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ENABLING THE DISABLED: REASSIGNMENT AND THE ADA

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INTRODUCTION

Assume you are an employer. You have an employee who becomes disabled and can no longer continue in his or her current position, even with an accommodation. Another job becomes vacant. The disabled employee is qualified for this job, but you would prefer to transfer a non-disabled employee whom you believe to be more qualified. What can you do? Are you obligated to transfer a disabled employee who can no longer perform his or her current job duties? If so, must you give the vacant job to the qualified disabled employee even if there is a more qualified non-disabled employee you would rather transfer to that job?

With the Americans with Disabilities Act of 1990 ("ADA"),[1] Congress hoped to break down unnecessary barriers to the employment of qualified individuals with disabilities.[2] Congress concluded that state

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1. 42 U.S.C. § 12101 et. seq. (1999).

2. The Senate Committee on Education and Human Resources found:

> Individuals with disabilities experience staggering levels of unemployment and poverty.
> According to a recent Lou Harris poll, not working is perhaps the truest definition of what it means to be disabled in America. Two thirds of all disabled Americans between the age

laws protecting the disabled, and the Rehabilitation Act of 1973, were not addressing this problem effectively.[3] Consequently, the employment provisions of the ADA went well beyond the Rehabilitation Act, prohibiting private employers from discriminating against the disabled and affirmatively compelling them to modify their workplaces to accommodate qualified disabled workers.

Under both the ADA and the Rehabilitation Act, the failure to make a reasonable accommodation is a form of unlawful discrimination. However, the ADA, for the first time, specifically included reassignment as one accommodation employers must consider for disabled employees.[4] In 1992, Congress amended the Rehabilitation Act to include reassignment as an accommodation.[5] Federal courts have recognized that the statutory obligation to reassign is new. Unfortunately, the courts have not provided much guidance on the scope and parameters of this obligation. Courts have disagreed over when there is an obligation to consider reassigning a disabled employee and what it means to reassign.

This article explores the scope of the legal obligation to consider reassignment as an accommodation under the ADA. Part I examines when an employer has an obligation to consider reassignment as a possible accommodation; concluding that reassignment should be explored whenever a disability makes an employee unable to perform the essential functions of his or her current position.

Part II explores the scope of an employer's duty to reassign. Based on the language of the ADA, its legislative history, and judicial and administrative interpretations of the statute, employers should transfer qualified disabled employees to vacant positions, regardless of whether

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of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.

S. REP. NO. 101-116, at 9 (1989). *See also* H.R. REP. NO. 101-485, pt. 1, at 32-34 (1990).

3. *See* S. REP. NO. 101-116, at 18-19 (1989); H.R. REP. NO. 101-485, pt. 2, at 29, 32 (1990).

4. *See* 42 U.S.C. § 12111(9)(B).

5. *See* 29 U.S.C. §§ 791(g), 794(d) (1994) *amended by* Pub. L. No. 102-59, Title V, § 506 (1992). As discussed more fully in Part I(A), *infra*, this amendment legislatively overruled prior judicial pronouncements that the Rehabilitation Act did not require reassignment as an accommodation.

a more qualified non-disabled employee may be seeking the same position. This obligation is limited by the contractual and quasi-contractual rights of non-disabled employees, as well as the employer's right to refuse any accommodation that would result in undue hardship.

Part III offers some practical guidance to employers who are navigating the accommodation process.

I. WHEN SHOULD AN EMPLOYER CONSIDER REASSIGNMENT AS A POSSIBLE ACCOMMODATION?

A. Reassignment Under the Rehabilitation Act

Because Congress, the Equal Employment Opportunity Commission (EEOC), and the courts all have relied on the Rehabilitation Act for guidance in interpreting the ADA, understanding the treatment of reassignment as an accommodation under that statute is helpful to any analysis of this accommodation under the ADA. As initially enacted, the Rehabilitation Act[6] did not compel employers to reassign disabled employees who became unable to perform their job duties.[7] In *School Board of Nassau County v. Arline*,[8] the United States Supreme Court stated that the Rehabilitation Act only required that disabled employees be given the same transfer opportunities as non-disabled employees. In other words, there was no independent statutory obligation to reassign disabled employees:

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6. 29 U.S.C. § 701 et seq. (1999).

7. Prior to 1992, the regulations implementing the Rehabilitation Act defined reasonable accommodation to include "making facilities readily accessible..., job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices." 29 C.F.R. § 1614.704(b) (1991). In 1992, this regulation was replaced by 29 C.F.R. § 1614.203, which specifically includes reassignment as an accommodation employers must consider. *See also*, Gile v. United Airlines, Inc., 95 F.3d 492, 496-97 (7th Cir. 1996) ("Until recently, the Rehabilitation Act and its regulations did not include reassignment to a vacant position within the list of potential reasonable accommodations."); Shiring v. Runyon, 90 F.3d 827, 831-32 (3d Cir. 1996) (concluding that prior to 1992, the Rehabilitation Act did not require reassignment to a vacant position); Fedro v. Reno 21 F.3d 1391, 1394-95 & n.5 (7th Cir. 1994) (finding that prior to 1992, the obligation to reasonably accommodate under the Rehabilitation Act did not include transfer or reassignment); Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993); Bates v. Long Island R.R. Co., 997 F.2d 1028, 1035-36 (2d Cir.); Guillot v. Garrett, 970 F.2d 1320, 1326-27 (4th Cir. 1992) (rejecting argument that Rehabilitation Act created any duty to reassign); Lyles v. Dep't of the Army, 864 F.2d 1581, 1583 (Fed. Cir. 1989); Shea v. Tisch, 870 F.2d 786, 789-90 (1st Cir. 1989).

8. 480 U.S. 273 (1987).

