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Employment Law: Reasonable Accomodation under the Americans with Disabilities Act vs. Employee Seniority Rights: Understanding the Real Conflict in *U.S. Airways v. Barnett*

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NOTE

Employment Law: Reasonable Accommodation Under the Americans with Disabilities Act vs. Employee Seniority Rights: Understanding the Real Conflict in *U.S. Airways v. Barnett*

I. Introduction

The Americans with Disabilities Act of 1990[1] (ADA) has been the center of controversy in several recent U.S. Supreme Court decisions.[2] Justice O'Connor aptly described the Supreme Court's October 2001 term as one that would be remembered for its "emphasis on the ADA."[3] One of these landmark cases, *U.S. Airways, Inc. v. Barnett*,[4] is tremendously important because the Supreme Court interpreted the meaning of "reasonable accommodation" under the ADA for the first time.[5] More importantly, the Supreme Court sought to resolve the conflict between reasonable accommodation under the ADA and employers' bona fide seniority systems and the seniority rights of nondisabled employees.[6]

In a fascinating 5-4 decision, the Court held that employers ordinarily need not reassign disabled employees as a reasonable accommodation of their

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. Several recent Supreme Court cases interpret various ADA provisions. *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002) (holding that "punitive damages . . . may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act"); Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78-79 (2002) (allowing employers to screen out potential workers with a disability for on-the-job risks to their own health or safety); EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002) (interpreting the relationship between an agreement to arbitrate an employment dispute and the EEOC's pursuit of relief under an ADA enforcement action); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (identifying correct standard for what constitutes a disability under the ADA); PGA Tour, Inc. v. Martin, 532 U.S. 661, 676-78 (2001) (interpreting the public accommodation provision of Title III of the ADA in regard to a professional golfer); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363-65 (2001) (determining the scope of the Eleventh Amendment regarding state employee suits under Title I of the ADA).

3. Tony Mauro, *American Lawyer Media: Supremes Continue to Trim ADA's Parameters*, THE RECORDER (S.F.), April 30, 2002, at 2.

4. 535 U.S. 391 (2002).

5. *See* Vikram David Amar & Alan Brownstein, *Reasonable Accommodation Under the ADA*, 5 GREEN BAG 2D 361, 362 (2002) ("*Barnett* is important because it is the first decision by the Court to construe the heart of the employment sections of the ADA—the requirement that an employer must make 'reasonable accommodations' to the needs of a disabled employee . . . . *Barnett* is the first high court word on what 'reasonable accommodation' means.").

6. *Id.*

disability if this reassignment will conflict with the employers' seniority systems.[7] The Court, however, failed to follow a bright-line approach in honoring the importance of employee seniority rights. On its own initiative, the Court created an opportunity for employees to combat the effectiveness of employers' seniority systems, allowing employees to rebut the reasonableness of a seniority system by showing past inconsistencies in the system's administration.[8] Because of these past inconsistencies, the Court reasoned, employees will lack the essential element of reliance on the consistent and nondiscriminatory execution of seniority rights within the company.[9] Thus, the Court concluded, making one more accommodation will have little adverse effect on either the nondisabled employees or their employers.[10]

The unlikely majority of Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, and Breyer traveled a middle course between the two approaches proposed by the two polar dissenting opinions. Justice Souter, joined by Justice Ginsburg, agreed with the plaintiff employee, arguing that it is not unreasonable to accommodate individuals by placing them in a position that conflicts with seniority.[11] In contrast, Justice Scalia, joined by Justice Thomas, agreed with the defendant, U.S. Airways, promoting the bright-line approach that it should always be unreasonable to assign disabled employees to a position that conflicts with any employer's bona fide seniority policy.[12]

The Court's comprised ruling ignores established precedent supporting and upholding bona fide seniority systems and their tremendous role in the employment community.[13] In so doing, the Court's decision will effectively eliminate the ability of employers with bona fide seniority systems to prevail on summary judgment because of the newly created rebuttable presumption allowing employees to challenge the validity and consistency of seniority systems. As such, *Barnett* will substantially increase ADA litigation, allowing it to survive long past the summary judgment phase, as well as cause a lack of uniformity among courts interpreting when and how employers' seniority systems can meet the consistency standards set forth by the Court. In essence, by creating this judicial scapegoat for employees because of its fear of unilaterally created seniority systems, the Court in its new balancing approach provides unwarranted preferential treatment to disabled employees under the ADA.

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7. *U.S. Airways*, 535 U.S. at 403.
8. *Id.* at 405.
9. *Id.*
10. *Id.*
11. *Id.* at 420 (Souter, J., dissenting).
12. *Id.* (Scalia, J., dissenting).
13. *See* discussion *infra* Part II.A.

This note explores and analyzes the Court's opinion in *Barnett*, the prior precedent, the immediate impact of *Barnett* on ADA interpretation and on subsequent ADA cases, and the policy ramifications of the Court's misguided conclusion. Part II of this note discusses the ADA's reasonable accommodation provision, the value of seniority systems in the employment setting, and then examines the history of the battle between "reasonable accommodation" and bona fide seniority systems under the ADA. Part III outlines the *Barnett* Court's holding and analyzes both dissenting opinions. In Part IV, this note critiques the Court's faulty balancing approach, the policy implications of the Court's ruling, and why Justice Souter's dissent does not offer a workable solution. Finally, Part V concludes by suggesting the following bright-line approach for the Court: it should always be unreasonable to accommodate disabled employees under the ADA if that accommodation conflicts with legal and bona fide seniority systems, regardless of whether employers have unilaterally created and administered the seniority system.

II. Historical Background

A. Reasonable Accommodation Under the ADA

Under the ADA, employers are prohibited from discriminating against "a qualified individual with a disability."[14] The ADA defines a "qualified individual" as an employee who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[15] Thus, employers discriminate if they do not make "reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability."[16] Accordingly, employers owe no duty to accommodate disabled employees who require an *unreasonable* accommodation to perform their jobs. In addition, employers' actions do not constitute discrimination if employers can show that the accommodation "would impose an undue hardship" on the operation of their business.[17] Typical examples of reasonable accommodations given by the ADA include: (1) "[m]aking changes to existing facilities,"[18] (2) "[p]roviding assistive devices or

14. 42 U.S.C. § 12112(a) (2000).

15. *Id.* § 12111(8).

16. *Id.* § 12112(b)(5)(A); *see* 29 C.F.R. app. § 1630.9 ("[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.").

17. 42 U.S.C. § 12112(b)(5)(A).

18. Stephen F. Befort & Tracy Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE

personnel,"[19] (3) "[j]ob restructuring,"[20] and (4) "[r]eassignment to a vacant position."[21]

"Reassignment" undoubtedly serves as the most controversial of the ADA reasonable accommodation provisions. Since the passage of the ADA, situations have arisen in which disabled employees' reassignments conflict with the seniority rights of other nondisabled employees, raising the issue of whether the accommodation that violates employees' seniority rights is reasonable or unreasonable under the ADA. Employers' bona fide seniority systems created as a product of labor negotiations and placed into collective bargaining agreements generally have been held to supersede the interests of the disabled employee seeking accommodation.[22] An interesting variation on this conflict arises, however, when disabled employees seek accommodation that conflicts with seniority systems not contained in collective bargaining agreements but rather unilaterally created and enforced by employers.[23]

B. The Importance of Seniority Systems

Seniority systems of businesses have a storied history in employment law because of the employment benefits and the economic security that such systems provide. In 1980, the Supreme Court, in *California Brewers Ass'n v. Bryant*,[24] defined a "seniority system" as a "scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase."[25] Noting the importance of the objective aspect of seniority systems, the Court stated that "the principal feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in

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L. REV. 1045, 1053-54 (2000) (discussing the four basic types of reasonable accommodations under the ADA); *see* 42 U.S.C. § 12111(9)(A).

