. 431 U.S. 324 (1977).

71. *Id.* at 352-53.

72. *Id.* at 353.

73. *Id.* However, the Court did not expressly overrule *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), because *Griggs* did not involve a section 703(h) analysis of

This standard was an abrupt change from the Court's prior goal of equality by helping minorities attain their "rightful place" in employment. The Supreme Court concluded that Title VII never intended to invalidate facially neutral seniority policies, nor eliminate non-minority employees' vested seniority rights under such a policy, even if this exercise perpetuated the effects of prior discrimination.⁷⁴ Instead, the *Teamsters* decision placed a hardship on Title VII plaintiffs and "created an unpalatable situation, permanently handicapping victims of discrimination."⁷⁵

Following the *Teamsters* decision, the Court continued on its course of protecting seniority systems that Title VII sought to invalidate. In *Pullman-Standard v. Swint*,⁷⁶ the Court reiterated its decision in *Teamsters* by eliminating disparate impact⁷⁷ analyses in seniority system challenges under Title VII.⁷⁸ Most disconcerting, though, was the Court's decision in *American Tobacco Co. v. Patterson*.⁷⁹ Undermining a prior decision,⁸⁰ the Court ruled that section 703(h) also protected bona fide seniority systems created *after* the passage of the Act, and held that both pre- and post-Act seniority systems can only be invalidated by proof of an *intent* to discriminate.⁸¹ Four justices, in two dissenting opinions, argued that the majority opinion was inconsistent with Title VII.⁸² The four dissenting justices stated that: (1) Congress did not intend to protect "new rights that are the by-product of discrimination;"⁸³ (2) disparate impact analysis should still apply to post-Act seniority systems;⁸⁴ and (3) a seniority system is not *bona fide* if unlawful when adopted.⁸⁵ Despite criticism, the Court has yet to change its course. Cases decided subsequent to *Patterson* continue to advance the Court's expansion of section 703(h).⁸⁶

bona fide seniority systems. See *Int'l Bhd. of Teamsters*, 431 U.S. at 349.

74. *Int'l Bhd. of Teamsters*, 431 U.S. at 353-54.

75. Hernandez, *supra* note 38, at 353.

76. 456 U.S. 273 (1982).

77. *Id.* at 276-77.

78. *Id.* at 289.

79. 456 U.S. 63 (1982).

80. See Hernandez, *supra* note 38, at 357 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

81. *Patterson*, 456 U.S. at 69-71.

82. *Id.* at 77-90.

83. *Id.* at 78 (Brennan, J., dissenting) (joined by Marshall and Blackmun, JJ.).

84. *Id.* at 89-90 (Stevens, J., dissenting).

85. *Id.* at 87-88 (Stevens, J., dissenting).

86. See *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 908-09 (1989) (reiterating that a claim under section 703(h) depends on proof of intentional discrimination,

3. *Effect of the Supreme Court's Rulings on Title VII and Seniority*

The Court's decisions giving broad protection to seniority systems stifle the purpose of Title VII. By allowing facially neutral policies enacted before and after the Act to find protection under section 703(h), the Court is maintaining the status quo of prior discrimination, rather than remedying the historic exclusion of minorities from equal participation in the workplace.⁸⁷ Consequently, even if a minority finds a job, a facially neutral seniority system will result in a layoff of mostly minorities based on the "last-hired, first-fired" approach. Is this what Congress intended by enacting one of the most important and revolutionary civil rights legislations of the 20th century?

C. *The Americans with Disabilities Act and Seniority*

The ADA was modeled, in part, on Title VII.⁸⁸ Enacted in 1990, the ADA ambitiously sought to address the "pervasive social problem" of over forty-three million disabled Americans who were excluded from full participation in society because of their disabilities.⁸⁹ In the employment arena, Congress's goal was to increase the employment of qualified disabled individuals by not only prohibiting employers from discriminating,⁹⁰ but also by affirmatively requiring employers to provide reasonable accommodation.⁹¹ Theoretically, the ADA operates as a powerful

showing disparate impact is not enough); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-80 (1984) (giving preference to seniority agreements over affirmative action consent decrees).

87. See *Hernandez*, *supra* note 38, at 382.

88. "It is evident from the legislative history that several provisions of Title VII were copied or incorporated by reference into the ADA." *U.S. Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1533 (2002) (citing S. REP. NO. 101-116, at 2, 25, 43 (1989); H.R. REP. NO. 101-485, pt. 2, at 54, 76-77 (1990), *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (101 Stat.) 303, 358-60 (codified at 42 U.S.C. §§ 12101-12117 (2000)).

89. 42 U.S.C. § 12101(a) (2000).

90. "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2000).

91. Defining "discrimination" as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the

mechanism against disability discrimination. In reality, its provisions are inconsistently applied and the plaintiffs' claims are often defeated.⁹²

The ADA obligates employers to provide reasonable accommodations to disabled workers as a means of enabling those workers to perform essential job duties.⁹³ Perhaps the most controversial accommodation is "reassignment to a vacant position." While it aids disabled employees in procuring gainful employment, this accommodation imposes significant burdens on employers and other employees. As a consequence, courts have been reluctant to implement the ADA's provisions as Congress initially envisioned them.⁹⁴ This is especially true in the context of reassignment of a disabled employee to a vacant position when the employer has a seniority system in place.⁹⁵ The failure of Congress to provide express language in the ADA indicating whether the rights of a disabled employee supersede those of employees with seniority rights has led to confusion and inconsistency in the

operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A) (2000).

92. According to the Equal Employment Opportunity Commission ("EEOC"), between July 26, 1992 and Sept. 30, 2001, only 32.6 percent of the claims brought by the EEOC on behalf of plaintiffs were successful. These numbers only reflect claims that are brought by the EEOC; they do not reflect suits brought by individuals. Americans with Disabilities Act of 1990 (ADA) Charges FY 1992 - FY 2001, at <http://www.eeoc.gov/stats/ada-charges.html> (last visited Oct. 4, 2002). See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (discussing plaintiffs' success rates in employment discrimination cases, including Title VII, Age Discrimination in Employment Act, and the ADA).

93. See 42 U.S.C. § 12111(9) (2000). The ADA states that a reasonable accommodation may include:

- (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring; part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

94. See discussion *infra* Part II.C.1.

95. See Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439 (2002); Estella J. Schoen, *Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems*, 82 MINN. L. REV. 1391 (1998).

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courts.⁹⁶

1. *The Majority Approach*

Only a year after the ADA's enactment, the Seventh Circuit took the opportunity to address this question⁹⁷ in *Eckles v. Consolidated Rail Corp.*⁹⁸ Eckles worked as a yardmaster – a position that required varying shifts in a tower office accessible only by stairs.⁹⁹ During his employment, a doctor diagnosed Eckles with epilepsy and advised him to transfer to a shift with regular hours and to cease working in the tower office.¹⁰⁰ Pursuant to the employer's collective bargaining agreement, Eckles requested that the employer bump another employee in order to accommodate his disability.¹⁰¹ The employer initially granted Eckles' request, but later reneged the accommodation.¹⁰²

The Seventh Circuit framed the issue as a conflict between the rights of the disabled employee and his co-workers, rather than between the employer and employee.¹⁰³ In this context, the court found that Congress did not intend to “bump” other employees out of their positions to accommodate disabled employees.¹⁰⁴ According to the court's interpretation of “reassignment to a vacant position,” open positions will rarely be “vacant” when a seniority system exists, because more senior employees should be allowed to fill those positions.¹⁰⁵

Moreover, the court looked at cases decided under the

96. Several circuits have adopted a per-se rule that an employer is not required to violate a seniority system in order to reassign a disabled employee. *See* Lujan v. Pac. Mar. Ass'n, 165 F.3d 738 (9th Cir. 1999); Foreman v Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996); Milton v. Scrivner, 53 F.3d 1118 (10th Cir. 1995); Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995). Other courts have rejected the *per se* approach for a balancing approach. *See* Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999); Aka v. Wash. Hosp. Ctr., 116 F.3d 876 (D.C. Cir. 1997), *vacated*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc); Ransom v. Arizona, 983 F. Supp. 895 (D. Ariz. 1997); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995).