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.[9]

In 1990, Congress passed the Americans with Disabilities Act.[10] For the first time, employers had a statutory obligation to consider reassignment as a possible accommodation for disabled workers.[11] Federal courts recognized that the specific inclusion of reassignment in the list of illustrative accommodations was an expansion of the pre-existing obligation to accommodate under the Rehabilitation Act.[12] Two years later, Congress amended the Rehabilitation Act so that the standards for determining liability would be the same under the Rehabilitation Act and the ADA.[13]

B. Judicial Interpretations of the ADA's Obligation to Reassign

At first blush, the ADA's provisions relating to reassignment are circular. The statute makes it unlawful for an employer to fail to make reasonable accommodations for "an otherwise qualified individual with a disability."[14] Reasonable accommodations include reassignment to a

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9. *Id.* at 289 n.19.

10. *See* Pub. L. No. 101-336 (1990).

11. The ADA defined "reasonable accommodation" to include, "job restructuring, part-time or modified work schedules, *reassignment to a vacant position.*" 42 U.S.C. § 12111(9)(B) (emphasis added).

12. *See* Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048 (7th Cir. 1996) ("We recognize that the ADA does expressly recognize 'reassignment to a vacant position' as an expected form of reasonable accommodation, thereby rejecting a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was *never* required.") (quoting 42 U.S.C. § 12111); *Shiring*, 90 F.3d at 831 ("Although reassignment was an option under the 1990 Americans with Disabilities Act, . . . it was not required of federal employers under the Rehabilitation Act." (citation omitted)); Emrick v. Libbey-Owens-Ford Co., 875 F.Supp. 393, 395-96 (E.D. Tex. 1995); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104 (S.D. Ga. 1995) ("The ADA, unlike the Rehabilitation Act, contains explicit language concerning the employer's duty to consider reassignment to a vacant position as a possible accommodation if the employee is no longer able to perform the essential functions of his original job.").

13. *See* 29 U.S.C. §§ 791(g), 794(d) (1992); Pub. L. No. 102-569, Title V, § 506; *see also* 29 C.F.R. § 1614.203(g); Myers v. Hose, 50 F.3d 278, 281 (4th Cir. 1995) ("Thus, whether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same.").

14. 42 U.S.C. § 12112(b)(5)(A) (1990).

vacant position.[15] However, the ADA defines "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."[16]

These three provisions create an apparent contradiction. Only qualified individuals are entitled to any accommodation, including reassignment. However, a qualified individual is, by definition, someone who can do the essential functions of his or her position. If a disabled employee can do all of the essential functions of his or her job, when would reassignment ever be necessary?

1. A Minority Of Courts Have Ruled That There Is No Obligation To Reassign Disabled Employees Who Can No Longer Perform The Essential Functions Of Their Current Position.

These apparently contradictory provisions have led some courts to rule that a disabled employee is not entitled to reassignment if the employee cannot perform the essential functions of his or her current position. For example, the Fourth Circuit Court of Appeals stated, *in dicta*, that there is no legal obligation to reassign an employee who is unable to do the essential functions of his or her current position.[17]

Several federal district courts also have ruled, without discussion, that the ADA's duty to reasonably accommodate does not include a duty to reassign an employee who cannot perform the essential functions of his or her current position.[18] Even though the ADA includes a broader obligation to reassign than the pre-1992 Rehabilitation Act, these district courts have consistently relied on *Arline*[19] for guidance in determining the scope of an employer's duty to reassign under the ADA. *Parisi v. Coca Cola Bottling Co.*,[20] is illustrative of these cases.

In *Parisi*, the federal District Court for the Eastern District of New

15. *See* 42 U.S.C. § 12111(9)(B).

16. 42 U.S.C. § 12111(8).

17. *See Myers*, 50 F.3d at 284.

18. *See, e.g.*, Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1537 (N.D. Ala. 1995) ("[T]he duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment if the employee is unable to meet the demands of his present position." (citing *Myers*, 50 F.3d at 284.)); Christopher v. Laidlaw Transit Inc., 899 F.Supp. 1224, 1227 (S.D.N.Y. 1995); Odessey v. Comcast Cablevision of Maryland, 8 AD Cases 1036 (D. Md. 1998).

19. *See* School Board of Nassau County v. Arline, 480 U.S. 273, 273 (1987). *See also supra* text accompanying note 7.

20. 995 F.Supp. 298 (E.D.N.Y. 1998).

York relied on *Arline* to rule that an employee, who cannot perform the essential functions of his or her current position, is not qualified and is not entitled to an accommodation, including the accommodation of reassignment.[21] The court concluded that any right to a transfer or reassignment would have to be based on a contract provision or prior employment policy: "There is no general duty to transfer a disabled employee unable to perform one job to another available position, absent some showing–not made here–of a contractual right to transfer or an established policy of such transfers."[22] Thus, an employer need not "provide disabled employees with alternative employment when the employee is unable to meet the demands of his present position."[23]

According to *Parisi*, the ADA did nothing but extend the Supreme Court's analysis in *Arline* to private employers.[24] Several other courts have disagreed with this analysis. These courts have ruled that the ADA's specific reference to reassignment as an accommodation has expanded the law beyond *Arline* and the pre-1992 Rehabilitation Act. Their rationale is discussed more fully in the following section.

2. The Majority of Courts Addressing the Issue Have Ruled That Employers Must Consider Reassigning Disabled Employees Who Can No Longer Continue in Their Current Jobs.

Although decisions like *Parisi* have some basis in the plain language of the ADA, they clearly represent a minority position. The majority of courts addressing the issue have ruled that the ADA imposes an obligation to consider reassignment whenever a disability makes an employee unable to perform the essential functions of his or her current position.[25] The Seventh Circuit Court of Appeals has reached this

21. *See id.* at 302-04. In *Parisi*, the plaintiff was a deliveryman for Coca-Cola. *See id.* at 299. He suffered a knee and leg injury that made him unable to continue working as a route deliveryman. *See id.* The Court ruled that the plaintiff was not disabled; and that he was not an "otherwise qualified individual" with a disability, since he could no longer do his job. *See id.* at 302-03. Therefore, he was not entitled to any other accommodation, including reassignment. *See id.* at 303.

