No. 12-

IN THE

Supreme Court of the United States

UNITED AIR LINES, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* ("ADA"), provides that employers shall not "*discriminate* against a qualified individual with a disability." 42 U.S.C. § 12112(a) (emphasis added). The ADA further provides that "discrimina[tion]" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." *Id.* § 12112(b)(5)(A). The statute identifies "reassignment to a vacant position" as one of several "reasonable accommodation[s]" for employers to consider in accommodating the needs of disabled employees. *Id.* § 12111(9)(B).

In *U.S. Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002), this Court held that "*ordinarily* the ADA does not require" reassignment to a vacant position where the employer has an established seniority system because such a requested accommodation is ordinarily "not a 'reasonable' one." *Id.* at 406, 403 (emphasis in original). The Court also explained that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy." *Id.* at 397 (emphasis in original).

Petitioner, United Air Lines, Inc., maintains Reasonable Accommodation Guidelines that provide

preferential treatment to employees with disabilities in the reassignment process. However, while providing preferential treatment by waiving various disability-neutral rules, Petitioner maintains a best-qualified personnel policy and hires the most-qualified individual. The question presented is:

If a disability prevents an employee from performing the essential functions of his or her current position even with accommodation, does the ADA require an employer to reassign a minimally qualified disabled employee to a vacant position as a "reasonable accommodation" even though another individual is entitled to the position under the employer's established best-qualified selection system?

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this petition contains all parties to the proceeding.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states the following:

Petitioner, United Air Lines, Inc., is a wholly-owned subsidiary of United Continental Holdings, Inc. United Continental Holdings, Inc., is publicly traded and no publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

United Air Lines, Inc., respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

The amended opinion of the court of appeals (App., *infra*, 1-11) is reported at 693 F.3d 760. The original, vacated opinion of the court of appeals (App., *infra*, 12-20) is reported at 673 F.3d 543. The minute entry and transcript of proceedings in the district court granting Petitioner's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) (App., *infra*, 21-27) have not been designated for publication.

STATEMENT OF JURISDICTION

The court of appeals initially entered judgment on March 7, 2012. App. 12. After the United States Equal Employment Opportunity Commission ("EEOC") timely petitioned for rehearing *en banc*, the court of appeals vacated the original panel opinion and entered a new final judgment on September 7, 2012. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, are set forth at App. 28-56.

STATEMENT OF THE CASE

1.a. This case concerns the scope of the ADA's prohibition of "discriminat[ion] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a) (App. 42). In enacting the ADA, Congress found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity *to compete on an equal basis* * * * and costs the United States billions of dollars." *Id.* § 12101(a)(8) (App. 29) (emphasis added). Congress specifically stated that the purpose of the ADA was "to provide a clear and comprehensive national mandate for the *elimination of discrimination* against individuals with disabilities." *Id.* § 12101(b)(1) (App. 30) (emphasis added).

b. The ADA defines prohibited "discrimina[tion]" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." *Id.* § 12112(b)(5)(A) (App. 44). The statute, in turn, states that "'reasonable accommodation' *may* include"

> job restructuring, part-time or modified work schedules, *reassignment to a vacant position*, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9)(B) (App. 41) (emphases added).

c. This Court in *Barnett* considered whether reassignment to a mailroom position was a "reasonable accommodation" under the ADA where the reassignment "would violate the rules of a seniority system" that was "unilaterally imposed by management." 535 U.S. at 403-04. The Court held that such a reassignment was "ordinarily" not "reasonable." *Id.* at 403.

In rejecting U.S. Airways' contention that the Act never requires "preferential treatment" of any kind, this Court explained:

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

Id. at 397 (emphasis in original). The *Barnett* Court then went on to list examples of "preferences" in the form of reasonable accommodations that would enable disabled employees to have equal opportunity, such as suspending disability-neutral rules regarding office assignments which would prevent a disabled employee who needs a ground floor office from working on the ground floor. *Id.* at 397-98; see also *id.* at 398 (citing, *inter alia*, as other examples, "neutral furniture budget rules" and statutory examples of "job restructuring," "modified work schedules," and "acquisition * * * of equipment").

d. This case raises the important and recurring issue whether the "preferences" provided for in the ADA: (i) level the playing field for disabled employees or

(ii) go significantly further and require affirmative action such that, absent undue hardship, employers who have an established, bona fide policy to fill positions with the most-qualified individual ordinarily must instead fill that position by reassigning a minimally qualified disabled employee who is not the most-qualified individual.

2. The facts of this case, on appeal from the grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), are straightforward and undisputed. In 2003, Petitioner, United Air Lines, Inc., set out Reasonable Accommodation Guidelines ("Guidelines") that provide preferences to employees who, because of disability, can no longer perform the essential functions of their current jobs even with reasonable accommodations. App. 3. The Guidelines state that "transfer * * * [to] an equivalent or lower-level vacant position" may be a reasonable accommodation, but specify that the transfer process is competitive. *Ibid.* (internal quotation marks omitted; alterations in original).

Accordingly, employees needing accommodation will not automatically be placed into vacant positions for which they are minimally qualified, but instead will be given several affirmative preferences, and are not required to comply with a number of disability-neutral rules. *Ibid*. These affirmative preferences (which are not afforded to non-disabled employees) include permitting disabled employees who need accommodation to submit an unlimited number of transfer applications, guaranteeing them an interview, and giving them priority consideration over similarly qualified applicants—that is, if two candidates are equally qualified, the employee with a disability seeking an accommodation will get the position. *Ibid.*

It thus is undisputed that Petitioner's policies provide affirmative preferences for disabled individuals who can no longer perform the essential functions of their current job (even with accommodation). However, disabled employees are not entitled to automatic reassignment under the Guidelines over better-qualified individuals. *Ibid.*

3.a. The EEOC filed suit in the United States District Court for the Northern District of California alleging that Petitioner's Guidelines violate the ADA. *Ibid.* The EEOC argued that reassignment under the ADA is mandatory, and requires employers to appoint employees who are unable to perform their current positions due to disability to a vacant position for which they are at least minimally qualified, regardless of whether the employer has an established policy of selecting the most-qualified applicant. App. 4-5.

b. Petitioner successfully moved to transfer the case to the United States District Court for the Northern District of Illinois, where its corporate headquarters lie. App. 3.

4. The district court, relying on the Seventh Circuit's decision in *EEOC* v. *Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), granted Petitioner's motion to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6). App. 4. In *Humiston-Keeling*, the Seventh Circuit had previously held that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant." 227 F.3d at 1029.

5.a. The EEOC appealed, requesting that the court of appeals overrule *Humiston-Keeling* on the grounds that that decision was implicitly overturned by this Court's decision in *Barnett*. A panel of the court of appeals affirmed the district court, concluding that later circuit decisions had confirmed the validity of *Humiston-Keeling* after *Barnett*. App. 17-18 (citing *Mays* v. *Principi*, 301 F.3d 866 (7th Cir. 2002); *Craig* v. *Potter*, 90 F. App'x 160 (7th Cir. Feb. 20, 2004); *King* v. *City of Madison*, 550 F.3d 598 (7th Cir. 2008)).

b. The EEOC petitioned for rehearing *en banc*. Rather than review the case *en banc*, the court of appeals invoked Circuit Rule 40(e)—a local procedure requiring proposed opinions that overrule a prior decision of the court to be circulated to the full court in advance of publication. After distribution, and receiving no votes from any active judge to rehear the case *en banc*, the panel published its revised opinion overruling *Humiston-Keeling*. App. 1-2.