19. Befort & Donesky, *supra* note 18; 42 U.S.C. § 12111(9)(B).

20. Befort & Donesky, *supra* note 18; 42 U.S.C. § 12111(9)(B).

21. Befort & Donesky, *supra* note 18; 42 U.S.C. § 12111(9)(B). In *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), the court stated that in reasonably accommodating an employee under the ADA, an "employer should first consider lateral moves to positions that are regarded as equivalent," and "may only consider lesser jobs that constitute a demotion if there are no such equivalent positions available." *Id.* at 1177; *see also* 29 C.F.R. app. § 1630.2(o) ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation.").

22. *See* discussion *infra* Part II.B.1.

23. *See* discussion *infra* Part II.B.2.

24. 444 U.S. 598 (1980).

25. *Id.* at 606 (footnote omitted).

employment."[26] In upholding the seniority exemption under Title VII of the Civil Rights Act of 1964,[27] the Court reasoned that seniority systems vary among particular industries or businesses and that the legislative history behind the exemption does not suggest that courts should "prefer any particular variety of seniority system over any other."[28]

Moreover, courts, scholars, and, most importantly, employers and their employees recognize the significant benefits that seniority systems provide to the workplace. First, employment decisions including pay increases, promotions, and job assignments are largely or entirely based on seniority rights.[29] Indeed, "the length of time an employee is associated with a particular company, division, or position provides a fair, objective alternative criterion for making" employment decisions that is both easily understood by employees and objectively instituted by management.[30] An employee's seniority rights, therefore, act as a means of securing that employee's "due process" rights to avoid and "limit[] nepotism and unfairness in personnel decisions."[31] These due process rights inevitably restrict management in imposing arbitrary and nepotistic determinations for advancement, assignment, and termination.[32]

Second, in addition to ensuring employee due process, seniority rights effectively limit fierce workplace competition that "pits one worker against another" by requiring all employees to submit to a hierarchal order of advancement.[33] Thus, employees who normally would "fight[] among themselves over scarce opportunities and curry[] favor with supervisors," instead

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26. *Id.*

27. 42 U.S.C. § 2000e-2(h) (2000); *see* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977) ("[U]nmistakable purpose of [Title VII's seniority defense] was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.").

28. *Cal. Brewers Ass'n*, 444 U.S. at 608; *see* TWA v. Hardison, 432 U.S. 63 (1977). The Supreme Court noted the importance of seniority systems under collective bargaining, stating that "[c]ollective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts." *Id.* at 79.

29. Susan Gardner & James F. Morgan, *The Supreme Court to Decide: Seniority Rights or Reasonable Accommodation Under the Americans with Disabilities Act (ADA)*, 52 LAB. L.J. 234, 235 (2001).

30. *Id.*

31. Carl Gersuny, *Origins of Seniority Provisions in Collective Bargaining*, 33 LAB. L.J. 518, 519 (1982) (employees usually view seniority as an important indicator of corporate loyalty and job commitment).

32. *Id.* Gersuny reasoned that "[s]eniority is germane to due process because its implementation serves to restrict management's capacity for applying arbitrary and capricious criteria in making invidious distinctions among employees." *Id.*

33. *Id.*

rely on and adhere to seniority rights based on a "hierarchic principle based on institutional age."[34] Finally, seniority systems provide economic security to employees in times of economic downturn, massive layoffs, or steady reductions in the employer's workforce.[35] When layoffs occur, an employee's "chances of being retained or recalled will very likely depend upon such factors as the basis for determining seniority preference."[36] Thus, seniority systems not only ensure neutrality in receiving numerous employment benefits, but they also provide employees with both employment security and economic reliability.[37]

C. Seniority Rights Under a Bona Fide Seniority System

The issue of whether violating a seniority provision should operate as a per se bar to employers providing a reasonable accommodation under the ADA has been the source of tremendous controversy. Scholars have observed that this issue usually arises in "two contexts: (1) the existence of a collectively-bargained-for clause that enables union employees with seniority to receive preference for requested transfers, and (2) the existence of an employer-instituted seniority provision that provides the same benefit for employees in a non-unionized setting."[38]

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34. *Id.*

35. Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962).

36. *Id.* (arguing that "[i]n industries characterized by a steady reduction in total employment, the employee's length of service is his principal protection against the loss of his job").

37. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976) ("Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees . . . and to compute noncompetitive benefits earned under the contract of employment . . . .") (citation omitted). For a general description of the possible benefits conferred upon employees under seniority systems, see Donald R. Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 490 (1975):

> Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, "bumping" possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line.

Id. (citations omitted).

38. Gardner & Morgan, *supra* note 29, at 237.

1. Employee Seniority Rights Under a Collective Bargaining Agreement

Most courts have followed a bright-line approach in holding that violating employee seniority rights prescribed in a bona fide collective bargaining agreement constitutes a per se bar to employers in making a reasonable accommodation under the ADA.[39] In *Eckles v. Consolidated Rail Corp.*,[40] the

39. *See, e.g.*, Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 679 (9th Cir. 2001) ("[A]n accommodation that is contrary to the seniority rights of other employees set forth in a CBA would be unreasonable per se."); Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 257 (6th Cir. 2000) (finding that an employer need not "waive legitimate, non-discriminatory employment policies or displace other employees' rights to be considered in order to accommodate the disabled individual"); Boersig v. Union Elec. Co., 219 F.3d 816, 822 (8th Cir. 2000) (noting the importance of protecting seniority rights under a collective bargaining agreement from the "unnecessary interference arising from the perceived need to accommodate a disabled employee under the ADA"); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1307 (11th Cir. 2000) ("[A]n accommodation that contravenes the seniority rights of other employees under a collective bargaining agreement is unreasonable as a matter of law."); Aldrich v. Boeing Co., 146 F.3d 1265, 1271 n.5 (10th Cir. 1998) (holding that the ADA does not require Boeing to transfer an employee to a position that would violate the seniority provisions of the collective bargaining agreement); Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998) ("Nothing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers."); Cassidy v. Detroit Edison Co., 138 F.3d 629, 634 (6th Cir. 1998) ("[A] reassignment will not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement."); Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997) ("[A]n accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable."); Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (finding a reassignment under the ADA unreasonable because the position to which the Plaintiff requested reassignment conflicted with a collective bargaining agreement); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (holding that "the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"); Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1051 (7th Cir. 1996) ("After examining the text, background, and legislative history of the ADA duty of 'reasonable accommodation,' we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."); Benson v. Northwest Airlines, 62 F.3d 1108, 1114 (8th Cir. 1995) (holding that "[t]he ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) ("Farmland Foods had no obligation to terminate other employees or violate a collective bargaining agreement in order to accommodate Wooten . . . ."); Daugherty v. City of El Paso, 56 F.3d 695, 699-700 (5th Cir. 1995) (city was not required to fundamentally alter its program or "violate[] [its] rules and regulations" to accommodate an employee because such action would cause undue hardship); Milton v. Scrivner, 53 F.3d 1118, 1125 (10th Cir. 1995) ("[C]ollective bargaining agreement prohibits [employees'] transfer to any other job because [they] lack the requisite seniority."). *But see* Aka