22. *Id.* at 303.

23. *Id.* (citations omitted).

24. *See id.* at 303-04.

25. *See*, e.g., Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Gile v. United Air Lines, Inc., 95 F.3d 492, 498 (7th Cir. 1996); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677 (7th Cir. 1998); Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1162 (10th Cir. 1999) (en banc); Pedigo v. P.A.M. Transp., Inc., 891 F.Supp. 482, 487 (W.D. Ark. 1994); Community Hosp. v. Fail, 969 P.2d 667, 676 (Colo. 1998).

conclusion in several cases. For example, in *Gile v. United Air Lines*,[26] the Seventh Circuit recognized that only "qualified individuals" were entitled to any accommodation, including reassignment.[27] In that case, however, the only accommodation which would have allowed Ms. Gile to continue working for United Air Lines was reassignment to a different shift or position.[28] After reviewing the development of the Rehabilitation Act through its 1992 amendments, the legislative history of the ADA, and the EEOC's interpretation of that statute, the court concluded that Ms. Gile may be entitled to reassignment, even though she could no longer perform the essential functions of her current position:

> Our review of the ADA, its regulations, and the EEOC's interpretive guidance leads us to the conclusion of the majority of courts that have addressed the issue that the ADA may require an employer to reassign a disabled employee to a different position as a reasonable accommodation where the employee can no longer perform the essential functions of their current position.[29]

That same year, in *Cochrum v. Old Ben Coal Co.*,[30] a different panel of the Seventh Circuit reaffirmed *Gile*.[31] In a concurring opinion, Judge Cudahy defined "qualified individual with a disability" as an "employee [who] is able to perform the essential functions of his or her current job, *or some other available job*, with or without accommodation."[32] Judge Cudahy went on to state that, "in an appropriate case, the ADA may require the employer to transfer the disabled employee to another available job for which he or she is qualified."[33]

Two years later, in *Dalton v. Subaru-Isuzu Automotive, Inc.*, the

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26. 95 F.3d at 492.

27. *Id.* at 496.

28. *See id.*

29. *Id.* at 498. The Court also reviewed and criticized those cases finding no obligation to reassign employees who become incapable of continuing in their current positions: "Those courts which have found that reassignment to a different position cannot be a reasonable accommodation under the ADA mistakenly rely upon pre-amendment Rehabilitation Act cases...." *Id.*

30. 102 F.3d 908, 913 (7th Cir. 1996).

31. *See id.*

32. *Id.* (Cudahy, J., concurring).

33. *Id*; *see also* Aka v. Washington Hosp. Ctr.. 156 F.3d 1284, 1304-05 (D.C. Cir. 1998) (en banc).

Seventh Circuit articulated a two-step test to determine if a disabled employee is a qualified individual.[34] First, the disabled employee must establish that he or she has the necessary "educational background, experience, skills, licenses, etc." to satisfy the employer's legitimate qualifications for the position.[35] Second, the employee must establish that he or she "can perform the essential functions of the job *held or desired,* with or without a reasonable accommodation."[36] Under this analysis, an employee who satisfies both of these criteria may be entitled to reassignment if no other accommodation will allow the employee to stay in his or her current position.[37]

In *Hendricks-Robinson v. Excel Corp.*,[38] the court's analysis of reassignment as an accommodation continued to evolve. In that case, the Seventh Circuit ruled that an "employer must consider reassignment as one form of accommodation" for any disabled employee who is unable to perform his job.[39]

Although the Seventh Circuit has undertaken the most extensive analysis and discussion to date of the phrase "qualified individual with a disability," that court hardly stands alone in its interpretation. As noted in *Gile*, a majority of the courts that have addressed this issue have ruled that a disabled employee may be entitled to reassignment even though no accommodation would allow the employee to stay in his or her current job.[40] Since *Gile*, other courts have relied on the Seventh Circuit's analysis to define "qualified individual with a disability" and to provide greater clarity to employers trying to comply with the ADA's obligation to reassign.[41]

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34. 141 F.3d. 667, 676 (7th Cir. 1998).

35. *Id.*

36. *Id.* (emphasis in original); *see also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1162 (10th Cir. 1999) (en banc).

37. *See Dalton*, 141 F.3d at 676; *see also Aka*, 156 F.3d at 1305. As discussed in Part II, *infra*, there is no obligation to reassign if reassignment would result in an undue hardship or trample the legitimate contractual or quasi-contractual rights of non-disabled employees.

38. 154 F.3d 685 (7th Cir. 1998).

39. *Id.* at 693.

40. *See, e.g.*, Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); Daugherty v. City of El Paso, 56 F.3d 695, 698-99 (5th Cir. 1995); *Midland Brake*, 180 F.3d at 1162; Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104 (S.D. Ga. 1995); Pedigo v. P.A.M. Transp., Inc., 891 F. Supp. 482, 485-87 (W.D. Ark. 1994); Vazquez v. Bledsoe, 888 F. Supp. 727, 731 (E.D.N.C. 1995); Emrick. v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397 (E.D. Tex. 1995); Community Hosp. v. Fail, 969 P.2d 667, 676-77 (Colo. 1998).

41. *See, e.g., Aka*, 156 F.3d at 1301; *Midland Brake*, 180 F.3d at 1162-63; *Fail*, 969 P.2d at 676-77.

C. The ADA's Legislative History and the EEOC's Interpretation Support the Majority Interpretation of "Qualified Individual with a Disability."