The court of appeals explained in its revised opinion that this "may be a close question," but nevertheless held that, in its view, "*Humiston-Keeling* did not survive *Barnett*." App. 2-3. Relying heavily on this Court's observation in *Barnett* that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal," *Barnett*, 535 U.S. at 397, the court of appeals concluded that *Barnett* construed the ADA to be a "mandatory preference act." App. 7. The panel thus concluded that, absent a particularized showing of undue hardship, the Act requires employers to grant preferential job reassignments to employees with disabilities notwithstanding that a more-qualified

individual would have received the position under an established best-qualified selection policy. App. 9.

The court of appeals remanded the case to the district court with instructions to disregard the best-qualified provision of Petitioner's Guidelines and limit its analysis to determining if mandatory reassignment would be reasonable in the run of cases and, if so, whether there are fact-specific considerations that would render mandatory reassignment an undue hardship in this case. App. 3, 9-10. At Petitioner's request, the court of appeals stayed the mandate pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending this Court's disposition of the Petition.

REASONS FOR GRANTING THE PETITION

This Court previously granted a petition for certiorari to the Eighth Circuit in *Huber* v. *Wal-Mart Stores, Inc.* to address the issue presented in this case. 552 U.S. 1074 (2007). That case was dismissed shortly thereafter when the parties settled their dispute. 552 U.S. 1136 (2008). Since the Court granted certiorari in *Huber* a few years ago, two important developments have increased the need for this Court to resolve a circuit split on a recurring issue of national importance.

First, at the time the Court granted certiorari in *Huber*, the two courts of appeals to address *Barnett*'s application to best-qualified selection systems—the Seventh and Eighth Circuits—had both agreed that the ADA's prohibition against "discrimination" and its "reasonable accommodation" requirement did not require, in the ordinary case, that employers discriminate against non-disabled individuals who were better qualified in favor

of a less-qualified disabled employee seeking a transfer as a reasonable accommodation. Now, with the Seventh Circuit switching sides, the two courts of appeals to address best-qualified selection systems post-*Barnett* are squarely on opposite sides of the circuit split and also disagree about the import of *Barnett* on the question presented.

Second, since the settlement in *Huber*, Congress amended the ADA to significantly expand the number of individuals with a covered disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008) ("ADAAA"). As the EEOC's final rule implementing the ADAAA noted, "The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA." Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630). Thus, under the court of appeals' ruling below, an employer's obligation to engage in affirmative action in favor of less-qualified disabled employees and against more-qualified individuals is significantly expanded under the ADAAA.

This case presents an ideal vehicle to resolve a circuit split on an important, recurring question regarding whether the ADA requires an employer to reassign a disabled employee to a position as a "reasonable accommodation" where another individual would be entitled to the position under the employer's established best-qualified selection policy.

First, there is a direct, acknowledged 2-1 circuit split over whether an employer "discriminates" in violation

of the ADA by applying a policy of hiring the best-qualified individual. The Seventh Circuit below and the Tenth Circuit *en banc* (over a vigorous dissent) hold that reassignment of a minimally qualified disabled employee to a vacant position even though another individual would be selected under the employer's best-qualified selection policy is ordinarily a "reasonable" accommodation. Conversely, the Eighth Circuit holds that the ADA does not require an employer to disregard best-qualified selection policies, and thus a transfer request that violates such a policy is not a "reasonable" accommodation. (To compound this confusion, the D.C. Circuit, sitting *en banc*, also appears to have concluded (over a vigorous dissent) that the ADA requires a minimally qualified disabled individual to be reassigned over more-qualified individuals, though the other circuits have disagreed about the holding of the D.C. Circuit.)

Just as the Court did in *Huber*, the Court should grant certiorari again to resolve this split. The split is of at least equal and arguably greater intensity now, as the two courts of appeals to address the issue of best-qualified selection systems following *Barnett* have reached opposite conclusions and disagree not only over the meaning of the ADA but also the import of this Court's decision in *Barnett*.

Second, this case presents an important, recurring question whether the ADA is in effect an affirmative action statute (as the Seventh, Tenth, and arguably D.C. Circuits have held) or, like other civil rights statutes, was designed to level the playing field to enable disabled individuals "to compete on an equal basis" with non-disabled individuals (as Congress provided and as at least six courts of appeals have held). See also 42 U.S.C. § 12101(a)(8) (App. 29). The

Seventh Circuit's determination that *Barnett* concluded that the ADA is "a mandatory preference act" is based on a misreading of this Court's statement "that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." App. 7 (quoting *Barnett*, 535 U.S. at 397) (internal quotation marks omitted). Nothing in *Barnett* suggests that such "reasonableness" mandates an accommodation that expressly disfavors the selection of other more-qualified individuals (as opposed to preferences allowing disabled employees to compete fairly). To the contrary, *Barnett* expressly noted that an accommodation may be "unreasonable because of its impact * * * on fellow employees." 535 U.S. at 400. The Court should thus also grant certiorari to decide this important question and to resolve the deepening split over whether the ADA is a non-discrimination statute or goes further and requires employers "to turn nondiscrimination into discrimination," *Terrell* v. *USAir*, 132 F.3d 621, 627 (11th Cir. 1998) (rejecting such a proposition).

I. A Longstanding Split Exists Over Whether The ADA Requires An Employer To Reassign A Disabled Employee To A Position As a "Reasonable Accommodation" Where Another, More-Qualified Individual Would Be Selected Under The Employer's Best-Qualified Personnel Policy.

As the court of appeals acknowledged, its decision below implicates a longstanding split in the Circuits. App. 10-11. With the Seventh Circuit switching sides, the direct split is now 2-1 (or 3-1 if this Court reads the D.C. Circuit as siding with the panel opinion below). In all of the prior cases on both sides of the issue (including two *en banc* decisions), strong dissenting positions have disagreed with the majority's decision.

In *Huber* v. *Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir.), *cert. granted,* 552 U.S. 1074 (2007), *cert. dismissed*, 552 U.S. 1136 (2008), the Eighth Circuit confronted the identical question the court of appeals confronted here—whether an employer who has an established policy to fill vacant job positions with the most-qualified individual is required, as a reasonable accommodation, to reassign a minimally qualified disabled employee to a vacant position even though the disabled employee is not the most qualified for the position. *Id.* at 481.

After surveying the then-circuit split, which it believed was between the Tenth and Seventh Circuits, the Eighth Circuit ultimately followed the Seventh Circuit's decision in *Humiston-Keeling*, creating at the time a 2-1 split in favor of the conclusion that "the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." *Huber*, 486 F.3d at 483 (footnote omitted).[1]

The Eighth Circuit found *Humiston-Keeling*'s rationale, which it quoted at length, persuasive:

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1. As discussed below, the *en banc* D.C. Circuit in *Aka* v. *Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998), also appears to have addressed this issue, but the Eighth Circuit believed that the D.C. Circuit "d[id] not hold the ADA require[d] an employer to place a disabled employee in a position while passing over more qualified applicants." *Huber*, 486 F.3d at 483 n.2. Compare also *Humiston-Keeling*, 227 F.3d at 1028 (concluding *Aka* is distinguishable) with App. 10-11 (concluding that *Aka* requires reassignment of a less-qualified disabled employee as a reasonable accommodation).