Seventh Circuit defined "bona fide" seniority systems as those created for legitimate rather than discriminatory purposes.[41] After finding the seniority system under the collective bargaining agreement to be bona fide, the court held that "the special treatment demanded by Eckles simply is not required as a 'reasonable accommodation' under the ADA, due to its effects on the legitimate seniority rights of other employees."[42] The *Eckles* court correctly reasoned that the true conflict in these types of cases is not "between the rights of the disabled individual and his employer and union, but between the rights of the disabled individual and those of his [more senior] co-workers."[43]

Furthermore, in *Dalton v. Subaru-Isuzu Automotive, Inc.*,[44] the Seventh Circuit recognized both the limitations on an employer's duty to reassign under the ADA and the importance of seniority rights under collective bargaining agreements. The *Dalton* court held that "[n]othing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers."[45] In addition, the court admitted that it had not found any ADA or Rehabilitation Act[46] case that required employers to reassign disabled employees to a position when such a transfer would "violate a legitimate, non-discriminatory policy of the employer."[47] Moreover, in *Davis v. Florida Power*

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v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc) (viewing a seniority system under a CBA as merely a factor in determining undue hardship for making a reasonable accommodation for a disabled employee).

40. 94 F.3d 1041 (7th Cir. 1996).

41. *Id.* at 1046 n.7.

42. *Id.* at 1045.

43. *Id.* at 1046.

44. 141 F.3d 667 (7th Cir. 1998).

45. *Id.* at 678.

46. 29 U.S.C. §§ 701-796 (2000). *See* McKay v. Toyota Motor Mfg. U.S.A. Inc., 110 F.3d 369, 373 n.1 (6th Cir. 1997) ("[C]ourts have universally looked to Rehabilitation Act cases as a source of guidance when construing the ADA."); Gile v. United Airlines, Inc., 95 F.3d 492, 497 (7th Cir. 1996) (noting that the definition of "reasonable accommodation" in the Rehabilitation Act is the same as that in the ADA). For examples of cases upholding the general rule under the Rehabilitation Act that reassignment of an employee in violation of a collective bargaining agreement or seniority system is per se unreasonable, see *Mason v. Frank*, 32 F.3d 315, 319-20 (8th Cir. 1994); *Carter v. Tisch*, 822 F.2d 465, 467-68 (4th Cir. 1987); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1251-52 (6th Cir. 1985); *Daubert v. United States Postal Service*, 733 F.2d 1367, 1370 (10th Cir. 1984). For cases upholding seniority systems under Title VII, see generally *TWA v. Hardison*, 432 U.S. 63, 79 (1977). In *Hardison*, the Supreme Court held that TWA was not required to take steps inconsistent with a valid collective bargaining agreement. *Id.* For more discussion of *Hardison* and the Rehabilitation Act, see *infra* Part IV.A.2.

47. *Dalton*, 141 F.3d at 679; *see* Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997).

& Light Co.,[48] the Eleventh Circuit held that the ADA does not require accommodations that contravene the seniority rights of other employees under a collective bargaining agreement.[49] The *Davis* court cited authority from eight other circuits holding that such accommodations are unreasonable as a matter of law.[50]

2. An Employer's Unilaterally Imposed Seniority System

Precedent also exists for honoring the seniority provisions under employers' own unilaterally created and imposed seniority systems. The Tenth Circuit, in *Smith v. Midland Brake, Inc.*,[51] spoke of the importance of other fundamental employer policies in determining the reasonableness of an ADA accommodation.[52] In support of honoring seniority policies not necessarily contained in collective bargaining agreements, the *Smith* court recognized that violating neutral employment policies in making a reassignment is unreasonable.[53] Furthermore, the court noted that a particular industry could have a well-entrenched seniority system that would give rise to legitimate expectations by more senior employees of a job that disabled employees may desire.[54] Thus, "[r]equiring an employer to disrupt and violate . . . reasonable expectations of seniority rights in order to favor a disabled employee . . . could . . . constitute a fundamental and unreasonable [disruption] of the employer's business."[55]

Following the rationale expressed by the Tenth Circuit in *Smith*, at least one court has held that seniority rights in employer-created seniority systems deserve the same legal recognition as those seniority rights contained within collective bargaining agreements. In *EEOC v. Sara Lee Corp.*,[56] the Fourth Circuit directly addressed the issue of reasonable accommodation when the reassignment of disabled employees conflicts with employers' own unilaterally created and imposed seniority systems. In *Sara Lee*, a disabled employee was forced to take another shift because more senior employees opted to displace workers after a plant closed in another city.[57] The seniority policy in question was "an internal

48. 205 F.3d 1301 (11th Cir. 2000).
49. *Id.* at 1306.
50. *Id.* at 1307.
51. 180 F.3d 1154 (10th Cir. 1999). For a detailed discussion of *Smith*'s holding, see *infra* Part IV.B.2.
52. *Id.* at 1175-76.
53. *Id.*
54. *Id.*
55. *Id.*
56. 237 F.3d 349 (4th Cir. 2001).
57. *Id.* at 351.

policy of Sara Lee and [was] not part of a collective bargaining agreement."[58] In articulating the benefits of seniority systems and defending their importance to both employers and employees, whether under collective bargaining agreements or unilaterally imposed systems, the court stated:

> No reason exists for creating a different rule for legitimate and non-discriminatory policies that are not a part of a collective bargaining agreement. All workers — not just those covered by collective bargaining agreements — rely upon established company policies. The ADA does not require employers to disrupt the operation of a defensible and non-discriminatory company policy in order to provide a reasonable accommodation.[59]

In April 2002, the U.S. Supreme Court faced this unique employment conflict for the first time. The stage had been set for the Court to uphold seniority systems regardless of whether they originate under a collective bargaining agreement or from employers' unilaterally imposed seniority systems. Instead, the Court intervened and mistakenly created a new standard and judicial balancing test that were both unnecessary and without precedential basis. The Court ultimately failed to recognize that the true conflict in cases like *Barnett* is not between employers and the disabled employees but rather between the disabled employees and the nondisabled employees whose seniority rights are being violated.[60]

III. U.S. Airways, Inc. v. Barnett: The Supreme Court Decides

A. Factual Background

In 1990, Robert Barnett injured his back while working as a cargo handler for U.S. Airways at San Francisco International Airport and could no longer perform his heavy-lifting duties.[61] After returning from disability leave, Barnett used his seniority to transfer to a physically less-demanding mail room job. "Barnett learned in August of 1992 that two employees with greater seniority

58. *Id.*

59. *Id.* at 355; *see also* Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998) (noting that Frontier was not required to revise its own bidding system to accommodate disabled employee); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (noting that "even if there were no CBA in place, B & W would not be obligated to accommodate Foreman by reassigning him to a new position"); Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996) (finding significant limitations on an employer's potential obligation to reassign a disabled employee as a reasonable accommodation).

60. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996).

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

planned to exercise their seniority right to transfer to [Barnett's position in] the mail room. Once bumped, Barnett's seniority would have limited him to transferring to jobs in the cargo area."[62] Barnett asked the company to let him remain in the mail room "as a reasonable accommodation under the ADA."[63] U.S. Airways allowed Barnett to remain in the mail room for five months before informing him in January 1993 that he would be removed from the mail room and would eventually lose his job.[64]

B. Procedural History

In February 1993, Barnett filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC).[65] In August 1994, the EEOC determined that "there was reason to believe that U.S. Air had discriminated against Barnett by denying him reasonable accommodation under the ADA."[66] Barnett then filed suit against U.S. Airways in federal district court. The district court granted U.S. Airways summary judgment, finding that altering the seniority system "would result in undue hardship to both [U.S. Airways] and its non-disabled employees."[67]

While the Ninth Circuit affirmed,[68] the en banc Ninth Circuit court reversed, however, holding that violating a seniority system that is not grounded in a collective bargaining agreement is not a per se violation when considering reassignment as a reasonable accommodation.[69] Instead of a per se rule of unreasonableness, the court held that a seniority system should merely be one factor in a fact-intensive undue hardship analysis "to determine whether [the] particular reassignment would constitute an undue hardship to the employer."[70] In reaching its decision, the Ninth Circuit's primary consideration in reversing the district court was that U.S. Airways' seniority system was unilaterally imposed rather than the product of "bargained for rights" contained in a collective bargaining agreement.[71]

The Supreme Court granted certiorari to consider the dispute between seniority rights and reasonable accommodation under the ADA.[72] The Court articulated this conflict as the tension "between (1) the interests of a disabled

62. *Id.* at 1108-09.
63. *Id.* at 1109.
64. *Id.*
65. *Id.*
66. *Id.*
67. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002) (*Barnett II*).
68. Barnett v. U.S. Air, Inc., 157 F.3d 744, 754 (9th Cir. 1998).
69. *Barnett I*, 228 F.3d at 1119-20.
70. *Id.* at 1120.
71. *Id.* at 1119.
72. *See* U.S. Airways, Inc. v. Barnett, 532 U.S. 970 (2001).

worker who seeks reassignment . . . as a 'reasonable accommodation' [of his disability], and (2) the interests of [non-disabled] workers with superior [seniority] rights to bid for the job under [the] employer's seniority system."[73]

C. The Primary Issue Before the Court

The Supreme Court articulated the issue on appeal as "whether a proposed accommodation that would normally be reasonable [under the ADA] is rendered unreasonable because the assignment would violate a seniority system's rules."[74] However, as one author wrote, the real issue "was whether seniority rules unilaterally imposed by the employer require a different employer defense than seniority rules established via a [collective bargaining agreement]."[75]

D. The Court's Balancing Approach

The Supreme Court held that if employers can demonstrate that a requested accommodation conflicts with the rules of their seniority systems, then such a showing ordinarily is sufficient to prove that the accommodation is unreasonable.[76] The Court reasoned that such a conflict between an accommodation and employers' seniority rules entitles employees to summary judgment on the question of reasonableness.[77] Nevertheless, the Court allowed a seniority-rule exception, stating that employees "remain[] free to show that special circumstances warrant a finding that, despite the presence of a seniority system . . . , the requested 'accommodation' is 'reasonable' on the particular facts."[78] Such a showing, the Court noted, will defeat employers' summary judgment demands.[79]

Justice Breyer, writing for the Court, identified two examples of particular facts or "special circumstances" when a reassignment that violates the provisions of a bona fide seniority system would still be reasonable under the ADA.[80] The first case would involve employers that, "having retained the right to change the seniority system unilaterally," alter the conditions of the system too frequently.[81] The result, the Court stated, would be the reduction of "employee expectations that the [seniority] system will be followed"; therefore,

73. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393 (2002) (*Barnett II*).

74. *Id.* at 392.

75. Art Gutman, *On the Legal Front: The Supreme Court Ruling in* U.S. Airways v. Barnett, INDUS.-ORGANIZATIONAL PSYCHOLOGIST, July 2002, at 90, 91.

76. *Barnett II*, 535 U.S. at 403.

77. *See id.* at 405.

78. *Id.*

79. *Id.; see* FED. R. CIV. P. 56(e).

80. *Barnett II*, 535 U.S. at 405.

81. *Id.*

one more change to accommodate disabled employees would make little difference to employers or the expectations of nondisabled employees.[82] The second instance would be when an employers' unilateral seniority systems contain exceptions that have already been used in the past so that one further exception likely would not make much difference.[83] Justice Breyer concluded that plaintiffs bear the burden to show these "special circumstances" making "an exception from the seniority system reasonable in [a] particular case."[84]

E. Dissenting Opinions

1. Justice Scalia, Joined by Justice Thomas: Seniority Always Prevails

In dissent, Justice Scalia, joined by Justice Thomas, accused the majority of "[i]ndulging its penchant for eschewing clear rules that might avoid litigation," and answering "maybe" to whether reasonable accommodation under the ADA "requires reassignment of a disabled employee to a position that [conflicts with] the employer's bona fide and established seniority system."[85] Justice Scalia argued that the Court misinterpreted the ADA when it concluded that the ADA could override any bona fide seniority system, either unilaterally imposed by management or the product of a collective bargaining agreement.[86]

Justice Scalia first contended that the ADA's statutory language "provides that discrimination includes 'not making reasonable accommodations *to the known physical or mental limitations* of an otherwise qualified individual with a disability."[87] He then reasoned 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."[88] Thus, he concluded that the ADA "does *not* envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability — for example, another employee's claim to that position under a seniority system."[89]

In addition, Justice Scalia countered that the Court should adopt a clear-cut rule that would protect seniority systems of all kinds, regardless of whether they are contained in a collective bargaining agreement or a unilaterally instituted

82. *Id.*
83. *Id.*
84. *Id.* at 406.
85. *Id.* at 411-12 (Scalia, J., dissenting).
86. *Id.* (Scalia, J., dissenting).
87. *Id.* at 412-13 (Scalia, J., dissenting); *see* 42 U.S.C. § 12112(b)(5)(A) (2000).
88. *Barnett II*, 535 U.S. at 413 (Scalia, J., dissenting).
89. *Id.* at 416 (Scalia, J., dissenting); *see* Jonathan David Bible, U.S. Airways v. Barnett*: Seniority Systems and the Americans with Disabilities Act*, 53 LAB. L.J. 61, 66 (2002).

system.[90] Justice Scalia noted that the Court's rebuttable presumption provides employees with not only "the opportunity to unmask sham seniority systems," but that "it [also] gives them a vague and unspecified power (whenever they can show 'special circumstances') to undercut *bona fide* systems."[91]

2. Justice Souter, Joined by Justice Ginsburg: Seniority Never Prevails

At first glance, one might view the 5-4 decision in *Barnett* as an extremely close decision issued by a very divided Court. In reality, only Justice Souter, joined by Justice Ginsburg, agreed with the Ninth Circuit's ruling and would have maintained a burden on employers with unilaterally instituted seniority systems to show that accommodation of the employee would cause specific "undue hardship" on the employer.[92] Although both Justice Souter and Justice Scalia authored dissenting opinions, they took opposite viewpoints.