At the time of the ADA's passage, Congress recognized that an overly simplistic reading of the legislative definitions could result in a circular and nonsensical interpretation of the statute. The Senate Report on the ADA offered some guidance on the interpretation of the phrase "qualified individual with a disability":

> [S]ection 102(b)(5) [42 U.S.C. § 12112(b)(5)] of the legislation requires that reasonable accommodation be made for a "qualified individual who is an applicant or employee." The term "qualified" as used in this section does not refer to the definition of "qualified individual with a disability" set forth in Section 101(7) [42 U.S.C. § 12111(8)] *because such an interpretation would be circular and meaningless.* Rather, as in the Section 504 regulations, the term "qualified" in Section 102(b)(5) means "otherwise qualified" (See 45 C.F.R. § 84.12(a)), i.e., a person with a disability who meets all of an employer's job-related selection criteria except such criteria he or she cannot meet because of a disability.[42]

This legislative guidance certainly suggests that a disabled employee can be entitled to reassignment even if no accommodation would enable the employee to do his or her current job duties. Leaving nothing to chance, the Senate report clarified this guidance by stating explicitly that reassignment should be an option for disabled employees who can no longer perform the essential functions of their current position:

> If an employee, because of a disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.[43]

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42. S. REP. NO. 101-116, at 33 (1989) (emphasis added).

43. *Id.* at 31-32. In *Pedigo*, the Court read this legislative history as clear evidence that Congress intended for employers to consider reassigning any disabled employee who became unable to continue in his or her current position. *See Pedigo*, 891 F.Supp. at 486-87. The Colorado Supreme Court reached a similar conclusion in *Fail*, 969 P.2d at 677-78; *see also* H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

The EEOC also has taken the position that reassignment should be an option for disabled employees who can no longer perform their current job duties:

> Reassignment may be an appropriate accommodation when an employee becomes disabled, when a disability becomes more severe, or when changes or technological developments in equipment affect the job performance of an employee with a disability. If there is no accommodation that will enable the person to perform the present job, or if it would be an undue hardship for the employer to provide such accommodation, reassignment should be considered.[44]

As a matter of policy, reassignment should be considered for any disabled employee who cannot continue in his or her current position. One of the overriding justifications for the ADA's employment provisions was the desire to reduce the massive unemployment facing the disabled.[45] This objective is best served by attempting to transfer disabled employees who can no longer perform the essential functions of their current jobs to vacant jobs that they are qualified and able to perform.

Reassignment, however, should not be an employer's primary means of accommodating disabled workers. To the contrary, reassignment should be used as an accommodation of last resort. Biased perceptions about the disabled, and discomfort around those with obvious disabilities, are precisely the kind of stereotypical attitudes the ADA attempts to eradicate. These misconceptions could lead some employers to adopt a policy of reassigning disabled employees to undesirable jobs with limited opportunities. The EEOC has recognized this concern and has warned against segregating the workplace through unnecessary reassignments.[46]

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44. AMERICANS WITH DISABILITIES ACT OF 1990: U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC TECHNICAL ASSISTANCE MANUAL at III-24 (1992). By way of example, the EEOC offers: "If an employee whose job requires driving loses her sight, reassignment to a vacant position that does not require driving would be a reasonable accommodation, if the employee is qualified for that position with or without an accommodation." *Id.* at III-4.

45. *See supra* text accompanying notes 1-3; *see also* S.REP. NO. 101-116, at 9; H.R. REP. NO. 101-485, pt. 2, at 32-34.

46. According to the EEOC's Interpretive Guidance, "reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship.... Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable

Employers should view any request for an accommodation as a two-step inquiry. First, is there any accommodation that will allow this employee to perform the essential functions of his or her current position? If not, is there any vacant position which the employee is qualified and able to perform, with or without an accommodation? Part II of this article discusses how an employer must balance the rights of disabled and non-disabled employees when considering reassignment.

II. WHAT IS THE SCOPE OF AN EMPLOYER'S REASSIGNMENT OBLIGATION?

As discussed in Part I, most courts agree that an employee may be entitled to reassignment when the employee becomes incapable of remaining in his or her current position. However, the exact parameters of an employer's duty to reassign are far less clear.

Several courts have defined the duty to reassign only in the negative–explaining what an employer is not required to do. There is a consensus among federal courts that the obligation to reassign does not include any of the following:

–Reassigning a disabled employee to a position for which he or she is not qualified;[47]

–Bumping a non-disabled employee from the position he or she currently holds;[48]

–Creating a new position for a disabled employee;[49]

–Promoting a disabled employee;[50] and

–Violating legitimate transfer policies, seniority policies, the provisions of a collective bargaining agreement, or the legitimate

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positions or to designated offices or facilities." 29 C.F.R. § 1630.2(o) app (1999); *see also* Gile v. United Airlines, 95 F.3d 492, 497-98 (7th Cir. 1996).

47. *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 633 (7th Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998); *Gile*, 95 F.3d at 499; Smith v. Midland Brake, Inc., 180 F.3d 1154, 1178 (10th Cir. 1999) (en banc); *Fail*, 969 P.2d at 673.

48. *See Aka*, 156 F.3d at 1305; *Baert*, 149 F.3d at 633; *Dalton*, 141 F.3d at 678; Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047 (7th Cir. 1996); *Gile*, 95 F.3d at 499; McCreary v. Libby-Owens-Ford Co.,132 F.3d 1159, 1165 (7th Cir. 1998); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 397 (E.D. Tex. 1995); *Fail*, 969 P.2d at 673.

49. *See Aka*, 156 F.3d at 1305; *Baert*, 149 F.3d at 633; Benson v. Northwest Airlines, Inc., 62 F.3d. 1108, 1114 (8th Cir. 1005); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 809 (5th Cir. 1997); *Gile*, 95 F.3d at 499; *McCreary*, 132 F.3d at 1165; *Fail*, 969 P.2d at 673.