> The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory * * * * To conclude otherwise 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."

Huber, 486 F.3d at 483-84 (quoting *Humiston-Keeling*, 227 F.3d at 1028-29).[2] The Eighth Circuit also expressly considered the implications of *Barnett*, concluding that *Barnett* "bolstered" its holding. *Huber*, 486 F.3d at 483-84.[3]

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2. The Eighth Circuit also noted that the Fifth Circuit had likewise held that "'The [ADA] does not require affirmative action in favor of individuals with disabilities.'" *Huber*, 486 F.3d at 484 n.3 (quoting *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1094 (5th Cir. 1996)); see *infra* 16-19 (discussing courts of appeals which have held in other contexts that the ADA is not an affirmative action statute).

3. The Eighth Circuit denied rehearing *en banc* over a vigorous dissent. 493 F.3d 1002 (Murphy, J., dissenting from the denial of rehearing *en banc*). The four dissenters specifically contended that the panel decision "is contrary to the Supreme Court's admonition in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002), that preferences are a valid means to achieve the statutory goals." *Ibid.*

Contrary to the Eighth Circuit, a sharply divided Tenth Circuit, sitting *en banc*, held in a case pre-dating *Barnett* that "requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history." *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1169 (10th Cir. 1999) (*en banc*). Three judges dissented from this part of the court's ruling, emphasizing that the ADA did not require "priority in hiring or reassignment over those who are not disabled" and noting that "[o]ther cases reinforce that any potential reasonable accommodation must accord with the fair and impartial consideration deserved by all individuals." *Id.* at 1182 (Kelly, J., dissenting) (citation and internal quotation marks omitted); see also *infra* 16-19 (discussing other cases).

Likewise, a sharply divided *en banc* D.C. Circuit stated that "the reassignment obligation means something more than treating a disabled employee like any other job applicant," but ultimately "decline[d] to decide the precise contours of an employer's reassignment obligations." *Aka* v. *Wash. Hosp. Ctr.*, 156 F.3d 1284, 1304-05 (D.C. Cir. 1998) (*en banc*). The four judges in dissent stated that an employer "was under no duty to afford Aka a hiring preference—because of his disability—over a more qualified, non-disabled applicant." *Id.* at 1311 (Henderson, J., dissenting). Another dissent noted that the majority "declines to read 'reassignment to a vacant position' in the context of the other types of reasonable accommodation listed in 42 U.S.C. § 12111(9)." *Id.* at 1314 (Silberman, J., dissenting). Foreshadowing the analysis of this Court in *Barnett*, the dissent further noted that the examples of reasonable accommodations in the statute

> share the common theme of regulating the relationship of the disabled employee vis-à-vis the employer, making no mention of the disabled employee's rights vis-à-vis other non-disabled employees or applicants—that is, none even alludes to the possibility of a preference for the disabled over the non-disabled.

Id. at 1314 (Silberman, J., dissenting). Cf. *Barnett*, 535 U.S. at 400 ("[A] demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees * * * *").

The court of appeals' decision in this case to overrule *Humiston-Keeling* does nothing to resolve or even lessen the circuit split—it merely changes which position now constitutes the majority view. Moreover, the court of appeals' decision further contributes to the uncertainty, not only by changing sides over the proper construction of the ADA generally, but also by creating a new split with the Eighth Circuit in *Huber* over the correct interpretation of *Barnett* itself, which the court of appeals itself acknowledged "may be a close question." Compare App. 2-3 ("*Humiston-Keeling* did not survive *Barnett*.") with *Huber*, 486 F.3d at 483 (holding that *Barnett* "bolster[s]" the conclusion that the ADA "does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate").

After the court of appeals' decision in this case, the courts of appeals disagree over what this Court in *Barnett* meant by "preference" in the reassignment context. Does it mean affirmative action in favor of minimally qualified

disabled employees over better-qualified individuals, as the court of appeals has held? Or, does "preference" mean something more limited, such as giving disabled employees individualized preferences in the reassignment process that non-disabled applicants do not enjoy, but that stop short of dictating personnel decisions, as the Eighth Circuit holds?

This Court should again grant certiorari to resolve not only the circuit split over the effect of best-qualified personnel policies on an employer's ADA reasonable accommodation obligation that existed at the time this Court granted certiorari in *Huber*, but also to resolve the newly created split over what this Court meant by "preference" in *Barnett*.

II. The Question Whether The ADA Requires Employers To Engage In Affirmative Action In Favor Of Minimally Qualified Disabled Employees And To Discriminate Against More-Qualified Individuals Is Important And Recurring.

The question whether the ADA requires preferences which enable disabled individuals to compete on a level playing field with non-disabled individuals or goes further and requires employers automatically to reassign disabled individuals to positions *because of* their disability is an important and recurring question which this Court should definitively resolve. Indeed, if the decision below is correct, it will have significant repercussions in a wide range of cases in which the courts of appeals have repeatedly explained that "we do not read the ADA as requiring affirmative action." *Daugherty* v. *City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

A. The Seventh Circuit's Decision Further Exacerbates A Circuit Split With Six Courts Of Appeals Which Have Held That The ADA Is Not An "Affirmative Action" Statute.

The court of appeals' decision to adopt a construction of the ADA's reassignment form of reasonable accommodation so as to require affirmative action on behalf of minimally qualified disabled employees and against more-qualified individuals not only deepens the circuit split discussed above, it also conflicts with the decisions of six circuit courts, including the Eighth Circuit in *Huber*, that have rejected constructions of the ADA as an affirmative action statute in other contexts.

In *Daugherty*, the Fifth Circuit considered a city charter that gave physically incapacitated employees the highest priority in filling vacancies, but gave full-time employees priority over part-time employees. 56 F.3d at 699. Upholding the City's decision not to give a full-time position to a part-time employee with a disability who requested an accommodating transfer, the Fifth Circuit held: "[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." *Id.* at 700.

The Second Circuit followed suit in *Wernick* v. *Federal Reserve Bank of New York*, 91 F.3d 379 (2d Cir. 1996), expanding *Daugherty*'s core holding. In *Wernick*, the plaintiff sought transfer to a new position under a different supervisor because a poor working relationship with her existing manager created stress, which in

turn exacerbated her back condition. *Id.* at 381-82. Rejecting plaintiff's claim that the ADA required her employer to grant her an accommodating transfer, the Second Circuit held that "nothing in the law leads us to conclude that in enacting the disability acts, Congress intended to interfere with personnel decisions within an organizational hierarchy. Congress intended simply that disabled persons *have the same opportunities available to them as are available to nondisabled persons*." *Id.* at 384 (emphasis added); see also *id.* at 385 (quoting *Daugherty*'s determination that the ADA does not require "affirmative action").

In *Terrell*, a plaintiff with carpal tunnel syndrome ("CTS") requested a part-time position as an accommodation for her disability even though her employer had recently phased-out part-time positions. 132 F.3d at 625-26. Rejecting plaintiff's failure to accommodate claim, the Eleventh Circuit, citing *Daugherty*, reasoned that giving plaintiff a part-time job as an accommodation when part-time employees without disabilities had been furloughed:

> would result in the non-disabled (those part-time agents without CTS) being discriminated against—on the most basic of employment issues, that is, do you have a job at all—in favor of the disabled (those part-time agents with CTS) * * * * *The ADA was never intended to turn nondiscrimination into discrimination.*

Id. at 627 (emphasis added).