Justice Souter argued primarily that the ADA, unlike Title VII of the Civil Rights Act of 1964[93] (Title VII) and the Age Discrimination in Employment Act[94] (ADEA), does not protect seniority rules from reasonable accommodation because the ADA contains no statutory bona fide seniority system defense.[95] Because Congress modeled the ADA after Title VII,[96] Justice Souter reasoned that the "failure to replicate Title VII's exemption for seniority systems leaves the statute ambiguous, albeit with more than a hint that seniority rules do not inevitably carry the day."[97] In addition, Justice Souter noted that both the House[98] and Senate[99] reports provide that seniority systems should only be one factor in an overall reasonable analysis.[100] Thus, Justice Souter concluded that if Congress considered seniority rights in collective bargaining agreements as "no more than a factor in the analysis, [then] surely no greater weight was meant for a seniority scheme like the one before us, unilaterally imposed by the

90. *Barnett II*, 535 U.S. at 418-19.

91. *Id.* at 419.

92. *Id.* at 420-24 (Souter, J., dissenting).

93. 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.").

94. 29 U.S.C. § 623(f) (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 . . . .").

95. *Barnett II*, 535 U.S. at 420 (Souter, J., dissenting).

96. *See* H.R. REP. NO. 101-485, pt. 2, at 22, 54, 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336, 358-60; S. REP. NO. 101-116, at 2, 25, 43 (1989).

97. *Barnett II*, 535 U.S. at 421 (Souter, J., dissenting).

98. *See* H.R. REP. NO. 101-485, pt. 2, at 63.

99. *See* S. REP. NO. 101-116, at 32.

100. *Barnett II*, 535 U.S. at 421 (Souter, J., dissenting).

employer, and, unlike collective-bargaining agreements, not singled out for protection by any . . . federal statute."[101]

IV. Analysis and Policy Implications

A. Why the Majority's Balancing Test Does Not Work[102]

1. Collective Bargaining Agreements v. Employer Instituted Systems

The most intriguing aspect of the majority opinion is that it fails to distinguish between the seniority rules under a collective bargaining agreement and the seniority rules under an employer's unilaterally imposed system. After noting that most courts have found that seniority systems trump the need of reasonable accommodation under the ADA, the Court stated that the relevant seniority advantages and the related difficulties that result in violating seniority provisions are not limited to seniority systems contained in collective bargaining agreements.[103] The Court recognized that seniority systems and employee seniority rights, management-imposed or not, provide objectivity, reliability, and an overall atmosphere of trustworthiness that give employees an incentive "to invest in the employing company."[104]

Logic compels that if the Court were not going to distinguish between collective bargaining agreements and unilaterally imposed seniority systems, then the Court would follow judicial precedent addressing seniority systems under collective bargaining agreements.[105] The Court's holding would make much more sense had it directly addressed "whether an employer's unilaterally imposed seniority system trumps a disabled employee's right to

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101. *Id.* at 422 (Souter, J., dissenting).

102. *See* Robert S. Greenberger, *Career Journal: Justices Back Seniority in Disability Case*, WALL ST. J., Apr. 30, 2002, at B12. This article discusses that some in the legal community, representing both management and disabled workers, have reacted positively to the Court's ruling. One law professor remarked: "'It is an eminently reasonable opinion, which doesn't give either people with disabilities or employers everything they want, but strikes the right balance in crafting a workable law.'" *Id.* In addition, a management lawyer stated that "'[i]t certainly doesn't gut the obligation to make 'reasonable accommodation'. . . it just says that in this case the seniority rules at least create a presumption that accommodation that seeks to trump those rules isn't reasonable.'" *Id.* Meanwhile, in her concurring opinion, Justice O'Connor seems to concur only to be agreeable. Justice O'Connor states that she supported the majority's opinion "[b]ecause I think the Court's test will often lead to the correct outcome, and because I think it important that a majority of the Court agree on a rule when interpreting statutes." *Barnett II*, 535 U.S. at 411 (O'Connor, J., concurring).

103. *Barnett II*, 535 U.S. at 403-04.

104. *Id.* at 404.

105. *See* cases cited *supra* note 39.

reassignment."[106] As discussed in Part II of this note, most courts had applied a bright-line per se rule of unreasonableness when they found that accommodations violated the seniority rules under collective bargaining agreements.[107] In effect, the Court's ruling destroyed the burden that the Ninth Circuit had placed on employers to defend such unilaterally imposed systems and then illogically failed to follow a bright-line rule of unreasonableness. Instead, the Court introduced a balancing test requiring employees to demonstrate "special circumstances" that would make an exception from *any* seniority system reasonable.[108]

2. Reasonable Accommodation Under the ADA

The second failure of the Court's opinion is that it expands the meaning of "reasonable accommodation" under its new balancing approach to include reassignment in conflict with more senior nondisabled employees.[109] In contrast to other accommodations, such as making facilities accessible or making adjustments for disabled employees in their current positions, reassignment under the ADA directly impacts the rights of nondisabled workers. Because reassignment can deprive more senior employees of the possibility of filling a particular position, Justice Scalia views this type of accommodation as preferential and per se unreasonable under the ADA.[110] To understand Justice Scalia's bright-line approach in *Barnett* and his inference of affirmative action in the Court's opinion, and especially in Justice Souter's dissent, it is imperative to compare the "reasonable accommodation" provision of the ADA with antidiscrimination statutes like Title VII and the ADEA, and the ADA's statutory predecessor, the Rehabilitation Act of 1973.[111]

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106. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1118 (9th Cir. 2000) (en banc) (*Barnett I*). The Ninth Circuit offered this question as one that had never previously been addressed. *Id. But see* EEOC v. Sara Lee Corp., 237 F.3d 349, 351 (4th Cir. 2001).

107. *See supra* Part II.B.1.

108. Gutman, *supra* note 75, at 91.

109. Although most of this section disputes the reasoning behind Justice Souter's dissent, the majority's opinion creates an opportunity for preferential treatment and rejects Scalia's approach and interpretation of reasonable accommodation under the ADA. *See Barnett II*, 535 U.S. at 398 (finding that "[t]he simple fact that an accommodation would provide a 'preference' . . . cannot *in and of itself*, automatically show that the accommodation is not 'reasonable.' As a result, we reject the position taken by US Airways and Justice Scalia to the contrary.").

110. *See id.* at 414 (Scalia, J., dissenting) ("When one departs from this understanding, the ADA's accommodation provision becomes a standardless grab bag — leaving it to the courts to decide which workplace preferences . . . can be deemed 'reasonable' to 'make up for' the particular employee's disability"); *see also* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000).