50. *See* Malabarba v. Chicago Tribune Co., 149 F.3d 690, 699 (7th Cir. 1998); *Dalton* 141 F.3d at 679; *Midland Brake*, 180 F.3d 1176; *Fail*, 969 P.2d at 673.

contract rights of non-disabled employees.[51]

Fortunately, some courts have given positive guidance to employers attempting to satisfy their legal obligation to reassign. The Seventh Circuit has ruled that the ADA may require reassignment to a completely different job, including a position in a different department, office, or facility.[52] That court also has recommended a procedure for analyzing whether a reassignment is possible:

> The employer must first identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory prerequisites, and then determine whether the employee's own knowledge, skills and abilities would enable her to perform the essential functions of any of those alternative positions, with or without reasonable accommodations. The employer's duty to accommodate requires it to consider transferring the employee to any of these other jobs, including those that would represent a demotion.
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> [T]he "broad range" of jobs to which an employer must look when considering transfer as a reasonable accommodation for a disabled employee is bounded from above by the employer's freedom not to offer a promotion and from below by its legitimate nondiscriminatory limitations on lateral transfers and demotions.[53]

To date, the most comprehensive discussion of the ADA's obligation to reassign comes from the D.C. Circuit's *en banc* decision in *Aka v. Washington Hospital Center*.[54] Aka was an orderly who could no longer perform the essential functions of his job, even with an accommodation, because of bypass surgery.[55] Aka asked the hospital for a transfer,

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51. *See Aka*, 156 F.3d at 1305; Barnett v. U.S. Air, Inc., 157 F.3d 744, 751 (9th Cir. 1998); *Benson*, 62 F.3d at 1114; Cochrum v. Old Ben Coal Co., 102 F.3d 908, 912-13 (7th Cir. 1996); *Dalton*, 141 F.3d at 678-79; Daugherty v. City of El Paso, 56 F.3d 695, 699-700 (5th Cir. 1995); *Eckles*, 94 F.3d at 1051; *Foreman*, 117 F.3d at 810; *Midland Brake*, 180 F.3d at 1175-76; *cf.*, *Emrick*, 875 F. Supp. at 396-97 (concluding that a reassignment is not unreasonable *per se* simply because it violates a collective bargaining agreement or seniority system).

52. *See Gile*, 95 F.3d at 497-98.

53. *Dalton*, 141 F.3d at 678-79; *see also* DePaoli v. Abbott Laboratories, 140 F.3d 668, 674-75 (7th Cir. 1998).

54. 156 F.3d at 1284 (D.C. Cir. 1998).

55. *See id.* at 1286, 1300 n. 22.

stating that he wished to remain employed, in any capacity, for pension purposes.[56] One of the positions to which Aka sought a transfer was a file clerk job. Even though Aka met the minimum qualifications for this position, he was not given any of the four file clerk vacancies that arose.[57] Each of these vacancies went to a non-disabled employee whom the hospital found to be more qualified.[58]

Defending its refusal to reassign Aka to any of these four vacant positions, the hospital first argued that Aka's inability to perform the duties of his orderly job meant that he was not a qualified individual with a disability and, thus, was not entitled to any other accommodation.[59] Relying on *Gile*, guidance from the EEOC, and the ADA's legislative history, the court rejected this argument.[60] The court ruled that a disabled employee is a qualified individual with a disability whenever he can perform the essential functions of the position he holds, or of any position to which he seeks reassignment.[61]

The hospital and the dissent then argued that even if Aka was a qualified individual with a disability, the hospital discharged its obligation to reassign him because it did not deny him a transfer *because of* his disability.[62] The dissent took the position that an employer fully satisfies its obligation to reassign if it allows a disabled employee to compete equally with non-disabled employees for a vacant position.[63]

The majority found several flaws in this position. Turning first to the plain language of the ADA, the court found Congress' use of the word "reassign" to be significant:

> An employee who is allowed to compete for jobs precisely like any other applicant has not been 'reassigned'; he may have changed jobs, but he has done so entirely under his own power, rather than having been appointed to a new position.
> * * * *

56. *See id.* at 1286 n. 1.

57. *See id.* at 1287.

58. *See id.*

59. *See id.* at 1300.

60. *See id.* at 1300-01.

61. *See id.* at 1301 (quoting 42 U.S.C. § 12111(8). The Court stated that the hospital's interpretation was nonsensical: "In other words, employees should only be reassigned if they have no entitlement to reassignment. This is a paradox worthy of Lewis Carroll, whose White Queen gave her maid 'jam tomorrow and jam yesterday—but never jam *today*.'" *Id.*

62. *See id.* at 1303.

63. *See id.* at 1311-12.

> [T]he 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 in regard to job application procedures.[64]

Second, the majority found no support for the contention that it would be an impermissible preference to reassign a qualified disabled employee over a more qualified non-disabled employee.[65] The court found the only rational interpretation of the statutory text and legislative history to be that the obligation to reassign could, in some cases, compel the transfer of a qualified disabled employee over an arguably more qualified non-disabled employee.[66] This conclusion rested, in part, on a distinction between the level of accommodation that should be afforded disabled applicants versus disabled employees, "[a]though the ADA's legislative history does warn against 'preferences' for disabled *applicants*, it also makes clear that reasonable accommodations for existing *employees* who become disabled on the job do not fall within that ban."[67]

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64. *Id.* at 1302, 1304 (citations omitted); *see also* Smith v. Midland Brake, Inc., 180 F. 3d 1154, 1164 (10th Cir. 1999) (en banc).

65. *See Aka*, 156 F.3d at 1304-05.