97. *See* cases cited *supra* note 96 and accompanying text.

98. 94 F.3d 1041 (7th Cir. 1996).

99. *Id.* at 1043.

100. *Id.*

101. *Id.* at 1044.

102. *Id.*

103. *Id.* at 1046.

104. *Id.* at 1049-50.

105. *Id.* at 1045-46.

Rehabilitation Act¹⁰⁶ and Title VII to reinforce its reasoning.¹⁰⁷ The Seventh Circuit found that, under the Rehabilitation Act, courts unanimously held that employers are not required to reassign a disabled employee in violation of a bona fide seniority system.¹⁰⁸ With respect to Title VII, the Seventh Circuit reviewed *Trans World Airlines v. Hardison*,¹⁰⁹ a case involving a conflict between a demand for religious reasonable accommodation and the seniority rights of other employees under a collective bargaining agreement.¹¹⁰ The Seventh Circuit found persuasive the Supreme Court's decision to reject the accommodation in light of the collective bargaining agreement provision.¹¹¹ Consequently, the court held that the ADA did not require the employer to violate the bona fide seniority rights of other workers under the collective bargaining agreement and upheld the trial court's grant of summary judgment for the employer.¹¹²

2. *The Minority Approach*

The minority¹¹³ challenges the view that a seniority system is a *per se* bar to reassignment. It instead takes on several balancing approaches,¹¹⁴ two of which can be found in *Aka v. Washington Hospital Center*.¹¹⁵ A panel of the D.C. Circuit first heard the case in

106. 29 U.S.C. §§ 701-796 (2000).

107. *Eckles*, 94 F.3d at 1047-48.

108. *Id.* at 1047-48. Even though the Rehabilitation Act does not require reassignment in any instance, the court felt that Rehabilitation Act cases were appropriate in determining the meaning of reasonable accommodation in this ADA case. *Id.* at 1048-49; *see also* 29 U.S.C. § 701(a)(4) (2000).

109. 432 U.S. 63 (1977).

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

111. *Id.* at 1048-49. Yet, noting that "the Senate and House Reports on the ADA clarified *Hardison's* statement that only *de minimus* costs were required for reasonable accommodation does not apply under the ADA." *Id.* at 1049 (citations omitted).

112. *Id.* at 1051-52. "[W]e conclude that the ADA does not require disabled individuals to be accommodated by *sacrificing* the collectively bargained, bona fide seniority rights of other employees." *Id.* at 1051 (emphasis added).

113. *See* cases cited *supra* note 96 and accompanying text.

114. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1120 (9th Cir. 2000), *rev'd*, 122 S. Ct. 1516 (2002) (holding that a seniority system is not a *per se* bar to reassignment, but rather is a factor in the undue hardship analysis); *Emrick v. Libbey-Owens-Ford Co.*, 875 F. Supp. 393, 396-98 (E.D. Tex. 1995) (holding that a collective bargaining agreement should be a factor to consider when determining the reasonableness of the accommodation).

115. 116 F.3d 876 (D.C. Cir. 1997).

1997.¹¹⁶ Subsequently, the case was reheard en banc and decided on other grounds.¹¹⁷ The D.C. Circuit's analysis demonstrates the different balancing approaches taken by the minority view.

Aka had worked as an orderly for twenty years, when he developed heart disease and underwent bypass surgery.¹¹⁸ His position as an orderly was physically strenuous, and after surgery, his doctor advised him that he could no longer work as an orderly.¹¹⁹ Aka advised his employer of his disability and applied for several vacant, less strenuous positions.¹²⁰ However, Aka's employment was governed by a collective bargaining agreement, and the hospital refused to hire Aka for any of the vacant positions on the basis that such a reassignment would violate the agreement's terms.¹²¹ The district court rejected Aka's claim and granted summary judgment for the employer.¹²² In the first decision, the D.C. Circuit reversed and concluded that the legislative history supported a fact-specific, reasonable accommodation analysis and that seniority provisions should be a factor in that analysis.¹²³

The *Aka* court considered many of the same factors as the *Eckles* court. First, the *Aka* court determined that the ADA's plain language required reassignment subject only to specific exceptions.¹²⁴ Next, the court looked at a House Report¹²⁵ that stated:

The collective bargaining agreement could be relevant . . . in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered *as a factor* in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement *would not be determinative* on the issue.¹²⁶

116. *Id.*

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

118. *Aka v. Wash. Hosp. Ctr.*, 116 F.3d 876, 878 (D.C. Cir. 1997).

119. *Id.*

120. *Id.*

121. *Id.* at 892.

122. *Id.* at 877.

123. *Id.* at 895-96.

124. *Id.*

125. *Id.* at 895.

126. H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 345-46 (emphasis added).

The court found that this language bolstered its conclusion that Congress intended to prohibit a *per se* rule based on seniority provisions.¹²⁷ Finally, unlike the *Eckles* court, the *Aka* court found that cases decided under the Rehabilitation Act and Title VII were irrelevant to its analysis.¹²⁸ Because the Rehabilitation Act does not mention reassignment, the additional language in the ADA explicitly addressing reassignment rendered the Rehabilitation Act cases unpersuasive.¹²⁹ Likewise, the court stated that “the nature of the ADA prevents the Supreme Court’s Title VII decision in *Trans World Airlines v. Hardison* from being directly applicable to this case.”¹³⁰

The court subsequently vacated the *Aka* decision and decided it on different grounds en banc.¹³¹ The court en banc based its decision on the provisions of the union’s collective bargaining agreement, rather than the ADA.¹³² However, the court did address provisions of the ADA. Specifically, the court found that reassignment does not merely mean allowing one to compete equally for a job.¹³³

To begin with the statutory text, the word “reassign” must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been “reassigned”; the core word “assign” implies some active effort on the part of the employer. Indeed the ADA’s reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits discrimination “against a qualified individual with a disability because of the disability of such individual

127. *Aka*, 116 F.3d at 895.

128. *Id.* at 893. “With regard to the cases construing the Rehabilitation Act, we note that although this Act is quite similar to the ADA in most respects, the two acts diverge sharply on this particular question, because the ADA explicitly suggests ‘reassignment to a vacant position’ as a form of ‘reasonable accommodation’ that may be required of employers.” *Id.* (citations omitted).

129. *Id.*

130. *Id.* at 896 n.14 (citations omitted).

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

132. *Id.* at 1302-03. “On the present record, we cannot (and need not) reach the further question of whether in every case in which the ADA would require WHC to reassign an employee, section 14.5 would permit WHC to do so.” *Id.* at 1303.