111. *See* Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1049 (7th Cir. 1996) (recognizing that the ADA duty of reasonable accommodation is not equivalent to that under Title VII or the

Both Title VII and the ADEA prohibit employer discrimination without an obligation to provide for or assist employees in their job performance.[112] The main argument against Justice Scalia's line-drawing approach is that, by requiring reasonable accommodation for the disabled under the ADA, Congress intended to go beyond just prohibiting invidious discrimination against the disabled. Indeed, it intended to obligate employers to take proactive measures through accommodation.[113] Thus, opponents of Justice Scalia's approach, including Justice Souter in his dissent, conclude that it should be reasonable for employers to violate their seniority policies to reassign disabled employees.[114] Discussion surrounding the Supreme Court's decision in *TWA v. Hardison*,[115] however, sheds significant light upon this debate.[116] In *Hardison*, the Supreme Court considered a conflict between the religious accommodation provision under Title VII[117] and the seniority rights of other employees under a collective bargaining agreement.[118] Hardison asked to be relieved from working on Saturdays because of his religious beliefs.[119] The Supreme Court rejected Hardison's requested accommodation, holding that the statutory requirement to accommodate does not supersede the seniority rights of other employees under a collective bargaining agreement.[120] The Court reasoned that "[w]ithout a clear and express indication from Congress," a seniority system need not "give way when necessary to accommodate religious observances."[121] Furthermore, the Court found that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[122]

Opponents of Justice Scalia's bright-line approach argue that *Hardison* is not applicable to ADA reasonable accommodation situations for two reasons. First, in contrast to the ADA, Title VII contains a specific statutory affirmative

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Rehabilatation Act, but noting the "usefulness of these acts for understanding the basic meaning of the term as it was being used at the time Congress decided to employ it within the ADA").

112. Befort & Donesky, *supra* note 18, at 1047.

113. Amar & Brownstein, *supra* note 5, at 368.

114. *Id.*

115. 432 U.S. 63 (1977).

116. Equal protection considerations are especially inherent to Title VII decisions involving race. Thus, it may be more appropriate to consider Title VII cases involving religious accommodations. *See* Amar & Brownstein, *supra* note 5, at 368.

117. 42 U.S.C. § 2000e(j) (2000). Under this Title VII provision, an employer must "reasonably accommodate" the religious observances and practices of its employees to the extent that the accommodation does not constitute "undue hardship on the conduct of the employer's business." *Id.*

118. *Hardison*, 432 U.S. at 69.

119. *Id.* at 68.

120. *Id.* at 79.

121. *Id.*

122. *Id.* at 84.

defense for employer seniority systems.[123] Second, the Senate and House reports on the ADA specifically clarify that *Hardison*'s finding that only de minimis costs are necessary to constitute an unreasonable accommodation does not apply to the ADA.[124] Both of these arguments fail for several reasons.

First, the *Hardison* Court specifically stated that the same decision would have been reached even without the statutory seniority system affirmative defense under Title VII.[125] Thus, the Court did not find the statutory provision necessary to find the accommodation unreasonable because of the detrimental consequences that result from violating neutral and legitimate employer seniority policies. Second, the ADA's statutory predecessor, the Rehabilitation Act, similarly contains no statutory affirmative defense for seniority systems, and yet courts have unanimously rejected reasonable accommodation claims under the Rehabilitation Act where reassignment conflicts with bona fide seniority rights.[126] Because courts look to the Rehabilitation Act to interpret the ADA,[127] proponents of the bright-line approach argue that "the absence of an express protection of seniority rights in the ADA is not determinative."[128] In addition, the Seventh Circuit noted that in regard to the House and Senate Reports, the context of the Reports clearly demonstrates that "Congress intended [only] to reject the *de minimis* rule of *Hardison*, rather than the [Court's] holding . . . or the refusal to require an employer to violate the seniority rights of other employees to accommodate the religious restrictions of the [employee]."[129] Furthermore, if Congress had intended to reject *Hardison* completely, it could have inserted restrictive language into the ADA enabling disabled employees to trump the seniority rights of other employees when being reassigned. No such statutory language exists in the ADA, and, as discussed in Part IV.B.1 of this note, reliance on committee reports can be a very arbitrary and inconclusive process.

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123. *See supra* note 93.

124. The House Report states: "By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or expense' on the part of the employer, in light of the factors noted in the statute — i.e., a significantly higher standard than that articulation in *Hardison*." H.R. REP. NO. 101-485, pt. 2, at 68 (1990).

125. *Hardison*, 432 U.S. at 79-82 (noting the Court's already-stated conclusion was "supported by the fact that seniority systems are afforded special treatment under Title VII itself").

126. *See* cases cited *supra* note 46.

127. *See* McKay v. Toyota Motor Mfg. U.S.A., Inc., 110 F.3d 369, 373 n.1 (6th Cir. 1997) ("[C]ourts have universally looked to Rehabilitation Act cases as a source of guidance when construing the ADA.").

128. *See* Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1049 n.13 (7th Cir. 1996).

129. *Id.* at 1049 n.12.

Although *Barnett* holds that a reassignment in violation of a seniority system ordinarily will be unreasonable, the opportunity exists, nonetheless, for disabled employees to trump more senior employees. *Barnett*'s new balancing approach creates this opportunity and should be viewed as preferential treatment unwarranted by the ADA, such antidiscrimination statutes as Title VII and the ADEA, and the Rehabilitation Act.[130] Justice Scalia's bright-line approach follows established precedent and avoids accommodating disabled employees in a manner that is both unrelated to their disability and that adversely affects other employees.[131]

3. Justice Scalia's Policy Concerns: Litigation and Inconsistency

Perhaps most troubling, the majority's decision ensures that employers generally will not succeed on summary judgment. In the past, to prevail on summary judgment, employers generally could prove accommodation to be unreasonable by showing that it required them to violate the provisions of either their own seniority policy or the seniority policies of collective bargaining agreements.[132] Under *Barnett*, however, employers will rarely, if ever, have such an opportunity because the newly created rebuttable presumption concerning the administration of their seniority systems is a question of fact that will undoubtedly defeat their summary judgment motions.[133] Most likely, with regard to such determinations as "unlikely to matter" and "not likely to make a difference," the new presumption will require litigants to spend significant time, attention, and money driving the discovery phase of the lawsuit.[134] More importantly, because such issues are so fact-intensive, the presumption will significantly reduce the number of summary judgments granted.[135]

Furthermore, under the Court's ruling, employees are entitled to an exception from the reasonableness of employers' seniority systems if they can show that "one more departure [from the seniority rules] will not likely make a difference."[136] As Justice Scalia so aptly stated in his dissent, "I have no idea

130. *See The Supreme Court — Leading Cases*, 116 HARV. L. REV. 200, 342 (2002) (noting that "*Barnett* joins a growing line of rulings that implicitly reject the possibility that Congress intended the ADA to reach farther than other antidiscrimination statutes").

131. *See* Amar & Brownstein, *supra* note 5, at 369 (suggesting that Justice Scalia should "provide more of an explanation as to why the lines he wants to draw are consistent with Congress's social welfare instinct that animates the ADA, when there are no constitutional impediments to reading that statute more broadly").

132. *See supra* note 39.