66. *See id.*

67. *Id.* at 1304 (citations omitted). Relying on *Aka*, the Colorado Supreme Court also has interpreted the ADA's legislative history as imposing a greater burden to accommodate employees versus applicants. *See* Community Hosp. v. Fail, 969 P.2d 667, 678 (Colo. 1998). The Tenth Circuit Court of Appeals, sitting en banc, went even further. *See Midland Brake*, 180 F.3d at 1164. In *Midland Brake*, the dissent argued that the majority's interpretation of the ADA constituted affirmative action. *See id.* The majority responded:

> However, judicial labels cannot substitute for Congress' statutory mandate in the ADA. In § 12112(b)(5)(A), Congress defined the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability..." Then, in § 12111(9)(D), Congress defined the term "reasonable accommodation" to include "reassignment to a vacant position." Thus, although the dissent would prefer to view the reasonable accommodation of reassignment as "affirmative action," Congress chose to consider otherwise when it defined the failure reasonably to accommodate (including reassignment) as a prohibitive act of discrimination. It is the Congressional definition, of course, that must govern our analysis.

Aka was the first decision in which a federal court of appeals considered whether the obligation to reassign requires an employer to transfer a disabled employee into a vacant position for which the employee is qualified, even if the disabled employee is not the most qualified person seeking that position.[68] Since *Aka*, the Tenth Circuit Court of Appeals, sitting *en banc*, issued its decision in *Smith v. Midland Brake, Inc.*[69] That decision relied heavily on *Aka* to reach the very same conclusions concerning the scope of an employer's obligation to reassign disabled employees. Although other circuits have not specifically ruled on these issues, it is reasonable to assume that they will follow the lead of *Aka* and *Midland Brake.*

The Seventh Circuit Court of Appeals has already started down this path. *Aka* relied heavily on the rationale of prior Seventh Circuit decisions. To date, those decisions suggest that the Seventh Circuit will follow *Aka* and *Midland Brake* when asked to decide the same issues. For example, in *Miller v. Illinois Dep't. of Corrections*, the court stated: "Even if an employee . . . just says to the employer, 'I want to keep working for you—do you have any suggestions?' The employer has a duty under the Act to ascertain whether he has some job that the employee might be able to fill."[70]

Similarly, in *Hendricks-Robinson v. Excel Corp.*, the Seventh Circuit explained that "[a] request as straightforward as asking for continued employment is a sufficient request for accommodation."[71] Once such a request is made, an employer "has [a] duty to consider reassigning its disabled employees to other jobs for which they are qualified."[72] This duty compels an employer "to identify 'the *full range* of alternative positions' available and 'to consider transferring the employee to *any* of these other jobs, including those that would represent a demotion.'"[73]

Another reason to believe *Aka* and *Midland Brake* will be adopted by other courts is the support for their interpretation in the ADA's legislative history. One of the overriding purposes of the ADA was to create employment opportunities for disabled individuals who could

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Id. at 1167.

68. *See Aka*, 156 F.3d at 1300-03.

69. 180 F.3d at 1154.

70. 107 F.3d 483, 486-87 (7th Cir. 1997) (citations omitted).

71. 154 F.3d 685, 694 (7th Cir. 1998).

72. *Id.* at 695.

73. *Id.* (citation omitted) (emphasis in original).

work and wanted to work.[74] Consistent with that goal, the legislative history made it clear that the purpose of the reassignment obligation was to keep disabled employees working.[75]

Aka also is consistent with the EEOC's interpretation of the ADA. The Commission has taken the position that employers must reassign qualified disabled employees to a vacant position if they can no longer perform the essential functions of their current position:

> Where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation because of a disability... an employer must reassign him/her to an equivalent position for which s/he is qualified, absent undue hardship. If no equivalent vacant position (in terms of pay, status, etc.) exists, then the employee must be reassigned to a lower graded position for which s/he is qualified, absent undue hardship.[76]

In March of 1999, the EEOC issued a Policy Guidance on Reasonable Accommodation under the ADA.[77] In that Guidance, the Commission reiterated its position that reassignment should be considered for any employee who can no longer perform the essential functions of his or her position because of a disability.[78] The Commission then affirmed *Aka's* conclusion that reassignment must mean more than simply allowing disabled employees to compete for vacant positions:

> Does reassignment mean that the employee is permitted to compete for a vacant position?
>
> * * * *
>
> No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would

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74. *See* 42 U.S.C. § 12101 (1999); *see also*, H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

75. *See* S. REP. NO. 101-116, at 9 (1989); H.R. REP. NO. 101-485, pt. 2, at 32-34.

76. EEOC Enforcement Guidance: "Workers' Compensation and the ADA," ADA Manual No. 57 at 70:1220 ¶ 22 (BNA). Although this Guidance refers specifically to occupational injuries, neither the ADA nor the EEOC have drawn any distinction between work-related disabilities and other disabilities. Consequently, there is no reason to believe that the EEOC's opinion would be confined to work-related disabilities.

77. *See* Ida L. Castro, *EEOC Policy Guidance on Reasonable Accommodation Under the ADA*, 40 DAILY LABOR REPORT 1 (March 2, 1999) <http://pubs.bna.com/ip/BNA/dir.nsf/id/a0alp5v.7n.3>.

78. *See id.* at 71-74.

> be of little value and would not be implemented as Congress intended.[79]

The Tenth Circuit quoted these regulations in *Midland Brake*.[80]

Finally, federal courts have taken great pains to avoid becoming "super-personnel departments."[81] The rationale of *Aka* and *Midland Brake* permits courts to enforce the ADA's legislative mandate without weighing the relative qualifications of a disabled employee and the non-disabled worker whom the employer deemed to be "more qualified." Once a disabled employee proves that he or she is capable of adequately performing the duties of a vacant position, that person must be reassigned to the vacant position unless the employer can prove that undue hardship would result.[82] The relative qualifications of the disabled employee and any non-disabled employee-applicant become irrelevant.

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79. *Id.* at 75.

80. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1166-67 (10th Cir. 1999) (en banc) (citations omitted).

81. Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions."); *see also* Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997) ("As another court of appeals has put it, 'federal courts are not arbitral boards ruling on the strength of 'cause' for discharge. The question is not whether the employer made the best, or even a sound business decision; it is whether the real reason is [discrimination.]'"); Chiarmonte v. Fashion Bed Group, Inc., 129 F.3d 391, 400 (7th Cir. 1997), *cert. denied*, —U.S.—, 118 S.Ct. 1795 (1998) ("This Court has established that it 'does not sit as a super-personnel department that reexamines an entity's business decisions.'"); Hill v. St. Louis Univ., 123 F.3d 1114, 1120 (8th Cir. 1997) (stating that employment discrimination statutes do not "entitle courts to 'sit as super-personnel departments,' second-guessing the wisdom of businesses' personnel decisions."); Brill v. Lante Corp., 119 F.3d 1266, 1272 (7th Cir. 1997) ("Courts refuse to sit in judgment as super-personnel departments overseeing corporate decisions, even if some judges think the decisions to be mistaken or perplexing or silly."); Day v. Johnson, 119 F.3d 650, 657 (8th Cir. 1997), cert. denied, —U.S.—, 118 S.Ct. 707, (1998) ("federal courts are not self-appointed personnel managers, and they may not second-guess the fairness or wisdom of an employer's nondiscriminatory employment decision"); Walton v. Bisco Indus. Inc., 119 F.3d 368, 372 (5th Cir. 1997) ("we do not view the discrimination laws as vehicles for judicial second-guessing of business decisions.); Greenslade v. Chicago Sun-Times, Inc., 112 F.3d 853, 865 ("this court 'does not sit as a super-personnel department that reexamines an entity's business decisions'"); Fischbach v. D.C. Dep't. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Even if a court suspects that a job applicant 'was victimized by poor selection procedures' it may not 'second-guess an employer's personnel decision absent demonstrably discriminatory motive.'"); Fennell v. First Step Designs, Ltd., 83 F.3d 526, 537 (1st Cir. 1996) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions.'").

82. *See* Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1303 (D.C. Cir. 1998) en banc); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161-64 (10th Cir. 1999) (en banc).

III. PRACTICAL CONSIDERATIONS

There are two basic questions that an employer must answer to satisfy its obligation to accommodate a disabled employee: (1) Is there any accommodation that allows this employee to perform the essential functions of his or her current position? and, if not, (2) Is there any vacant position this employee is able and qualified to fill, with or without accommodation?

Reassignment should be considered only after every avenue of accommodating the employee in his or her position has been exhausted. To determine if an employee can be accommodated in his or her current position, an employer should review all medical information relevant to the employee's work restrictions. The employer then should meet with the employee for the purpose of agreeing on the essential functions of the employee's current position; the physical, mental, or emotional demands of that position; and the way in which the employee's condition creates challenges to the performance of these essential functions. The employer, employee, health care providers retained by either or both, and outside consultants such as the Federal Job Accommodation Network, should be consulted to discuss possible accommodations.

Once possible accommodations have been identified, the employer should analyze whether any accommodations would create an undue hardship. After eliminating any unduly burdensome accommodations, the employer is free to choose among effective accommodations, even if the accommodation chosen is not the first choice of the employee.

If there is no accommodation that allows the employee to perform the essential functions of his or her current position without an undue hardship, the employer and the employee should discuss the employee's ability to perform the duties of any currently vacant positions. There also may be an obligation to analyze positions that become vacant within a reasonable time. For example, some collective bargaining agreements create an entitlement to a twelve month medical leave of absence. If the employee is on a medical leave of absence because the employee is unable to perform the essential functions of his or her current position, there may well be an obligation to transfer the employee into a position that becomes vacant during the medical leave of absence.[83]

83. The EEOC's Interpretive Guidance states:

Finally, one question that continues to be debated is whether an employer has an obligation to transfer an employee into a position that is currently vacant, but which has been posted. According to the EEOC, the critical inquiry is whether the position is vacant now, or within a reasonable time after it has become clear that the employee cannot perform the essential functions of his or her current job.[84] In its Policy Guidance on Reasonable Accommodation Under the ADA, the Commission stated: "A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position."[85] If vacancy and qualifications are the only factors, an employer has an obligation to transfer a disabled employee to a vacant position for which he or she is qualified, regardless of whether the posting process has begun.

The Rehabilitation Act regulations take a different position. Under those regulations, if an employer becomes aware of the need for reassignment of a disabled employee after posting a position, the employer simply must allow the disabled employee to compete equally with those employees who have already begun the posting process.[86] Until the courts clarify this issue, the most conservative approach is to transfer disabled employees into currently vacant positions that match their qualifications and abilities, even if those positions were posted before it was known that the employee was unable to perform his or her current position.

As a matter of public policy, this conservative approach makes sense. Congress has found that society benefits from the employment of capable individuals with disabilities.[87] This public policy is served best

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As an example, suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available.

29 C.F.R. § 1630.2(o) App.

84. *See id.*

85. Castro, *supra* note 77, at 77.

86. *See* 29 C.F.R. § 1614.203(g) (1997).

87. The Senate Committee on Education and Human Resources stated:

> Individuals with disabilities experience staggering levels of unemployment and poverty.
> According to a recent Lou Harris poll, not working is perhaps the truest definition of what it means to be disabled in America. Two thirds of all disabled Americans between the ages

when qualified disabled employees are reassigned to vacant positions, regardless of whether a more qualified non-disabled person has expressed interest in the position or the job has been posted.