133. *Id.* at 1304.

in regard to job application procedures.¹³⁴

The D.C. Circuit noted numerous courts have found that the reassignment obligation means something more than treating a disabled employee like any other job applicant.¹³⁵ Subsequently, in *Smith v. Midland Brake, Inc.*,¹³⁶ the Tenth Circuit agreed with the *Aka* court by holding that “[t]he disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment.”¹³⁷

3. Legislative Goals vs. Judicial Interpretations

In enacting the ADA, Congress set forth its goal of empowering disabled individuals by eliminating obstacles in the workplace.¹³⁸ Title I of the ADA is specifically designed to remove barriers to employment for disabled persons regardless of whether the barriers result from intentional discrimination or from structures, policies, or procedures that have an unintended discriminatory effect on the disabled.¹³⁹ By allowing discriminatory seniority systems to trump the rights of the disabled, the courts have effectively eradicated the Act’s purpose and power.

134. *Id.* (citations omitted).

135. *Id.* (citing *Mengine v. Runyon*, 114 F.3d 415, 418 (3d Cir. 1997); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496-99 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114-15 (8th Cir. 1995)).

136. 180 F.3d 1154 (10th Cir. 1999) (en banc).

137. *Id.* at 1166. This reasoning has been criticized by several courts as giving preferential treatment to disabled employees. See *E.E.O.C. v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1027-29 (7th Cir. 2000) (criticizing preferential treatment given to disabled employees in reassignment as giving “bonus points” and constituting “affirmative action with a vengeance”); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 679 (7th Cir. 1998) (finding that the “rule would convert a nondiscrimination statute into a mandatory preference statute”); *Daughtery v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (stating “we do not read the ADA as requiring affirmative action in favor of individuals with disabilities in the sense of requiring that disabled persons be given priority in hiring or reassignment over persons who are not disabled”).

138. Senator Harkin stated that the ADA was “nothing less than an ‘[E]mancipation [P]roclamation’ for people with disabilities who will finally benefit from civil rights protections in the areas of private sector employment.” 136 CONG. REC. S9684, S9691 (1990) (statement of Sen. Inouye); “The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults from society.” *Id.* (Sen. Simon quoting Sen. Humphrey); “Mr. President, this ‘declaration of independence’ for the citizens with disabilities of this Nation has been a long time coming.” *Id.* at S9690-91 (statement of Sen. Simon).

139. 42 U.S.C. § 12101 (2000).

Even though the ADA and Title VII have a similar goal, Congress recognized discrimination against disabled individuals and minorities is distinct in cause.¹⁴⁰ A person's race, sex, religion, and national origin are usually unrelated to the person's ability to perform job duties.¹⁴¹ A disability, on the other hand, may be a legitimate concern in an employment decision.¹⁴² Accordingly, Congress defined discrimination in the ADA differently than in Title VII.¹⁴³

Despite the obvious and considerable differences, courts still use Title VII precedent when evaluating the ADA cases.¹⁴⁴ These differences can be seen in several instances, including the definition and application of "reasonable accommodation," the adoption of the *McDonnell Douglas* burden-shifting analysis, and the protection of seniority systems.¹⁴⁵ First, Title VII's "reasonable accommodation" is much narrower and more limited than the affirmative and broad definition in the ADA.¹⁴⁶ Second, the *McDonnell Douglas* test is aimed at proving intentional discrimination and is inappropriate in the majority of ADA cases

140. See Malloy, *supra* note 6, at 621. "The Congress finds that—unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4) (2000).

141. Malloy, *supra* note 6, at 621.

142. *Id.*

143. Under Title VII, "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). The ADA states that the term discriminate includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A) (2000). See also Malloy, *supra* note 6, at 622.

The "reasonable accommodation" provision of the ADA is a powerful force. It compels employers to acknowledge the subtle ways in which the workplace is biased. *Id.* at 623. It helps employers realize that workplaces are not structured neutrally, and it affirmatively obligates employers to make changes to the workplace. *Id.* at 624. An employer who fails to reasonably accommodate disabled employees can be found liable for discrimination. *Id.* at 625. Conversely, Title VII does not require the employer to make changes to the workplace, but rather only requires that employers *not* treat employees differently. *Id.* at 625.

144. See Malloy, *supra* note 6, at 626-27. See also *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996).

145. See Malloy, *supra* note 6, at 626-27.

146. See *id.* at 627-30.

where discrimination is not intentional.¹⁴⁷ Finally, unlike Title VII, the ADA does not have an exemption for bona fide seniority systems. However, the courts have used Title VII as a model in protecting seniority systems, ignoring the ADA's goals and legislative history and cutting off the rights of disabled employees working under seniority systems.¹⁴⁸ The recent Supreme Court decision, *U.S. Airways, Inc. v. Barnett*,¹⁴⁹ did just that.

III. THE *BARNETT* DECISION

A. *Facts*

In 1990, Robert Barnett injured his back while working in a cargo position at U.S. Airways.¹⁵⁰ Upon returning from disability leave, Barnett realized he could not perform the physical requirements of the position.¹⁵¹ He used his seniority rights to transfer to the mailroom.¹⁵² In August 1992, Barnett learned his position became open to seniority-based employees bidding under U.S. Airways' seniority system.¹⁵³ In fact, two employees with greater seniority planned to exercise their seniority rights to transfer to the mailroom.¹⁵⁴

If Barnett were displaced from the mailroom, he would have been limited to transferring to jobs in the cargo area.¹⁵⁵ Consequently, Barnett wrote to his station manager requesting that he be allowed to remain in the mailroom as a reasonable accommodation under the ADA.¹⁵⁶ U.S. Airways did not respond for five months but allowed Barnett to stay in the mailroom while the company evaluated his claim.¹⁵⁷ In January 1993, U.S. Airways

147. *See id.* at 643-44. An employer's building that requires climbing stairs to gain entrance was most likely not built with the intent to discriminate against the physically disabled. *Id.* at 610.

148. *See* discussion *supra* Part II.C.

149. 122 S. Ct. 1516 (2002).

150. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1108 (9th Cir. 2000).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1108-09.

155. *Id.* at 1109. In 1992, Barnett's doctor and chiropractor both recommended that Barnett avoid jobs that require heavy lifting, prolonged standing or sitting, and excessive bending, twisting, turning, pushing, and pulling. *Id.* at 1108.

156. *Id.* at 1109.