In *EEOC* v. *Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001), the Fourth Circuit was presented with a seniority

policy similar to the one this Court confronted in *Barnett*.[4] Noting that all workers, not just those covered by collective bargaining agreements, rely on established company policies, the Fourth Circuit explained:

> All antidiscrimination statutes, from Title VII to the ADA, impose costs on employers. The difference in this case is that requiring an employer to break a legitimate and non-discriminatory policy tramples on the rights of other employees as well. *The ADA does not require employers to penalize employees free from disability in order to vindicate the rights of disabled workers.*

Id. at 355 (citation omitted; emphasis added).

Finally, in *Hedrick* v. *Western Reserve Care System*, 355 F.3d 444 (6th Cir. 2004), the Sixth Circuit broadly explained that "'Employers are not required to * * * violate other employees' rights under a collective bargaining agreement or other non-discriminatory policy in order to accommodate a disabled individual.'" *Id.* at 457 (quoting *Burns* v. *Coca-Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000)).[5]

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4. *Barnett* cited *Sara Lee* as an example of a circuit holding, as *Barnett* ultimately concluded, that a requested accommodation which did not comport with a seniority system was ordinarily not "reasonable." *Barnett*, 535 U.S. at 396.

5. Although decided after this Court's *Barnett* decision, *Hedrick* did not cite *Barnett*. *Hedrick* did cite *Daugherty*, *Terrell*, and earlier decisions from its own Circuit. See *Hedrick*, 355 F.3d at 459.

Although arising in different contexts, the conclusions reached by the Second, Fourth, Fifth, Sixth and Eleventh Circuits, consistent with the Eighth Circuit in *Huber*, are clear and unmistakable: The ADA's reasonable accommodation requirement does not mandate affirmative action on behalf of individuals with disabilities; that is, the ADA's prohibition on discrimination against disabled individuals does not mandate discrimination against non-disabled individuals. These conclusions are irreconcilable with the opinion of the court of appeals in this case as well as the Tenth Circuit in *Smith* (and possibly the D.C. Circuit in *Aka*). This Court should grant the petition to definitively resolve this growing split as well.

B. *Barnett* Does Not Resolve The Important And Recurring Question Whether An Accommodation Is "Reasonable" Where It Requires An Employer To Reassign A Less-Qualified Disabled Employee In Violation Of An Employer's Best-Qualified Selection Policy.

The EEOC's contention below, and the court of appeals' conclusion, that *Barnett* resolved the question presented in this case is misplaced. As an initial matter, as noted above, the two Circuits to address this issue post-*Barnett* disagree over *Barnett*'s import and what *Barnett*'s use of the term "preference" means. And, this Court had previously granted certiorari to resolve this question.

More importantly, nothing in *Barnett* supports the EEOC's broad reading of that decision nor suggests that this Court concluded (or even suggested) that the ADA is an affirmative action statute requiring the transfer of a less-qualified disabled individual, as opposed to an anti-

discrimination statute designed to provide affirmative preferences so that "people with disabilities [have] the opportunity to compete on an equal basis," 42 U.S.C. § 12101(a)(8) (App. 29). Indeed, *Barnett* explained that "[t]he statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in * * * the workplace." 535 U.S. at 401. This Court also noted that:

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

Id. at 397 (first three emphases added).

This Court then listed examples of "preferences," in the form of waivers of neutral workplace rules, which would normally constitute "reasonable accommodations," such as a "different kind of chair" and modification of break schedules. *Id.* at 398. The examples of ADA-required "preferences" this Court provided are the types of modifications which allow for "equal opportunity" but leave unaffected the substantial rights and expectations of other individuals—both disabled and non-disabled.[6]

6. The "preferences" *Barnett* identified are the kinds of deviations from generally applicable disability-neutral workplace rules provided in Petitioner's Guidelines. But these preferences stop short of mandatory placement, thereby protecting the legitimate expectations of better-qualified individuals under Petitioner's Guidelines' best-qualified hiring mandate.

This Court's analysis does not suggest, much less dictate, that an accommodation is "reasonable" where it requires a more-qualified individual to be denied a position. To the contrary, *Barnett* suggests just the opposite: "a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees." *Id.* at 400.[7]

Moreover, in considering whether an exception from a unilaterally imposed seniority system was a reasonable accommodation, the *Barnett* Court explained that the typical seniority system "provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Barnett*, 535 U.S. at 404. But seniority systems are not unique among personnel policies capable of creating expectations of fair treatment, nor did this Court suggest otherwise. A bona fide best-qualified policy like Petitioner's can create the same expectation, and thus the same sense of entitlement, for the better-qualified individual. Indeed, this expectation that the best-qualified individual will ordinarily receive the position is so deeply entrenched in employer-employee relations that superior qualification is frequently the linchpin of a plaintiff's proof in discrimination cases alleging that his or her employer has acted unlawfully. See, *e.g.*, *Ash* v. *Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) ("[Q]ualifications evidence may suffice, at least in some

7. Under the Seventh, Tenth, and (possibly) D.C. Circuits' view of the ADA, most of the burden of the accommodation falls on the coworker or other individual with superior qualifications who would have received the job under the best-qualified policy. While, to be sure, the employer bears some of this burden in that it must accept a less-qualified individual in the job, it is the individual who would have had the job based on his or her superior qualifications whom the action affects most directly and most adversely.

circumstances, to show pretext."); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 187-88 (1989) (indicating that a plaintiff "might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position"), *superseded by statute on other grounds*, 42 U.S.C. § 1981(b).

The court of appeals' decision thus creates a potential Hobson's choice for employers faced with a minimally qualified disabled employee and a more-qualified employee competing for internal transfers to the same job—for example, a lawsuit under the ADA for failing to accommodate the disabled worker or a lawsuit under Title VII for failing to give the job to a black man, or a woman, or a Sikh with better qualifications.[8]

Like the ADA, other civil rights laws such as Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of

8. The prospect of a lawsuit under Title VII or an analogous discrimination law when an employer accommodates a disabled worker with a reassignment is significant. The dramatic expansion of the definition of "disability" under the ADAAA makes many "disabilities" less than obvious. Cf. 42 U.S.C. § 12102(4)(A) (App. 35-36) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."). The combination of disabling conditions that may have no outward manifestation and privacy laws that prevent employers from disclosing medical conditions may deprive employers who transfer minimally qualified disabled employees over better-qualified individuals of any meaningful way to articulate to a disappointed co-worker in a protected class the legitimate basis for what would otherwise appear to be unlawful discrimination.

1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, secure the rights of individuals not to be treated unfavorably by employers due to a protected characteristic. However, these laws do not require that individuals in a protected group be selected for a position over others outside the group by virtue of their protected status. To the contrary, as this Court has held:

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII); see also, *e.g.*, *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981).

This case presents an ideal vehicle for resolving the deepening circuit splits, clarifying *Barnett*'s discussion of "preferences," and defining an employer's "reasonable" accommodation responsibilities under the ADA. This Court should thus grant certiorari to decide the important and recurring question whether, unlike the other anti-discrimination statutes on which it was patterned, the ADA ordinarily requires, as the court of appeals determined, discrimination against a more-qualified individual and in favor of a disabled employee seeking an accommodation which would require an employer to deviate from its best-qualified selection policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11-1774

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

UNITED AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 10-cv-01699—Harry D. Leinenweber, Judge.