133. Bible, *supra* note 89, at 67.

134. *Id.*

135. *Id.*

136. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 405 (2002) (*Barnett II*).

what this means."[137] Justice Scalia further questioned the new standard by asking, "When is it possible for a departure from seniority rules to 'not likely make a difference'?".[138] The parameters of this vague and unclear standard, Scalia insists, will "be resolved only by constant litigation."[139] For example, the Supreme Court remanded this case to give Barnett the opportunity to show exceptions to U.S. Airways' seniority system.[140] However, the district court had already made several findings with respect to the system. The court had found that the "'evidence show[ed] that the [U.S. Airways] seniority system ha[d] been in place for "decades" and governs over 14,000 [employees].'"[141] Moreover, the district court explained that the "'seniority policies [of U.S. Airways were] common to the airline industry'" and that U.S. Airways' "'employees were justified in relying upon the [seniority] policy.'"[142] Thus, the court concluded, "'any significant alteration of that policy would result in undue hardship to both the company and its non-disabled employees.'"[143]

Thus, in *Barnett*, the Supreme Court essentially required more litigation to determine an issue on which the district court had already ruled. Judicial efficiency, financial considerations, and common sense all cry out for a more definite and clearer standard in interpreting the ADA. It is important to note that most courts in considering the legality of seniority systems had previously upheld only those that were "bona fide" and those company policies that were "legitimate and non-discriminatory."[144] This initial determination of the legitimacy of a seniority system would achieve the same purposes that the *Barnett* court sought to achieve by inventing the new rebuttable presumption, but without the increased time and effort expended in unnecessary litigation. Why the Court chose to abandon these initial considerations for a vague and completely new standard is difficult to comprehend.

One scholar has noted that *Barnett*'s rebuttable presumption "is . . . problematic in meaning and possible implications and is unsupported by the authorities cited for it."[145] One of these problems includes determining how many past changes in the administration of the employer's seniority system an employee will have to show for a court to determine that one more change "'will

137. *Id.* at 418 (Scalia, J., dissenting).
138. *Id.* (Scalia, J., dissenting).
139. *Id.* at 420 (Scalia, J., dissenting).
140. *See id.* at 406.
141. *Id.* at 395 (quoting App. to Pet. for Cert. at 96a).
142. *Id.* (quoting App. to Pet. for Cert. at 96a).
143. *Id.* (quoting App. to Pet. for Cert. at 96a).
144. *See supra* Part II.B.
145. Bible, *supra* note 89, at 67.

not likely make a difference.'"[146] Another obstacle is determining how many exceptions and what kind of exceptions an employer must have made in the past so that making one more exception accommodating a disabled employee is "'unlikely to matter.'"[147] Undoubtedly, the result will be that "judges and juries, at trial, will necessarily reach widely varying conclusions" and interpretations of these questions.[148]

Since the Court's ruling in *Barnett*, lower courts have extended and interpreted the decision in various ways. For example, in *Shapiro v. Township of Lakewood*,[149] the Third Circuit extended the two-step approach outlined in *Barnett* to cover analyzing a reassignment that would violate *any* disability-neutral rule of an employer.[150] In addition, the Tenth Circuit, in *Dilley v. Supervalu, Inc.*,[151] held that *Barnett* prohibits only a *direct*, rather than "a *potential* violation of [a] seniority system."[152] Thus, employers' contentions that their "seniority system would be violated *if* a more senior employee later requested to be placed in [the disabled employee's] position" does not make the accommodation unreasonable.[153]

One case in particular demonstrates why the *Barnett* Court erred in creating a new standard to evaluate an accommodation that conflicts with a bona fide seniority system. In *EEOC v. Valu Merchandisers Co.*,[154] the trial court denied the employer's summary judgment motion simply because the court held that the seniority system in question was not bona fide.[155] The court reasoned that because the employer's seniority system gave itself "unfettered discretion in deciding whether to implement its seniority policy or waive it altogether," the seniority system was neither legitimate nor nondiscriminatory.[156] As indicated in Part II of this note, prior to *Barnett*, most courts upheld only those seniority systems that were bona fide or that were legitimate and created for nondiscriminatory purposes.[157] Even before *Barnett*, courts considered this determination of the seniority system to be a question of law that preceded any inquiry into the reasonableness of a proposed accommodation.[158] However,

146. *Id.* (quoting *Barnett II*, 535 U.S. at 405).
147. *Id.* (quoting *Barnett II*, 535 U.S. at 405).
148. *Id.* at 67-68.
149. 292 F.3d 356 (3d Cir. 2002).
150. *Id.* at 361.
151. 296 F.3d 958 (10th Cir. 2002).
152. *Id.* at 963.
153. *Id.*
154. No. 01-2224-DJW, 2002 WL 1932533 (D. Kan. Aug. 9, 2002).
155. *Id.* at *7.
156. *Id.* at *8.
157. *See* discussion *supra* Part II.B.2.
158. *See* discussion *supra* Part II.B.2.

Barnett treats this inquiry as an extremely fact-intensive process that investigates the history behind the administration of the seniority system to establish consistency standards set forth under the Court's newly created rebuttable presumption. The *Valu Merchandisers* court reverted to a pre-*Barnett* inquiry by first ruling on the bona fide aspect of the employer's seniority system, and in so doing, protected the rights of a disabled employee from the possible discrimination of an employer. Thus, *Valu Merchandisers* shows that the protections sought by the *Barnett* Court can be achieved through the initial determination of the legitimacy of a seniority system but without the long and exhausting discovery process resulting from *Barnett*. The *Valu Merchandisers* case simply provides further evidence of why the Court's intervention in *Barnett* was both unnecessary and inconsistent.

B. Why Justice Souter's Dissent Does Not Work

1. Legislative Intent v. Textualism

Both Justice Souter and the Ninth Circuit relied on the EEOC enforcement guidelines[159] and the ADA's legislative history[160] to conclude that seniority systems must only be a factor in determining undue hardship for employers with unilaterally created seniority systems.[161] The Ninth Circuit ironically noted, however, that even though the EEOC and the legislative history rejected any *per se* rule barring accommodation when reassignment would conflict with collective bargaining agreements, most circuits, including its own, have reached the opposite conclusion and have held that the ADA does not require an accommodation when there is a conflict with seniority rights under collective bargaining agreements.[162] As evidence of this difference, the Ninth Circuit distinguished *Barnett* in the subsequent case of *Willis v. Pacific Maritime Ass'n*,[163] holding that an ADA accommodation "would be *per se* unreasonable where . . . the collective bargaining agreement contain[ed] bona fide seniority provisions."[164] Justice Souter's reliance, therefore, on the Ninth Circuit's use of the legislative history in rejecting a per se rule for unilaterally created seniority systems seems somewhat misplaced considering *Willis*' lack of reliance on the

159. Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000) (en banc) (*Barnett I*); *see* U.S. Equal Employment Opportunity Comm'n, COMPLIANCE MANUAL 5454 (noting that if employers have a policy prohibiting transfers, they must modify that policy to reassign disabled employees unless they can show that doing so would cause undue hardship).

160. *Barnett I*, 228 F.3d at 1119; *see* H.R. REP. NO. 101-485, pt. 2, at 63 (1990).

161. *Barnett I*, 228 F.3d at 1119-20.

162. *Id.* at 1120 n.9.

163. 244 F.3d 675 (9th Cir. 2001).

164. *Id.* at 677.