By way of example, assume that a disabled employee becomes unable to remain in his or her position after a vacancy has been posted. Two non-disabled employees have signed the posting. One of these non-disabled employees appears to be the most qualified of the three. However, all three are qualified and there is no reason to suspect that the disabled employee would not perform competently. Assume further that there are no seniority policies that disqualify any of these employees. If the non-disabled employee is transferred, the disabled employee may very well lose his or her job (assuming this is the only viable reassignment option). This result does not advance the goal of employing capable disabled people. On the other hand, if the disabled employee is reassigned, no one is out of a job and the policies underlying the ADA are achieved.

An employer may argue against the transfer of the disabled employee in this hypothetical by claiming that the employer's established policy is to transfer the most qualified employee.[88] Such a policy differs from the seniority policies to which courts traditionally have given deference. Unlike those seniority policies, a "most qualified" policy includes a necessary element of subjectivity and risks the obliteration of the statutory obligation to reassign.[89] Allowing this

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> of 16 and 64 are not working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled, who are not working, say that they would like to have a job. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job.

S. REP. NO. 101-116, at 9 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 32-34 (1990).

88. The dissenters unsuccessfully advanced a similar argument in both Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1303-05 (D.C. Cir. 1998) (en banc) and *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-67 (10th Cir. 1999) (en banc).

89. For example, in *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 678-79 (7th Cir. 1998), the court acknowledged an employer's right to maintain legitimate and nondiscriminatory transfer policies that could narrow the scope of its obligation to reassign. *See* 141 F.3d at 678-79. However, the Court was quick to state that policies which had the practical effect of obliterating the obligation to reassign would be invalid:

> An employer cannot, of course, convert its responsibility to look to a "broad range" of jobs into a "narrow band" simply by adopting a "no transfer" policy. Any such policy would remain subject to challenge both for any disparate impact it might impose on disabled employees, and for any unreasonable inflexibility in the face of a demand for reasonable adjustments to accommodate a disabled candidate for

sort of policy to bar the reassignment of a qualified disabled employee also would force courts to weigh the relative merits of all disabled and non-disabled applicants.[90]

Employers also may argue that transferring a disabled employee over a more qualified non-disabled employee constitutes an impermissible preference for the disabled.[91] However, the reality is that the ADA does require special treatment of the disabled. The ADA's obligations are markedly different from statutes like Title VII, which do no more than prohibit discrimination because of a protected characteristic such as race or gender.[92] The only provision of Title VII that places any affirmative obligation on employers is the provision requiring accommodation of the religious observances and practices of employees and applicants.[93] This provision has been interpreted to impose no more than a *de minimis* burden on employers.[94]

The ADA, on the other hand, requires affirmative action by employers to accommodate disabled applicants and employees, up to the point of undue hardship. Both Congress and the courts have affirmed that the ADA imposes a much heavier burden on employers

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transfer.

Id. at 679.

Similarly, in *McCreary v. Libbey-Owes Ford Co.*, 132 F. 3d 1159, 1165 (7th Cir. 1997), the court suggested that the obligation to reassign to a vacant position is mandatory: "[T]he ADA requires reassignment to a vacant position when the employee is no longer able to perform the essential functions of her employment, even with a reasonable accommodation, and the employee is qualified for the vacant position." *Id.* Like the EEOC, the Court focused on vacancy and qualification, saying nothing about whether prior posting would have any impact on the obligation to accommodate. *See Id.*

Also, cases interpreting the 1992 amendments to the Rehabilitation Act have found that reassignment is mandatory unless an undue hardship would result. *See, e.g.*, Shiring v. Runyon, 90 F.3d 827, 832 (3d Cir. 1996). It is difficult to imagine how undue hardship would result from terminating the posting process to award a vacant position to a disabled employee who is qualified for it.

90. As discussed in note 81, *supra*, federal courts studiously avoid any attempt to sit as "super-personnel departments." *See* Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).

91. *See Aka*, 156 F.3d at 1304-05; *Midland Brake*, 180 F.3d at 1167-68.

92. *See* 42 U.S.C. § 2000e-2 (1998).

93. Title VII compels an employer "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice [to the point of] undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

94. *See* Trans World Airlines Inc. v. Hardison, 432 U.S. 63 (1977). Congress specifically rejected this definition of reasonable accommodation under the ADA. *See* S. REP. NO. 101-116, at 36 (1989); H.R. REP. NO. 101-485, pt. 2, at 68 (1990).

than the religious accommodation provision of Title VII.[95]

An employer must make special accommodations for disabled applicants, and may not penalize them for those accommodations. Employers bear an even greater burden to accommodate disabled employees. The obligation to accommodate disabled employees may require reassignment to a vacant position. The only interpretation of this reassignment obligation which is faithful to the language of the ADA, and its legislative history, is an interpretation that requires the transfer of a qualified disabled employee to a vacant position except when reassignment results in an undue hardship, violates a legitimate contract right of a non-disabled employee, or a bona fide seniority or transfer policy. A policy requiring all employees to compete for the purpose of selecting the most qualified employee does not pass muster. Such a policy eviscerates the accommodation and reassignment provisions of the ADA; reducing the statute to no more than a prohibition of discrimination.

IV. CONCLUSION

The goal of the ADA is to eliminate those barriers that prevent the disabled from fully participating in society. To achieve this goal in the employment context, the ADA required, for the first time, that employers consider reassigning disabled employees as a preferable alternative to unemployment. The obligation to accommodate, including the obligation to reassign, is an affirmative obligation that entitles the disabled to "special privileges." Consequently, if the statutory obligation to accommodate by reassignment is to have any meaning, employers must reassign qualified disabled employees, even if a more qualified, non-disabled applicant is available.

95. *See* S. REP. NO. 101-116 at 35-36 (1989); H.R. REP. NO. 101-485, pt. 2, at 68 (1990). *See also*, Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49 (7th Cir. 1996) ("[w]e do not maintain that the ADA duty of 'reasonable accommodation' is equivalent to that under the Rehabilitation Act and Title VII").