Argued October 20, 2011— Decided September 7, 2012

Before CUDAHY, KANNE, and SYKES, *Circuit Judges.*

CUDAHY, *Circuit Judge.* First, the procedural posture of this case requires brief discussion. An earlier version of this opinion suggested that rehearing en banc was warranted for the full court to consider overruling *EEOC* v. *Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000), in light of *U.S. Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002). The EEOC then petitioned for rehearing en banc, and United Airlines, Inc. filed a response. Thereafter, every

member of the court in active service approved overruling *Humiston-Keeling* and it was suggested that the panel use Circuit Rule 40(e) for that purpose. However, the usual formal en banc procedure involving argument to the full court was not pursued. We vacate the original panel opinion and now issue this opinion overruling *Humiston-Keeling*. We have circulated the new panel opinion to the full court under Rule 40(e), and no member of the court has asked to rehear the case en banc. With that procedural explanation, we now proceed to the merits.

In this case, the Equal Employment Opportunity Commission (EEOC) asks this court to change its interpretation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). The case turns on the meaning of the word "reassignment." The ADA includes "reassignment to a vacant position" as a possible "reasonable accommodation" for disabled employees. 42 U.S.C. § 12111(9). The EEOC contends that "reassignment" under the ADA requires employers to appoint employees who are losing their current positions due to disability to a vacant position for which they are qualified. However, this court has already held in *Humiston-Keeling*, 227 F.3d at 1029, that the ADA has no such requirement. The EEOC argues that the Supreme Court's ruling in *Barnett*, 535 U.S. at 391, undermines *Humiston-Keeling*. Several courts in this circuit have relied on *Humiston-Keeling* in post-*Barnett* opinions, though it appears that these courts did not conduct a detailed analysis of *Humiston-Keeling's* continued vitality. The present case offers us the opportunity to correct this continuing error in our jurisprudence. While we understand that this may be a close question, we now make clear that *Humiston-Keeling*

did not survive *Barnett*. We reverse and hold that the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. We remand with instructions that the district court determine if mandatory reassignment would be reasonable in the run of cases and if there are fact-specific considerations particular to United's employment system that would render mandatory reassignment unreasonable in this case.

In 2003, United Airlines set out Reasonable Accommodation Guidelines that address accommodating employees who, because of disability, can no longer do the essential functions of their current jobs even with reasonable accommodation. While the guidelines note that "transfer * * * [to] an equivalent or lower-level vacant position" may be a reasonable accommodation, the guidelines specify that the transfer process is competitive. Accordingly, employees needing accommodation will not be automatically placed into vacant positions but instead will be given preferential treatment. This allows employees needing accommodation to submit an unlimited number of transfer applications, be guaranteed an interview and receive priority consideration over a similarly qualified applicant—that is, if two candidates are equally qualified, the employee-applicant seeking accommodation will get the job.

The EEOC filed suit in San Francisco, alleging that United's policy violates the ADA. The district court granted United's motion to transfer the case to Illinois.

That district court granted United's motion to dismiss the suit under Rule 12(b)(6). The court noted that binding precedent, *Humiston-Keeling*, 227 F.3d at 1028-29, held that a competitive transfer policy does not violate the ADA. The court also rejected the EEOC's contention that the Supreme Court's decision in *Barnett* undermined *Humiston-Keeling*.

We review a dismissal under Rule 12(b)(6) *de novo*. *Tamayo* v. *Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). A complaint must provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). This court construes the complaint "in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the EEOC's] favor." *Tamayo*, 526 F.3d at 1081 (citing *Killingsworth* v. *HSBC Bank Nev.*, 507 F.3d 614, 618 (7th Cir. 2007)). We have jurisdiction to hear EEOC's appeal under 28 U.S.C. § 1291.

The district court noted that *Humiston-Keeling* is directly on point and has not been overruled by the Seventh Circuit. The district court is correct on both points. *Humiston-Keeling* involved a worker, Houser, who could no longer perform her conveyor job due to an injured arm. 227 F.3d at 1026. After taking a temporary greeter position, Houser applied for vacant clerical positions within the company but did not get any of these jobs. *Id.* The EEOC brought suit, arguing the "reassignment form of reasonable accommodation * * * require[s] that the disabled person be advanced over a

more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show undue hardship." *Id.* at 1027 (internal quotation marks omitted). This court rejected that assertion, holding the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question." *Id.* at 1029.

The EEOC invites this court to overturn *Humiston-Keeling*, arguing that *Barnett* undercuts the reasoning of *Humiston-Keeling*. In *Barnett*, the Supreme Court considered reassignment under the ADA in the context of a seniority system. 535 U.S. at 393-95. Robert Barnett injured his back while working as a cargo-handler for U.S. Airways. *Id.* at 394. He invoked seniority, not his disability status, and transferred to a mailroom position. *Id.* Later, at least two employees senior to Barnett intended to bid for the mailroom position. *Id.* Barnett argued he should be allowed to keep this position and claimed his reassignment was a reasonable accommodation mandated by the ADA because he was an individual with a disability capable of performing the essential functions of the mailroom job. *Id.* at 394-95.

The Supreme Court first noted that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'" *Id.* at 398 (emphasis in original). Instead, the Court outlined a two-step, case-specific

approach. The "plaintiff/employee * * * need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Id.* at 401. Once the plaintiff has shown he seeks a reasonable method of accommodation, the burden shifts to the defendant/employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402.[1] While Barnett's request for assignment to the mailroom was a "reasonable accommodation" within the meaning of the statute, the violation of a seniority system "would not be reasonable in the run of cases." *Id.* at 403. An "employer's

1. A helpful summary of the Barnett framework is provided in *Shapiro* v. *Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002):

> It therefore appears that the Court has prescribed the following two-step approach for cases in which a requested accommodation in the form of a job reassignment is claimed to violate a disability-neutral rule of the employer. The first step requires the employee to show that the accommodation is a type that is reasonable in the run of cases. The second step varies depending on the outcome of the first step. If the accommodation is shown to be a type of accommodation that is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case. On the other hand, if the accommodation is not shown to be a type of accommodation that is reasonable in the run of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.

showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to demonstrate that the accommodation sought is unreasonable. *Id.* at 405. However, the Court was careful to point out that it was not creating a per se exception for seniority systems, since "[t]he plaintiff * * * nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." *Id.*

The EEOC points out that U.S. Airways relied heavily on *Humiston-Keeling* and, more importantly, that the *Barnett* Court flatly contradicted much of the language of *Humiston-Keeling.* U.S. Airways argued that it was not required to grant a requested accommodation that would violate a disability-neutral rule, using the argument from *Humiston-Keeling* that the ADA is "not a mandatory preference act" but only a "nondiscrimination statute." 227 F.3d at 1028. The *Barnett* Court rejected this anti-preference interpretation of the ADA, noting that this argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." 535 U.S. at 397. Merely following a "neutral rule" did not allow U.S. Airways to claim an "automatic exemption" from the accommodation requirement of the Act. *Id.* at 398. Instead, U.S. Airways prevailed because its situation satisfied a much narrower, fact-specific exception based on the hardship that could be imposed on an employer utilizing a seniority system. *Id.* at 405.