EEOC and the legislative history in accepting a per se rule for seniority systems under bona fide collective bargaining agreements.[165]

In picking and choosing when to rely on legislative intent, Justice Souter and the Ninth Circuit serve as prime examples of why Justice Scalia in *Barnett* found no merit in the language of the House and Senate reports. A noted opponent of inquiring into the minds of legislators, Justice Scalia has argued that such subjective adventures are unproductive and that only a statute's particular language should govern a court's investigation into that statute's meaning. According to Justice Scalia, such subjective inquiries to discern the motivation behind why legislators voted for a particular piece of legislation are "almost always an impossible task."[166] In addition, Justice Scalia has questioned the reliability of committee reports that supposedly summarize the consensus of the legislative intent behind the passing of a statue: "Can we assume, then, that [the legislators] all agree with the motivation expressed in the staff-prepared committee reports they might have read — even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for?"[167]

2. Affirmative Action?

Most affirmative action questions under the ADA arise in situations involving a reassignment to a vacant position. For example, in *Smith v. Midland Brake, Inc.*, the Tenth Circuit held that the ADA mandated the reassignment of a disabled employee despite the superior qualifications of another applicant or employee.[168] The court stated that a reasonable accommodation may require reassignment to a vacant position if (1) "no reasonable accommodation can keep the employee in his or her existing job," (2) "the employee is qualified for the job," and (3) the reassignment "does not impose an undue burden on the employer."[169] The ADA, the court reasoned, does not "requir[e] the reassigned employee to be the best qualified . . . for the [position]."[170] However, the *Smith*

165. *Id.*

166. Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Although written in the context of an Establishment Clause case, Scalia's comments in *Edwards* generally reflect his distaste for relying on legislative intent.

167. *Id.* at 637-38.

168. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) (en banc).

169. *Id.* at 1169.

170. *Id.* Such a conclusion, the court noted, is "judicial gloss unwarranted by the statutory language or its legislative history." *Id.* Two other circuit court cases followed the holding in *Smith*. In *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc), the D.C. Circuit held that the ADA's reassignment provision requires something more from an employer than simply allowing a disabled employee to compete equally with other job applicants for a vacant position. *Id.* at 1304. Furthermore, the court found that placing an employee in a vacant

court distinguished this type of reassignment from one that would conflict with the neutral employment policies of employers, finding the latter unreasonable because of the adverse effects on both employers and other nondisabled employees.[171]

In *Barnett*, Justice Scalia argued, however, that both reassignments discussed in *Smith* would be unreasonable because reassignment does not "envision the elimination of [workplace] obstacles . . . that have nothing to do with [employees'] disability."[172] Thus, Justice Souter's universal disapproval of employer seniority systems seems to inject an aspect of affirmative action into the workplace, advocating unwarranted preferential treatment for disabled employees in violation of established seniority rights.[173] Justice Souter's

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position over more qualified applicants was not a prohibited preference under the ADA. *Id.* at 1305. Also, the Tenth Circuit in *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999), held that the no-transfer policy of a municipal employer must give way to the ADA's reassignment obligation. *Id.* at 1131-32. The court recognized that "failure to reassign a disabled employee [may] constitute discrimination, and therefore a basis for liability, under the ADA." *Id.* at 1132. In addition, the court rejected the notion that such reassignments were preferential and a form of affirmative action. *Id.* at 1137.

171. *Smith*, 180 F.3d at 1176; *see also supra* Part II.B.2 (discussing the importance of neutral and legitimate employer policies identified by the *Smith* court).

172. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 416 (2002) (*Barnett II*) (Scalia, J., dissenting). Scalia argues that the other possible reasonable accommodations listed under 42 U.S.C. § 12111(9) of the ADA concern either workplace burdens because of an employer's disability or disability-related obstacles that have the same focus of eliminating obstacles of the current position. *Id.* at 415; *see Aka*, 156 F.3d at 1314-15 (Silberman, J., dissenting) (interpreting "'reassignment to a vacant position'" consistently with the other accommodations listed in § 12111(9), none of which "even alludes to the possibility of a preference for the disabled over the non-disabled"); *see also* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000). Judge Posner, writing for the Seventh Circuit, held that the ADA is not a mandatory preference act and found the Tenth Circuit's decisions in both *Smith* and *Davoll* inconsistent with the ADA. *Id.* at 1028. Judge Posner strongly advocated his disagreement with *Smith*:

> There is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group. That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing.

Id. at 1028-29.

173. *See* Befort & Donesky, *supra* note 18, at 1074. The authors describe the conflict under "non-discriminatory transfer and assignment policies" as:

> On the one hand, interpreting the ADA as requiring employers to make exceptions to such policies and to treat disabled employees differently than non-disabled employees resembles a preference in favor of the disabled and cuts against the

conclusion that U.S Airways should have accommodated Barnett would have inevitably violated the neutrality of the ADA, which "does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities."[174] Indeed, in *Daugherty v. City of El Paso*,[175] the Fifth Circuit emphasized that the ADA is not an affirmative action statute and noted the importance behind the ADA of not requiring preferences for disabled employees.[176] That court stated,

> [W]e 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 those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.[177]

Moreover, in *Dalton v. Subaru-Isuzu Automotive, Inc.*,[178] the Seventh Circuit discussed the affirmative-action quality of interpreting the ADA to require employers to abandon "legitimate, nondiscriminatory company policies."[179] The *Dalton* court noted that such an interpretation of the ADA 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."[180] Thus, whereas the majority opinion in *Barnett* created an opportunity for preferential treatment, Justice Souter's dissent called for a universal disapproval of seniority that undoubtedly violates the seniority rights of nondisabled employees in an affirmative-action type process. Both interpretations allow for preferential treatment unwarranted by the ADA.

V. Conclusion

In *Barnett*, the Supreme Court should simply have ruled that it is always unreasonable to accommodate disabled employees under the ADA if that accommodation conflicts with legal and bona fide seniority systems regardless

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> equal treatment model reflected in most anti-discrimination statutes. On the other hand, the text, history, and purpose of the ADA suggest that preferential treatment for the disabled may not only be appropriate, but required.

Id.

174. 29 C.F.R. pt. 1630 app. Bkgrd.
175. 56 F.3d 695 (5th Cir. 1995).
176. *Id.* at 700.
177. *Id.*
178. 141 F.3d 667 (7th Cir. 1998).
179. *Id.* at 678.
180. *Id.* at 679.

of whether employers have unilaterally created and administered their seniority systems. Instead, the Court created an unclear standard because of its fear that corrupt employers could use their unilaterally created seniority systems to avoid accommodating disabled employees. Unfortunately, the Court's creation of a new balancing inquiry did not follow judicial precedent supporting and upholding bona fide seniority systems because of their important role within and the many benefits that they provide for the employment community.

Employers are legally required to provide reasonable accommodations for their disabled employees. These accommodations effectively assist valuable disabled employees in fulfilling employment obligations for which they are qualified. But when a reassignment conflicts with a valid, legitimate, and nondiscriminatory seniority policy, the accommodation simply becomes unreasonable. To hold otherwise fails to recognize the significant importance of employer seniority systems and the seniority rights of nondisabled employees. The Court erred in not adequately understanding the real conflict in *Barnett* and by creating the opportunity for preferential accommodations that will adversely affect the efficiency, consistency, and policy of future ADA cases.

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