157. *Id.*

informed Barnett that it was denying his accommodation request and would place Barnett on job injury leave.¹⁵⁸ Subsequently, Barnett sent his manager a second letter proposing that either U.S. Airways provide him with special lifting equipment in the cargo area or restructure his cargo position so that he would only do office work.¹⁵⁹ On March 4, 1993, Barnett received a letter denying his alternative requests.¹⁶⁰

Barnett filed formal charges of discrimination against U.S. Airways in February of 1993.¹⁶¹ In August 1994, the EEOC issued a formal determination finding probable cause that U.S. Airways discriminated against Barnett.¹⁶² However, the district court granted summary judgment in favor of U.S. Airways on all of Barnett's claims.¹⁶³ Barnett appealed and argued that "U.S. Air violated the ADA by failing to engage in the interactive process, by failing to reassign him to the mailroom, by failing to provide other reasonable accommodation, and by retaliating against him."¹⁶⁴

The Court of Appeals for the Ninth Circuit made three significant holdings, all of which have received considerable review.¹⁶⁵ First, the court of appeals decided that U.S. Airways failed to engage in the interactive process and would be liable if a reasonable accommodation without undue hardship was possible.¹⁶⁶ Thus, the court found a triable issue of fact existed which precluded summary judgment.¹⁶⁷ Next, the court of appeals affirmed the district court's summary judgment dismissal of

158. *Id.*

159. *Id.*

160. *Id.* In the same March 4, 1993 letter, U.S. Airways' Vice President of Human Resources informed Barnett that he could bid for any job within his restrictions. *Id.* The court of appeals noted there was no evidence that Barnett was qualified, with or without reasonable accommodation, for any other position within U.S. Airways' system. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Melissa M. Chureau, *The Barnett Paradox: Icarus's Wings*, 6 J. SMALL & EMERGING BUS. L. 395 (2002); Robert B. White, *Reasonable Accommodation Under the ADA; Equal Opportunity or Preferential Treatment*, 44 SEPT. ADVOC. (IDAHO) 24 (2001).

166. *Barnett*, 228 F.3d at 1117. The court also found that Barnett's request to remain in the mailroom was a reasonable accommodation absent proof of undue hardship. *Id.* at 1122. In addition, the court noted alternative accommodations in the cargo facility may have been reasonable accommodations absent proof of undue hardship. *Id.*

167. *Id.*

Barnett's retaliation claim.¹⁶⁸ Finally, and most controversially, the court of appeals held "reassignment [to the mailroom] is a reasonable accommodation and that a seniority system is not a *per se* bar to reassignment. However a seniority system is a *factor* in the undue hardship analysis."¹⁶⁹ Consequently, the court's ruling requires a case-by-case, fact-intensive analysis of whether any particular assignment would constitute an undue hardship.¹⁷⁰ The United States Supreme Court granted certiorari to review this final ruling and overturned the Ninth Circuit's ruling.¹⁷¹

B. *The Ninth Circuit's Analysis of Seniority Systems Under the ADA*

In making its final ruling, the court of appeals divided its analysis¹⁷² into two key questions: (1) whether a seniority system is a *per se* bar to reassignment as a reasonable accommodation, and (2) whether a disabled employee seeking reasonable accommodation should have priority in reassignment.¹⁷³ The court began its analysis by noting the ADA explicitly states that reasonable

168. *Id.* The court of appeals engaged the Title VII burden-shifting analysis to determine whether Barnett proved his ADA retaliation claim. *Id.* at 1121.

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must show (1) that he or she engaged in or was engaging in an activity protected by the ADA, (2) the employer subjected him or her to an adverse employment decision, and (3) that there was a causal link between the protected activity and the employer's action.

Id. The court of appeals concluded that Barnett made his *prima facie* case, but failed to raise a genuine issue of fact suggesting the U.S. Airways' legitimate non-retaliatory explanation was mere pretext. *Id.*

169. *Id.* at 1120 (emphasis added).

170. *Id.*

171. U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1520 (2002).

U.S. Airways petitioned for certiorari, asking us to decide whether "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation' even though another employee is entitled to hold the position under the employer's bona fide and established seniority system." The Circuits have reached different conclusions about the legal significance of a seniority system. We agreed to answer U.S. Airways' question.

Id. (citations omitted).

172. As noted, the court of appeals also reviewed Barnett's claim for failure to engage in the interactive process, as well as his retaliation claim. *See Barnett*, 228 F.3d at 1108. However, these issues are outside the scope of this case note. This note will address only Barnett's claim that U.S. Airways violated the ADA by not allowing him to remain in his mailroom position as a reasonable accommodation and as an exception to its seniority policy.

173. *Id.* at 1117.

accommodation may include reassignment.¹⁷⁴ Next, the court reviewed EEOC enforcement guidelines, other circuits' holdings, and the legislative history of the ADA.¹⁷⁵

First, the court noted that no other circuit has answered the question of whether a seniority system trumps reassignment.¹⁷⁶ However, it found that the legislative history of the ADA indicates that a *collective bargaining agreement* is only a factor in determining the reasonableness of an accommodation, but rejects any *per se* bar.¹⁷⁷ In addition, the court found the EEOC guidelines reject any blanket rule that would consider a collective bargaining agreement a *per se* bar to a reasonable accommodation.¹⁷⁸ Given the lack of bargained rights in the present case as compared to a collective bargaining agreement, the court asserted that a "seniority system without more should not bar reassignment."¹⁷⁹ Furthermore, the court found that a *per se* bar conflicts with the basic premise of the ADA and frustrates the statute's goals.¹⁸⁰ A *per se* bar would sharply limit the range of available accommodations, as well as limit the ADA's effort to ground accommodation in the *individualized* needs of the disabled.¹⁸¹ Accordingly, the Ninth Circuit held that a seniority system is not a *per se* bar to reassignment, but rather is a factor in the undue hardship analysis.¹⁸²

Second, the court of appeals found agency interpretation

174. *Id.* (citing 42 U.S.C. § 12111(9)(B) (2000)).

175. *Id.* at 1117-20.

176. *Id.* at 1118.

177. *Id.* at 1119.

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

H.R. REP. NO. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 345-46.

178. *Barnett*, 228 F.3d at 1119. "In the EEOC's view, such a *per se* rule nullifies Congress' intent that undue hardship always be determined on a case-by-case basis." *Id.* (citing *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Compl. Man. (CCH), § 902, No. 915.002, at 5463 (March 1, 1999)). The EEOC states that the employer and union should negotiate in good faith a variance to the collective bargaining agreement if no reasonable accommodation exists that avoids violating the agreement. *Id.* (citing *EEOC Enforcement Guidance*, EEOC Compl. Man. at 5463).

179. *Id.*

180. *Id.* at 1120.

181. *Id.*

182. *Id.*

supported the contention that reassignment meant something more than merely allowing a disabled person to compete equally with non-disabled employees.¹⁸³ The court relied heavily on EEOC guidelines that advise an employer to provide reasonable accommodations even though they are not available to others.¹⁸⁴ In response to U.S. Airways' argument that the ADA guarantees no more than an equal opportunity to apply and compete for reassignment, the court pointed to the EEOC's guidelines: "Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended."¹⁸⁵ Moreover, the court looked to the EEOC's reasoning that a modification in workplace policy can be a reasonable accommodation.¹⁸⁶ The court of appeals also pointed to other circuits that had adopted the EEOC's position.¹⁸⁷

Therefore, the court of appeals held that "[i]f 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."¹⁸⁸

183. *Id.* at 1117-18.

184. *Id.* at 1117 (citing *EEOC Enforcement Guidance*, EEOC Compl. Man. at 5454).

185. *Id.* at 1118 (citing *EEOC Enforcement Guidance*, EEOC Compl. Man. at 5456).

186. *Id.* at 1117-18.

187. *Id.* at 1118; *see* *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1165 (10th Cir. 1999) (en banc) (finding that the ADA's "reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world" and that reassignment is "one of the forms of reasonable accommodation specifically mentioned by the statute to be utilized if necessary and reasonable to keep an existing disabled employee employed by the company."); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc) (explaining that ADA's reference to reassignment would be redundant if it only gave permission to apply).