The analysis of *Barnett*'s impact on *Humiston-Keeling* is further complicated by the fact that we are not the first panel to consider this issue. This court considered *Barnett*'s relationship to *Humiston-Keeling*, albeit in an abbreviated fashion and without the benefit of briefing, in *Mays* v. *Principi*, 301 F.3d 866 (7th Cir. 2002). In *Mays*, this court relied on *Humiston-Keeling* in finding that an employer did not violate the duty of reasonable accommodation in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq*., by giving an administrative nursing position to a better qualified applicant, rather than to a disabled employee needing reassignment.[2] *Mays*, 301 F.3d at 871-72. The *Mays* Court interpreted the recently handed down *Barnett* decision actually to bolster *Humiston-Keeling* by equating seniority systems with any other normal method of filling vacancies. *Id*. at 872.

> [*Barnett*] holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. If for "more senior" we read "better qualified," for "seniority system" we read "the employer's normal method of filling vacancies," and for "superseniority" we read "a break," *U.S. Airways* becomes our case.

Id. at 872 (internal citation omitted).

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2. Instead, the employer placed the disabled employee in a clerical position.

The EEOC argues, and we agree, that the *Mays* Court incorrectly asserted that a best-qualified selection policy is essentially the same as a seniority system. In equating the two, the *Mays* Court so enlarged the narrow, fact-specific exception set out in *Barnett* as to swallow the rule. While employers may prefer to hire the best qualified applicant, the violation of a best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy. To strengthen this critique, the EEOC points out the relative rarity of seniority systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.

The Supreme Court has found that accommodation through appointment to a vacant position is reasonable. Absent a showing of undue hardship, an employer must implement such a reassignment policy. The *Mays* Court understandably erred in suggesting that deviation from a best-qualified selection policy always represented such a hardship.

In any event, the *Barnett* framework does not contain categorical exceptions. On remand, the district court must conduct the *Barnett* analysis. In this case, the district court must first consider (under *Barnett* step one) if mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation.[3] Assuming that the district

3. We do not believe this step will cause the district court any great difficulty. This is the very accommodation analyzed in *Barnett*. There, the Supreme Court "assume[d] that normally such

court finds that mandatory reassignment is ordinarily reasonable, the district must then determine (under *Barnett* step two) if there are fact-specific considerations particular to United's employment system that would create an undue hardship and render mandatory reassignment unreasonable.

For its part, United argues that this court should not abandon *Humiston-Keeling*, in part because the Eighth Circuit explicitly adopted the reasoning of *Humiston-Keeling* in *Huber* v. *Wal-Mart*, 486 F.3d 480, 483-84 (8th Cir. 2007)*, reh'g en banc denied*, 493 F.3d 1002 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074, *cert. dismissed*, 552 U.S. 1136 (2008). The Eighth Circuit's wholesale adoption of *Humiston-Keeling* has little import. The opinion adopts *Humiston-Keeling* without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*.[4] Two of our sister Circuits have already determined that the ADA requires employers to appoint disabled employees to vacant positions, provided that such

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a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system." 535 U.S. at 403. There is no seniority system at issue here. However, we suppose it is possible there is some comparable circumstance of which we are unaware. We note for completeness that if mandatory reassignment is not ordinarily a reasonable accommodation, the EEOC can still prevail if it shows that special factors make mandatory reassignment reasonable in this case.

4. It is also worth noting that the Supreme Court granted certiorari in *Huber*, but the parties settled and the Supreme Court dismissed the case. 552 U.S. 1136 (2008).

accommodations would not create an undue hardship (or run afoul of a collective bargaining agreement): the Tenth in *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc) and the D.C. in *Aka* v. *Washington Hospital Center*, 156 F.3d 1284, 332 U.S. App. D.C. 256 (D.C. Cir. 1998) (en banc). We feel that in light of *Barnett*, pursuant to Circuit Rule 40(e) as suggested under the procedure described above, we must adopt a similar approach.

For the foregoing reasons, the judgment of the district court is REVERSED and we REMAND this matter to the district court for further consideration consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11-1774

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

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Defendant-Appellee.

Appeal from the United States District Court
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No. 10-cv-01699—**Harry D. Leinenweber**, *Judge.*

Argued October 20, 2011—Decided March 7, 2012

Before CUDAHY, KANNE, and SYKES, *Circuit Judges.*

CUDAHY, *Circuit Judge.* In this case, the Equal Employment Opportunity Commission (EEOC) asks this court to change its interpretation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). The EEOC contends that the ADA requires employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified. However, this court has already held, in

EEOC v. *Humiston-Keeling*, 227 F.3d 1024, 1029 (7th Cir. 2000), that the ADA has no such requirement. The EEOC argues that the Supreme Court's ruling in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002), undermines *Humiston-Keeling*. Several courts in this circuit have relied on *Humiston-Keeling* in post-*Barnett* opinions, though it appears that these courts did not conduct a detailed analysis of *Humiston-Keeling*'s continued vitality. In accordance with this circuit's case law, we affirm the district court's holding that the ADA does not mandate reassignment. However, this circuit might reconsider the impact of *Barnett* on *Humiston-Keeling*.

In 2003, United Airlines set out Reasonable Accommodation Guidelines that address accommodating employees who, because of disability, can no longer do the essential functions of their current jobs even with reasonable accommodation. While the guidelines note that "transfer * * * [to] an equivalent or lower-level vacant position" may be a reasonable accommodation, the guidelines specify that the transfer process is competitive. Accordingly, an employee will not be automatically placed into a vacant position. Instead, employees needing accommodation will be given preference, meaning they can submit an unlimited number of transfer applications, they are guaranteed an interview and they will receive priority consideration over a similarly qualified applicant.

The EEOC filed suit in San Francisco, alleging that United's policy violates the ADA. The district court granted United's motion to transfer the case to Illinois. The district court granted United's motion to dismiss

the suit under Rule 12(b)(6). The district court noted that binding precedent, *EEOC* v. *Humiston-Keeling*, 227 F.3d 1024, 1028-29 (7th Cir. 2000) held that a competitive transfer policy does not violate the ADA. The court also rejected the EEOC's contention that the Supreme Court's decision in *US Airways, Inc.* v. *Barnett*, 535 U.S. 391 (2002) undermined *Humiston-Keeling*.

This court reviews a dismissal under Rule 12(b)(6) *de novo*. *Tamayo* v. *Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). A complaint must provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2002) (*quoting Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). This court construes the complaint "in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the EEOC's] favor." *Tamayo*, 526 F.3d at 1081 (*citing Killingsworth* v. *HSBC Bank Nev.*, 507 F.3d 614, 618 (7th Cir. 2007)). We have jurisdiction to hear EEOC's appeal under 28 U.S.C. § 1291.

The district court noted that *Humiston-Keeling* is directly on point and has not been overruled by the Seventh Circuit. The district court is correct on both points. *Humiston-Keeling* involved a worker, Houser, who could no longer perform her conveyor job due to an injured arm. 227 F.3d at 1026. After taking a temporary greeter position, Houser applied for vacant clerical positions within the company. However she did not get any of these jobs. *Id.* The EEOC brought suit, arguing the "reassignment form of reasonable accommodation

* * * require[s] that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show undue hardship." *Id.* at 1027 (internal quotation marks omitted). This court rejected that assertion, holding the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question." *Id.* at 1029.

As there is a controlling case directly on point, the EEOC must convince this court to overrule its prior decision. This is no easy task. The doctrine of *stare decisis* holds that "the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases." *Tate* v. *Showboat Marina Casino P'ship*, 431 F.3d 580, 583 (7th Cir. 2005). The EEOC's interpretation may in fact be a more supportable interpretation of the ADA, and here we think that this is likely. However, the EEOC must do more to force an abandonment of *stare decisis*. In order to provide this court with a compelling reason to deviate from precedent, the EEOC must show that *Humiston-Keeling* is inconsistent with an onpoint Supreme Court decision or is otherwise incompatible with a change in statutory law.

The EEOC invites this court to overturn *Humiston-Keeling*, arguing that *Barnett* undercuts the reasoning of *Humiston-Keeling*. In *Barnett*, the Supreme Court considered reassignment under the ADA in the context of a seniority system. 535 U.S. at 393-95. Robert Barnett

injured his back while a cargo-handler for U.S. Airways. He invoked seniority and transferred to a mailroom position. *Id.* at 394. Later, at least two employees senior to Barnett intended to bid for the mailroom position. *Id.* Barnett claimed that because he was an individual with a disability capable of performing the essential functions of the mailroom job, the mailroom job was a reasonable accommodation mandated by the ADA. *Id.* at 394-95.

The Supreme Court first noted that "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'" *Id.* at 398 (emphasis in original). Instead, the Court outlined a case-specific approach: Once the plaintiff has shown he seeks a reasonable method of accommodation, "the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 403. While Barnett's request for assignment to the mailroom was a "reasonable accommodation" within the meaning of the statute, the violation of a seniority system would present an undue hardship to any employer. *Id.* at 403.

The EEOC points out that US Airways relied heavily on *Humiston-Keeling* and, more importantly, that the Court flatly contradicted much of the language of *Humiston-Keeling* in *Barnett.* US Airways argued that it was not required to grant a requested accommodation that would violate a disability-neutral rule, picking up

the argument from *Humiston-Keeling* that the ADA is "not a mandatory preference act" but only a "non-discrimination statute." The Court rejected this anti-preference interpretation of the ADA, noting that this argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." 535 U.S. at 397. Merely following a "neutral rule" did not allow US Airways to claim an "automatic exemption" from the accommodation requirement of the Act. *Id.* Instead, US Airways prevailed because its situation satisfied a much narrower exception based on the hardship that would be imposed on an employer utilizing a seniority system.

While EEOC's argument may be persuasive, the analysis of *Barnett*'s impact on *Humiston-Keeling* is further complicated by the fact that we are not the first panel to consider this issue. This court has previously considered *Barnett*'s relationship to *Humiston-Keeling*, albeit in an abbreviated fashion without the benefit of briefing. In *Mays* v. *Principi*, 301 F.3d 866 (7th Cir. 2002), this court relied on *Humiston-Keeling* in finding that an employer did not violate the duty of reasonable accommodation in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, by giving an administrative nursing position to a better qualified applicant, rather than to a disabled employee needing reassignment.[1] *Mays*, 301 F.3d at 871-72. The *Mays* Court noted that the recently handed down *Barnett* decision actually bolstered *Humiston-Keeling.*

1. Instead, the employer placed the disabled employee in a clerical position.

In so doing, the *Mays* Court equated seniority systems with any normal method of filling vacancies. "[*Barnett*] holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when a more senior employee invokes an entitlement to it conferred by the employer's seniority system. If for 'more senior' we read 'better qualified,' for 'seniority system' we read 'the employer's normal method of filling vacancies,' and for 'superseniority' we read 'a break,' *U.S. Airways* becomes our case." *Id.* at 872 (internal citation omitted).

The EEOC argues that the *Mays* Court's assertion that a best-qualified selection policy is essentially the same as a seniority system is simply wrong. In equating the two, the *Mays* Court so enlarges the narrow exception set out in *Barnett* as to swallow the rule. To bolster this critique, the EEOC points out the relative rarity of seniority systems and the distinct challenges of mandating reassignment in a system where employees are already entitled to particular positions based on years of employment.

But the *Mays* Court is not the only court to treat *Humiston-Keeling* as good law. On two other occasions after the Supreme Court's ruling in *Barnett*, this court has relied on *Humiston-Keeling*: *Craig* v. *Potter*, 90 F. App'x 160 (7th Cir. Feb. 20, 2004), and *King* v. *City of Madison*, 550 F.3d 598 (7th Cir. 2008).[2] In short, this court has made no move to abandon *Humiston-Keeling* after *Barnett*, bolstering the district court's conclusion that *Barnett* does not overrule or undermine *Humiston-Keeling*. While

2. However, neither of these cases mentions *Barnett*.

these decisions have not provided detailed analysis, their mere existence and consistent interpretations compel this court to find that *Humiston-Keeling* remains good law.

The EEOC asks us to adopt the position of our sister Circuits, the Tenth in *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*) and the D.C. in *Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284, 332 U.S. App. D.C. 256 (D.C. Cir. 1998) (*en banc*), holding that the ADA requires reassignment to vacant positions. The EEOC argues that both decisions conduct a more thorough analysis of the statutory language and legislative history of the ADA than this court did in *Humiston-Keeling*. But this argument cannot do much work, for the EEOC is merely returning to its position that this court in *Humiston-Keeling* misinterpreted the ADA. Instead, the EEOC must show that this court's established interpretation of the ADA in *Humiston-Keeling* is no longer viable after *Barnett*.

For its part, United argues that this court should not abandon *Humiston-Keeling*, in part because the Eighth Circuit explicitly adopted the reasoning of *Humiston-Keeling* in *Huber* v. *Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). The Eighth Circuit's wholesale adoption of *Humiston-Keeling* has little import. The opinion adopts *Humiston-Keeling* without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*. A circuit split will remain even if this court adopts the position of the Tenth and D.C. Circuits. However, there is no harm in lessening this split if, in fact, *Barnett* undermines *Humiston-Keeling*. In that respect, the present panel

of judges strongly recommends *en banc* consideration of the present case since the logic of EEOC's position on the merits, although insufficient to justify departure by this panel from the principles of *stare decisis*, is persuasive with or without consideration of *Barnett*.

This court has previously determined that *Barnett* does not conflict with *Humiston-Keeling*. Courts within this circuit have continued to cite *Humiston-Keeling* favorably. As *Humiston-Keeling* is still good law and directly on point, the district court rightly concluded that the ADA does not require employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified. For this reason, the judgment of the district court is AFFIRMED.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Harry D. Leinenweber
Sitting Judge if Other than Assigned Judge

CASE NUMBER
10 C 1699

DATE
2/3/2011

CASE TITLE
EEOC vs. United Air Lines

DOCKET ENTRY TEXT

For the reasons stated in open court, defendant's motion to dismiss plaintiff's second amended complaint for failure to state a claim, is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 10 C 1699

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

Chicago, Illinois
February 3, 2011
9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D.
LEINENWEBER

[2] (Proceedings had in open:)

THE CLERK: 10 C 1699, *Equal Employment Opportunity Commission* v. *United Air Lines, Inc.*

THE COURT: Before this Court is Defendant's motion to dismiss Plaintiff's Second Amended Complaint

for failure to state a claim. For the reasons that follow, the motion is granted.