188. *Barnett*, 228 F.3d at 1120. The dissent rejected the majority's reasoning that the ADA mandates employers to give preferences to disabled employees over able employees. *See id.* at 1126. The dissent cited the Seventh Circuit, which stated that "[such a] . . . rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees." *Id.* (citing *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 679 (7th Cir. 1998)).

C. *The Supreme Court's Analysis*

The Supreme Court reversed the Ninth Circuit in a five to four decision.¹⁸⁹ Justice Breyer wrote for the Court and was joined by Justices Rehnquist, Stevens, O'Connor, and Kennedy.¹⁹⁰ Although Justices O'Connor and Stevens concurred with the majority, they both wrote separately.¹⁹¹ Finally, Justices Scalia and Souter filed two divergent dissents, which were joined by Justices Thomas and Ginsburg, respectively.¹⁹²

1. *The Majority's Opinion*

The majority decided that a proposed accommodation that would violate the rules of a seniority system is not "reasonable in the run of cases."¹⁹³ "To the contrary, it will ordinarily be unreasonable for the assignment to prevail."¹⁹⁴ To support its

189. U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1518 (2002).

190. *Id.* at 1519-25.

191. *Id.* at 1525-28.

192. *Id.* at 1528-34.

193. *Id.* at 1524. In its findings, the Court rejected several of the arguments put forth by U.S. Airways and Barnett. *Id.* at 1520-23. Specifically, U.S. Airways argued that seniority systems should almost always trump a conflicting accommodation demand when that accommodation requires that an employer grant preferential treatment. *Id.* at 1520-21. The Court replied that the ADA specifies that preferences will sometimes prove necessary to achieve the statute's goals. *Id.* at 1521. In fact, the ADA requires preferences in the form of "reasonable accommodations." *Id.* Accordingly, the Court rejected the contention that the ADA creates an automatic exemption for neutral rules. *Id.* U.S. Airways also pointed to the ADA's provision that reassignment refers to a "vacant" position. *Id.* (citing 42 U.S.C. § 12111(9)(B) (2000)). The Court rejected U.S. Airways' argument that a position is not "vacant" if an established seniority system would assign that position to another worker. *Id.* The Court perceptively pointed to U.S. Airways' seniority system, which stated that Barnett's position became an "open" one. *Id.* Barnett contemplated that the words "reasonable accommodation" meant only "effective accommodation." *Id.* at 1522. Since seniority systems have nothing to do with effectiveness, Barnett argued that a seniority violation has nothing to do with "reasonableness." *Id.* Barnett added that a seniority rule violation might help prove "undue hardship." *Id.* However, he argued that a violation should not be taken into consideration of determining "reasonable accommodation," because this would make the terms "reasonable accommodation" and "undue hardship" mirror images and redundant. *Id.* The Court rejected each of these arguments, by clarifying that the word "accommodation," not the word "reasonable," conveys the need for effectiveness. *Id.* Furthermore, "reasonable accommodation" and "undue hardship" are not mirror images, because the former refers its impact on other employees, while the latter pertains to its impact on the operation of business. *Id.*

194. *Id.* at 1524.

contention, the Court looked to analogous case law in the context of Title VII and the Rehabilitation Act.¹⁹⁵ In such cases, the employer was not required to make accommodations that would conflict with the seniority rights of other employees.¹⁹⁶

Next, the Court listed several policy reasons that supported the view that seniority systems should not be undermined.¹⁹⁷ First, seniority systems provide important employee benefits by creating and fulfilling employee expectations of fair, uniform treatment.¹⁹⁸ Second, employees receive the benefits of job security and an opportunity for steady and predictable advancement based on objective standards.¹⁹⁹ Third, seniority systems and collective bargaining agreements limit unfairness in personnel decisions.²⁰⁰ Fourth, the Court noted that seniority systems encourage employee loyalty and investment in the company; an employee accepts less at the beginning for a greater return in the long run.²⁰¹ Finally, and most importantly, the Court opined that a seniority system's consistent, uniform treatment would be undermined by a complex, case-by-case analysis of each "accommodation" decision made by management.²⁰² Thus, the employer's showing of a violation of the rules of a seniority system is, by itself, ordinarily sufficient to show that an accommodation is not reasonable.²⁰³

The Court, however, articulated an exception to its implicit blanket ruling. "The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may

195. *Id.*

196. *Id.*; see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-80 (1977) (holding that, in the context of a Title VII religious discrimination case, an employer need not accommodate an employee's worship schedule if it would conflict with other employees' seniority rights); *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (concluding that under the Rehabilitation Act, "the postal service was not required to accommodate plaintiff further by placing him in a different position since to do so would violate the rights of other employees under the collective bargaining agreement."); *Carter v. Tisch*, 822 F.2d 465, 469 (4th Cir. 1987) (holding that the Rehabilitation Act did not require an employer to reassign an employee if the reassignment would defeat the provisions of a collective bargaining agreement).

197. *Barnett*, 122 S. Ct. at 1524-25.

198. *Id.* at 1524.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1524-25.

203. *Id.* at 1525.

not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”²⁰⁴ For example, the Court explained that an employer, who frequently and unilaterally changes its seniority system, reduces employee expectations and should accommodate an employee because “one more departure . . . will not likely make a difference.”²⁰⁵ Thus, the plaintiff has the burden of proving special circumstances that make an exception reasonable in the particular case.²⁰⁶

In sum, “a showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer – unless there is more. The plaintiff must present evidence of that ‘more,’ namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.”²⁰⁷ Given the Court’s newly articulated rule, it vacated the Ninth Circuit’s judgment and remanded the case for further proceedings consistent with its opinion.²⁰⁸

2. *Justice Stevens’s Concurring Opinion*

Justice Stevens wrote separately to comment on the court of appeals’ analysis. First, Justice Stevens disagreed with the court of appeals’ analysis that a seniority system is only relevant to the question of whether a given accommodation would impose an “undue hardship” on an employer.²⁰⁹ According to Justice Stevens, a possible conflict with an employer’s seniority systems bears on whether the requested accommodation is reasonable.²¹⁰ Second, Justice Stevens agreed with the court of appeals’ rejection of U.S. Airways’ *per se* bar to reasonable accommodation which would violate the rules of a seniority system.²¹¹

204. *Id.*

205. *Id.* Alternatively, the plaintiff may show that the system already contains so many exceptions, that one more will not matter. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1525-26.

210. *Id.* at 1525.

211. *Id.* at 1526. In addition, Justice Stevens presented several noteworthy questions:

(1) [W]hether the mailroom position held by [Barnett] became open for bidding merely in response to a routine airline schedule change, or as the direct consequence of the layoff of several thousand employees;

(2) whether [Barnett’s] requested accommodation should be viewed as an assignment to a vacant position, or as the maintenance of the status

3. Justice O'Connor's Concurring Opinion

Justice O'Connor clearly stated that she voted with the majority in order that the Court could adopt a rule.²¹² Justice O'Connor found the Court's test problematic and preferred a rule in which determining whether an accommodation is reasonable is dependent upon whether the seniority system prevents the position in question from being vacant.²¹³ In a workplace with a legally enforceable²¹⁴ seniority system, a position will not become vacant if the seniority system entitles another employee to that position.²¹⁵ Conclusively, "if a position is not vacant, then reassignment to it is not a reasonable accommodation."²¹⁶ Even though troubled by the Court's reasoning, Justice O'Connor voted with the majority because she felt that the Court's approach would often lead to the same outcome as her test.²¹⁷

quo; and

(3) exactly what impact the grant of [Barnett's] request would have had on other employees.

Id.

212. *Id.* "The Court, however, is divided in opinion, and if each member voted consistently with his or her own beliefs, we would not agree on a resolution of the question presented in this case." *Id.* (citing *Screws v. United States*, 325 U.S. 91, 134 (1945)).

213. *Id.* at 1526-27.

214. *Id.* at 1527. "In a workplace with an unenforceable seniority policy, however, an employee expecting assignment to a position under the seniority policy would not have any type of contractual right to the position and so could not be said to be its 'possessor.' The position therefore would become vacant." *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

4. *Justices Scalia and Thomas's Dissenting Opinion*²¹⁸

Justices Scalia and Thomas sharply criticized the Court for its indecisive reasoning behind a ruling that, they say, leaves a disabled employee in a state of uncertainty that can only be resolved by constant litigation.²¹⁹ To the contrary, Justices Scalia and Thomas simply reasoned that employers must modify or remove policies and practices that burden a disabled person *because of his or her disability*.²²⁰ Since a seniority system burdens the abled and disabled alike, a seniority system is not a disability-related obstacle and the ADA does mandate an exception to such a legitimate, nondiscriminatory policy.²²¹

The Justices looked to several circuit courts, as well as the EEOC, for support.²²² They suggest that the EEOC regulations

218. Justices Scalia and Thomas did not evaluate the reasonable accommodation provision of the ADA. For this reason, this note excludes them from the “reasonable accommodation” analysis. The Justices did conduct a thorough analysis of whether seniority systems discriminate *because of disability* of an individual. *Id.* at 1528-31; *see* 42 U.S.C. § 12112(a) (2000). They emphasized that the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them – those barriers that would not be barriers *but for* the employee’s disability. *Barnett*, 122 S. Ct. at 1529. They conclude that seniority systems “bear no more heavily upon the disabled employee than upon others – even though an exemption from such a rule or practice might in a sense ‘make up for’ the employee’s disability.” *Id.* However, this reasoning glosses over the ADA’s imposition of an affirmative obligation for employers to do just that – “make up for” the employee’s disability. The ADA requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities enjoy. This includes adjustment to neutral office rules. *See* 42 U.S.C. § 12111(9)(B) (2000) (“[R]easonable accommodation may include . . . job restructuring, part-time or modified work schedule, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications to examinations, training materials or policies, providing qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”).

219. *See id.* at 1528-32. “When one departs from this understanding, the ADA’s accommodation provision becomes a standardless grab bag.” *Id.* at 1529. “The employee would be entitled to an exception, for example, if he showed that ‘one more departure’ from the seniority rules ‘will not likely make a difference.’ I have no idea what this means.” *Id.* at 1531 (citations omitted).

220. *Id.* at 1529.

221. *See id.* at 1530.

222. *See id.* at 1530-31 (citing *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353-55 (4th Cir. 2001); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028-29 (7th Cir. 2000); *Burns v. Coca-Cola Enters., Inc.*, 222 F.3d 247, 257-58 (6th Cir. 2000); *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1020 (8th Cir. 2000); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997); *Daugherty v. El Paso*, 56 F.3d 695, 700 (5th Cir. 1995)).

acknowledge that the “ADA clears away only obstacles *arising from* a person’s disability and nothing more.”²²³ Reassignment to a vacant position does not include elimination of obstacles that have nothing to do with a person’s disability.²²⁴ Indeed, this may lead to the possibility of a preference for the disabled over the abled.²²⁵ Accordingly, the Justices would rule that the ADA was not meant to undercut bona fide seniority systems.²²⁶

5. Justices Souter and Ginsburg’s Dissenting Opinion

In contrast to Justices Scalia and Thomas, Justices Souter and Ginsburg approached the issue by first pointing out that “[n]othing in the ADA insulates seniority rules from the ‘reasonable accommodation’ requirement, in marked contrast to Title VII²²⁷ . . . and the Age Discrimination in Employment Act of 1967²²⁸ (ADEA).”²²⁹ They pointed out that Congress modeled several of the ADA’s provisions on Title VII, and Congress’s failure to replicate Title VII’s exemption for seniority systems suggests that seniority rules do not carry as much weight under the ADA.²³⁰ Moreover, they point to legislative history explaining that seniority provisions contained in a collective bargaining agreement are only a *factor* when deciding whether an accommodation is reasonable.²³¹ Accordingly, “[b]ecause a unilaterally-imposed seniority system enjoys no special protection under the ADA, a consideration of facts peculiar to [the] . . . case is needed to gauge whether [the plaintiff] has carried the burden of showing his proposed

223. *Id.* at 1531 (citing 29 C.F.R. § 1630.2(o) (2001)).

224. *Id.* at 1530.

225. *See id.*

226. *Id.*

227. 42 U.S.C. § 2000e-2(h) (2000) (“Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to [provide different benefits to employees] pursuant to a bona fide seniority . . . system.”).

228. 29 U.S.C. § 623(f)(2)(A) (2000) (“It shall not be unlawful for an employer . . . to take any action otherwise prohibited [under previous sections] . . . to observe the terms of a bona fide seniority system [except for involuntary retirement].”).

229. *Barnett*, 122 S. Ct. at 1532.

230. *Id.* at 1533.

231. *Id.*; *See also* H.R. REP. NO. 101-485, pt. 2, at 63 (1990) (collectively bargained provisions for seniority are not determinative on the issue whether an accommodation was reasonable); S. REP. NO. 101-116, at 32 (1989) (a collective-bargaining agreement assigning jobs based on seniority may be a factor when considering whether an accommodation is reasonable).

accommodation to be a 'reasonable' one despite the [defendant's seniority] policy."²³²

Under Justices Souter and Ginsburg's rule, Barnett proved that his requested accommodation was reasonable, and the burden should shift to U.S. Airways to show that a violation of the seniority system would work an undue hardship.²³³ They found that Barnett had held the mailroom job for two years before learning that U.S. Airways declared the position vacant.²³⁴ Thus, Barnett was not seeking a change, but rather a continuation of status quo.²³⁵ Under these circumstances, Barnett was not asking to bump other employees and no one lost a job because of his accommodation.²³⁶ Furthermore, U.S. Airways did not show evidence of any unmanageable ripple effects.²³⁷ The company also took great pains to ensure that its seniority rules raised no great expectations, that the system was noncontractual, and that the system was modifiable at U.S. Airways' will.²³⁸ Accordingly, Justices Souter and Ginsburg would have affirmed the Ninth Circuit's ruling.²³⁹

IV. ANALYSIS OF THE *BARNETT* DECISION

In *Barnett*, the Supreme Court created an untenable rule that will increase confusion and litigation inside and outside the courtroom, exacerbate the plight of disabled workers, and may validate illegal, unilaterally imposed seniority schemes. Moreover, the Court's decision fails to take into account significant legislative history, as well as the practical implications of its decision. While the Court's decision recognizes the historical and practical importance of seniority systems in the American workforce, it dismisses the practical discriminatory realities of seniority systems and the ambitious goals of the ADA, enacted to overcome these discriminatory effects.