Background: Plaintiff Equal Employment Opportunity Commission alleges in its Second Amended Complaint that Defendant United Air Lines, Inc., is in violation of the Americans with Disabilities Act, "ADA," because its guidelines require qualified employees with disabilities to compete for vacant positions that are needed as a reasonable accommodation. Under Defendant's guidelines, in order to receive priority consideration for placement in a vacant position as an accommodation, a disabled employee must be at least tied in qualifications with the best applicant. The ADA prohibits employers from discriminating on the basis of disability. Included in its definition of discrimination is the failure to make reasonable accommodations for a disabled employee, including reassignment to a vacant position. 42 U.S.C. 12111 (9)(B), 12112(b)(5)(A).

Defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant contends that Plaintiff can [3] prove no set of facts entitling it to relief because this Court is bound to follow the Seventh Circuit's ruling in *EEOC* v. *Humiston-Keeling, Inc.* In *Humiston-Keeling*, the Court held that the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." 227 F.3d 1024, 1029 (2000). Plaintiff makes no allegation that Defendant's policy is spurious or inconsistently applied.

Analysis: In *Humiston-Keeling*, the Seventh Circuit rejected a claim by the EEOC that is identical to the one in this case, namely that the reassignment provision of the ADA requires that a disabled employee receive a position over a more qualified nondisabled employee as long as the disabled employee is capable of performing the work required for the position. The Court held that such an interpretation would convert the ADA from a non-discrimination law into a "mandatory preference" law and would be inconsistent with the aims of the ADA. Rather, the Seventh Circuit interpreted the reassignment provision as requiring the employer to consider whether it is possible to assign the disabled worker to another position in which his or her disability will not be a hindrance. If such a reassignment is feasible, and there are no other superior applicants, then the ADA mandates reassignment. 227 F.3d at 1027-29.

[4] The circuits are split as whether reassignment is mandatory under the ADA. For example, the Tenth Circuit has held that reassignment must be offered to a disabled employee regardless of whether there are better qualified applicants. *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1167 (1999). But the Eighth Circuit has held that reassignment under the ADA requires only that an employer allow a disabled worker to compete for the job desired as an accommodation. *Huber* v. *Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (2007).

Generally, even when there is disagreement among the circuits, this Court is bound to follow Seventh Circuit precedent. *See U.S. ex rel. Rice* v. *Cooper*, 95 C 5507,

1997 WL 282734, at *4 (N.D. Ill. May 16, 1997). Plaintiff argues, however, that *stare decisis* does not apply because *Humiston-Keeling* has been overruled or at the very least undermined by the United States Supreme Court in *U.S. Airways* v. *Barnett*, 535 U.S. 391 (2002). In *Barnett*, the Supreme Court held that ordinarily, an accommodation is not reasonable if it conflicts with the rules of an employer's seniority system. However, in so ruling, the Court rejected defendant's argument that the ADA never requires an employer to grant an accommodation to a disabled employee if test accommodation would violate a disability neutral rule. The Court reasoned that preferences for disabled employees in the form of reasonable accommodations are sometimes necessary to carry out [5] the goals of the ADA, even if the difference in treatment violates an employer's disability neutral rule. As examples, the Court noted that neutral workplace rules limiting break time or furniture expenses may require exceptions for disabled employees. 535 U.S. at 394-97.

However, the high Court in *Barnett* did not face the precise issue presented here: Whether a disabled employee must be given a preference in obtaining a vacant position where the employer has guidelines requiring that vacant positions go to the best qualified applicant. Further, the Court noted that the ADA "requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy." *Barnett*, 535 U.S. at 397. The Seventh Circuit has consistently drawn a distinction between requiring employers to eliminate obstacles to

hiring disabled employees and requiring employers to hire disabled employees even in the face of superior applicants. *Humiston-Keeling*, 227 F.3d at 1028-29.

Barnett did not explicitly overrule *Humiston-Keeling* and it is far from clear that it did so implicitly. In face, in a Rehabilitation Act case, applying the same standards as are used for an ADA claim, the Seventh Circuit described *Barnett*'s holding regarding seniority rules as "bolster[ing]" the *Humiston-Keeling* rule. *Mays* v. *Principi*, 301 F.3d 866, 872 [6] (7th Cir. 2002). Since then, the Seventh Circuit has continued to cite *Humiston-Keeling* with favor. *See King* v. *City of Madison*, 550 F.3d 598, 600-01 (2008) (finding employer provided reasonable accommodation for disabled employee who failed to obtain a job outside her bargaining unit because she was not the most qualified applicant); *Craig* v. *Potter*, 90 F. App'x 160, 163 (2004) (holding in a Rehabilitation Act case that it would be unreasonable to force employer to abandon its policy of hiring the best applicant). This Court is bound to follow those rulings.

As additional support for its argument, Plaintiff points to the EEOC's regulations interpreting a reasonable accommodation as including reassignment to a vacant position. 29 C.F.R. 1630.2(o)(2)(ii). The EEOC has interpreted the reasonable accommodation requirement as requiring more than just that the disabled employee be allowed to compete for a vacant position. Rather, under the EEOC's interpretation, "reassignment means that the employee gets the vacant position" if qualified for it. "Otherwise, reassignment would be of little value

and would not be implemented as Congress intended." Enforcement Guidance, http://www.eeoc.gov/policy/docs/accommodation.html. Plaintiff argues this Court should defer to its interpretation of the reassignment provision.

However, agency interpretations are entitled to [7] deference only where the intent of Congress is unclear. *Chevron* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). In *Humiston-Keeling*, the Seventh Circuit found no ambiguity in the reassignment provision and expressly rejected the same interpretation that the EEOC puts forward today. It found the reassignment provision is not rendered meaningless simply because reassignment is not mandatory whenever the disabled employee is minimally qualified for the position. Rather, the Court held, the provision serves to obligate the employer to consider the possibility of reassignment to another position, rather than merely undertaking efforts to help the worker do the job for which he or she was hired. Further, the law mandates reassignment whenever it is feasible and there is no superior applicant. 227 F.3d at 1027-28.

A complaint should be dismissed under Rule 12(b)(6) only if it is clear that the "plaintiff can prove no set of facts in support of her claim that would entitle her to relief." *Doherty* v. *City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996). Given that *Humiston-Keeling* is directly on point and has not been overruled by the Seventh Circuit, this is such a case.

Conclusion: Defendant's motion to dismiss is granted.

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings. The Congress finds that

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability

have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(a) Findings. Congress finds that

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes. The purposes of this Act are

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning

of the Supreme Court in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Sec. 12102. Definition of disability

As used in this chapter:

(1) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major Life Activities

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of

individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

Sec. 12103. Additional definitions. As used in this chapter

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I - EMPLOYMENT

Sec. 12111. Definitions

As used in this subchapter:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that

cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 *et seq.*]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual. The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing

applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include

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

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Sec. 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuates the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the

known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that

impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitute discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Sec. 12113. Defenses

(a) In general. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise

deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification standards and tests related to uncorrected vision. Notwithstanding section 12102(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(d) Religious entities

(1) In general. This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this subchapter, a religious organization may require that

all applicants and employees conform to the religious tenets of such organization.

(e) List of infectious and communicable diseases

(1) In general. The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications. In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable

accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

Sec. 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability. For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity. A covered entity

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;

and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment

in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general. For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees. Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

Sec. 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

Sec. 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

Sec. 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination. The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 *et seq.*] shall

develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.