There are four approaches taken in this split decision.²⁴⁰

232. *Barnett*, 122 S. Ct. at 1534.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. Justice Stevens only comments on the Ninth Circuit's approach. *Id.* at 1525-26. Justices Scalia and Thomas do not reach this analysis. *Id.* at 1528-32; *see also supra* note 218.

Three of these opinions begin with the same analysis but diverge in their approach. The opinions written by Justices Breyer, O'Connor, and Souter begin with the two-part analysis²⁴¹ found in the ADA.²⁴² The ADA states that discrimination includes (1) an employer's not making *reasonable* accommodations to the known physical or mental limitation of an otherwise qualified employee, (2) unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.²⁴³ Under this burden shifting analysis, the employee need only show that an "accommodation" seems reasonable on its face, and then the employer must show special circumstances that demonstrate undue hardship in the particular circumstances.²⁴⁴

It is the first part of this burden-shifting analysis where the three opinions diverge. According to Justice Breyer, writing for the majority, an accommodation that conflicts with the rules of a seniority system is ordinarily not reasonable.²⁴⁵ Justice O'Connor would prefer to say that if a position were not vacant due to a *legally* enforceable seniority system, reassignment would not be a "reasonable" accommodation.²⁴⁶ Finally, Justices Souter and Ginsburg argue that a seniority system should not amount to more than "a factor" when it comes to deciding "whether an accommodation at odds with the seniority rules is 'reasonable' nevertheless."²⁴⁷

A. *The Majority's Perplexing Rule Stands on Shaky Grounds*

The majority's reasoning is unpersuasive, as it lacks a foundation of legal precedent and is based on weak policy reasons. The Court first finds precedent in cases based on Title VII²⁴⁸ and

241. See 42 U.S.C. § 12112(b)(5)(A)(2000); 28 C.F.R. § 41.53 (2003). See also Alysia M. Barancik, *Determining Reasonable Accommodations Under the ADA: Why Courts Should Require Employers to Participate in an "Interactive Process,"* 30 LOY. U. CHI. L.J. 513, 527-29 (1999) (discussing Title VII's McDonnell-Douglas burden shifting analysis applied to ADA cases); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed under Title VII in Disparate Treatment Cases to Claims Brought under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 98-102 (1997).

242. *Barnett*, 122 S. Ct. at 1520, 1527-28, 1532-38.

243. 42 U.S.C. § 12112(b)(5)(A) (2000).

244. *Barnett*, 122 S. Ct. at 1523.

245. *Id.* at 1525.

246. *Id.* at 1527.

247. *Id.* at 1533.

248. *Id.* at 1524 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-

the Rehabilitation Act.²⁴⁹ It notes that in the context of a Title VII religious discrimination case and several Rehabilitation Act cases, seniority systems trump the need for reassignment as a reasonable accommodation.²⁵⁰ However, the Court fails to appreciate the differences between the ADA and its predecessors.

The Court's reliance on the Rehabilitation Act is unpersuasive because the Rehabilitation Act does not even list "reassignment" as a reasonable accommodation.²⁵¹ More problematic, though, is the Court's reliance on Title VII.²⁵² Title VII's definition and analysis of discrimination is incompatible with the ADA. The two statutes have similar goals, but their means of achieving these goals are distinct and incongruent. Title VII promotes equality based on immutable traits that do not directly impact a person's ability to perform certain jobs.²⁵³ Conversely, a disability is sometimes a legitimate consideration in employment decisions.²⁵⁴ Because of these differences, the ADA mandates an *affirmative* obligation on employers to make *individualized* reasonable accommodations, whereas Title VII proscribes employers from considering a person's race, gender, religion, or national origin.²⁵⁵ Consequently, Title VII is also unpersuasive precedent in evaluating the reasonable

80 (1977) (Title VII religious discrimination case)). However, the committee reports of both Houses were aware of *Hardison* and expressed a choice against treating it as authority under the ADA, with its lack of provisions for exempting seniority systems. H.R. REP. NO. 101-485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350 ("The committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison* . . . are not applicable to this legislation"); *see also* S. REP. NO. 101-116, at 36 (1989) (expressing same opinion).

249. *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (Rehabilitation Act case).

250. *Barnett*, 122 S. Ct. at 1524.

251. *See* 29 U.S.C. § 701(a)(4) (2000), which provides that:

Congress finds that . . . increased employment of individuals with disabilities can be achieved through implementation of statewide workforce investment systems under title I of the Workforce Investment Act of 1998 [29 U.S.C.A. § 2801 et seq.] that provide meaningful and effective participation for individuals with disabilities in workforce investment activities and activities carried out under the vocational rehabilitation program established under subchapter I of this chapter, and through the provision of independent living services, support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations.

Id.

252. *See Barnett*, 122 S. Ct. at 1524.

253. *See Malloy*, *supra* note 6, at 608.

254. *See id.*

255. *See id.* at 622.

accommodation provision.

Next, the Court reviews the history of seniority systems in the United States.²⁵⁶ Although the Court makes a valid point that seniority systems have advantages for both employers and employees, it ignores the ultimate purpose of the ADA – placing an “affirmative . . . [obligation on employers] to promote entry of disabled into the workforce.”²⁵⁷ Ironically, the Court quoted this sentence earlier when discussing the “statute’s primary purpose.”²⁵⁸ Yet, the Court dismisses its own reasoning to give undeserved weight and importance to mere customary seniority systems. Moreover, it overlooks Congress’s decision not to give an exemption to seniority systems as it had done in prior anti-discrimination legislation.²⁵⁹

Finally, the Court articulates a perplexing rule that invites constant litigation, provides little guidance for litigants and judges, and places a disproportionate burden on plaintiffs. “The plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested ‘accommodation’ is ‘reasonable’ on the particular facts.”²⁶⁰ As Justice Scalia rightly pondered, “I have no idea what this means.”²⁶¹ The Court vaguely explains that an employer who frequently changes its rules under a seniority system reduces employee expectations and, therefore, should accommodate the employee because one more departure will not matter.²⁶² This leaves district courts and litigants with little guidance to determine a threshold at which the number of exceptions becomes too many. On the other hand, employers need only halt making any exceptions to their unilaterally imposed seniority systems to avoid a lawsuit, even if their seniority systems

256. *Barnett*, 122 S. Ct. at 1524-25.

257. *Id.* at 1523.

258. *Id.* at 1522-23.

259. Age Discrimination in Employment Act, 29 U.S.C. § 623(f) (2000) (“It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority systems that is not intended to evade the purposes of this chapter.”); Title VII, 42 U.S.C. § 2000e-2(h) (2000) (“[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . .”).

260. *Barnett*, 122 S. Ct. at 1525.

261. *Id.* at 1531.

262. *Id.* at 1525.

discriminate.

Another disconcerting issue is whether the Court's ruling places the entire burden of proof on the employee. Under the Court's test, the employer only needs to show the presence of a seniority system, whereas the plaintiff must prove that an accommodation is reasonable despite the presence of a seniority system. In doing so, the employee ultimately also bears the burden of showing that its employer's seniority system is inconsistently followed, illegitimate, or merely a sham.²⁶³ This rule is not only confusing, but also unduly and improperly burdensome on employees.²⁶⁴

In addition to the Court's distressing departure from precedent, logic, and fairness, the Court fails to address the legislative history of the ADA.²⁶⁵ Instead of looking to the intent of Congress, the Court bases its decision on a custom that has no legal standing in common law or statutory law. The Court does acknowledge that preferences will sometimes prove necessary to achieve the ADA's goals, but it stops there.²⁶⁶ Here, the remainder of the Court steps in to voice valid concerns.

B. Justice O'Connor's Concern About Reassignment and Vacancy

In looking at the ADA's legislative history, Justice O'Connor points out that Congress did not intend for reassignment to bump other employees out of a position to create a vacancy.²⁶⁷ Accordingly, she reasons that reassignment to a position cannot be reasonable unless the position is truly vacant.²⁶⁸ In determining whether a position is vacant, the threshold is determining whether a seniority system is legally enforceable.²⁶⁹ If a legally enforceable seniority system is in place, an open position may not actually be vacant because another employee may have a legal entitlement to the position. While this reasoning properly acknowledges the true

263. *See id.* at 1532.

264. The ADA burden-shifting analysis: once the plaintiff shows that an accommodation seems reasonable on its face, the *defendant* must show special circumstances that demonstrate undue hardship in the context of the particular employer's operations. *Id.* at 1527-28.

265. *See id.* at 1523-25.

266. *Id.* at 1521.

267. *Id.* at 1527 (citing H.R. Rep. No. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345; S. REP. NO. 101-116, at 32 (1989)).

268. *Id.* at 1527.

269. *See id.*

(non)legal standing of most seniority systems, it fails to take into account Congress's failure to exempt seniority systems and the legislative history, which notes that seniority systems are only a "factor" in deciding whether an accommodation is reasonable.²⁷⁰

C. Justices Souter and Ginsberg's Reasoning Finds Basis in the ADA

Justices Souter and Ginsburg's reasoning most accurately reflects the goals, legislative history, and plain language of the ADA. They correctly note that "[a]lthough [we] concur in the Court's appreciation of the value and importance of seniority systems, [we] do not believe that [our] hand[s] [are] free to accept the majority's result" ²⁷¹ A custom should not give way to anti-discrimination legislation.

The Justices correctly point out that "[n]othing in the ADA insulates seniority rules from the 'reasonable accommodation' requirement, in marked contrast to Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, each of which has an explicit protection for seniority."²⁷² This dissimilarity is bolstered by committee reports, which explicitly state that seniority protections in collectively bargained agreements should not amount to more than a "factor" in deciding whether an accommodation is reasonable.²⁷³ Justices Souter and Ginsberg also note that Congress considered that *a legally recognized collective bargaining agreement* is no more than a factor in the analysis.²⁷⁴ Accordingly, a non-contractual and unilaterally imposed seniority system imposed by the employer should not be singled out for protection under the ADA.²⁷⁵ Seniority systems do not deserve the generous protection given by the majority.

In addition, the Justices ruled out the majority's reliance of Title VII precedent.²⁷⁶ "The committees of both Houses of Congress dealing with the ADA were aware of [*Trans World Airlines v. Hardison*]²⁷⁷ and expressed a choice against treating it as authority under the ADA, with its lack of any provision for

270. *See id.* at 1532-33.

271. *Id.* at 1532.

272. *Id.* at 1532-33.

273. *Id.* at 1533.

274. *Id.* at 1533-34.

275. *See id.*

276. *Id.* at 1533.

277. 432 U.S. 63 (1977).

maintaining seniority rules.”²⁷⁸

Given the overall purpose of the ADA and its legislative history, Justice Souter and Ginsburg present the strongest argument of the Court. They argue that consideration of facts peculiar to an individual’s case is needed to gauge whether the employee has carried the burden of showing his proposed accommodation to be reasonable despite the presence of a seniority system.²⁷⁹ In reviewing Barnett’s case, the Justices took into account that Barnett was seeking merely to maintain his status quo, not to bump another employee from a job.²⁸⁰ In addition, they noted that U.S. Airways’ seniority system should not carry much weight given that the system was non-contractual and unilaterally imposed.²⁸¹ Conclusively, they would have held that Barnett met his burden.²⁸²

This test gives credence to the legislative history and plain language of the ADA. In addition, it recognizes the dissimilarities between Title VII and the ADA. Finally, this analysis takes into account Justice O’Connor’s valid concern of whether the seniority system is legally enforceable. Unfortunately, their test places a burden on the employee to show evidence that the employer’s seniority system may be a scam or legally unenforceable. On the other hand, there is no presumption against the employee, and the employer still faces the burden of showing that a violation of the seniority scheme would work an undue hardship. Overall, this test is most compatible with the ADA.

V. CONCLUSION

In its attempts to protect seniority systems, the Supreme Court has virtually eviscerated the goals of Congress’s anti-discrimination legislation. The Court’s decision in *Barnett* exacerbates the contraction of remedies available to a class of plaintiffs, whom Congress meant to empower. In enacting Title VII and the ADA, Congress sought, in part, to redress historical discrimination in the workplace.²⁸³ Yet, the Supreme Court perpetuates discrimination by allowing non-legally binding seniority systems to trump Title VII,

278. *Id.* (citing H.R. REP. NO. 101-485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350).

279. *See id.* at 1534.

280. *Id.*

281. *Id.*

282. *Id.*

283. 42 U.S.C. §§ 12101(a); 2000e-4(h)(2) (2000).

the Rehabilitation Act, and just recently, the ADA.²⁸⁴

In enacting the ADA, Congress took a different and more aggressive approach than in previous anti-discrimination legislation. Because disabilities directly affect work performance, Congress needed affirmative action to eradicate barriers.²⁸⁵ To help advance that goal, Congress made it unlawful for an employer to fail to provide reasonable accommodations for a known disability.²⁸⁶ In addition, Congress did not provide an express exemption for seniority systems, and discussed that seniority systems should only be a non-dispositive factor in determining whether an accommodation is reasonable.²⁸⁷ Nevertheless, the *Barnett* Court carved out a presumption in favor of non-legally binding seniority systems, even if they perpetuate discrimination.²⁸⁸ The *Barnett* Court ignored the plain language of the ADA, its legislative history, and its goal of advancing the disabled into the workplace.²⁸⁹ Instead the Court gave unmerited weight to seniority systems, leaving the disabled with little recourse against unilaterally imposed seniority schemes.

From the start, the Court's test places a heavy presumption against plaintiffs, but little burden on the employer.²⁹⁰ The employer merely must show a violation of a seniority rule.²⁹¹ In contrast, plaintiffs carry two heavy burdens: proving that (1) special circumstances exist, under which, (2) their proposed accommodation is reasonable – despite the presumption that a violation of the rules of a seniority system is ordinarily sufficient to show that an accommodation is not reasonable.²⁹² This rule invites constant litigation and gives little assurance to the disabled workers who need the empowerment of the ADA. The Court's ruling is one more inequitable strike against plaintiffs in employment discrimination cases.

284. See discussion *supra* Parts II.B-C.

285. See Malloy, *supra* note 6, at 608.

286. 42 U.S.C. § 12112(b)(5)(A) (2000).

287. See discussion *supra* Part II.C.

288. 122 S. Ct. at 1525.

289. See discussion *supra* Parts III.C.1, IV.

290. See discussion *supra* Part IV.

291. *Barnett*, 122 S. Ct. at 1525.

292. *Id.*