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Reasonable Accommodation After *Barnett*

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Reasonable Accommodation after *Barnett*

Synopsis

In the recent decision of *U.S. Airways, Inc., v. Barnett*, the U.S. Supreme Court addressed the interaction of job reassignment under the ADA and employer seniority systems and concluded that in most situations, seniority rights should be given presumptive priority over the reassignment of employees with disabilities. The decision is troubling because it allows employers to evade providing accommodations that do not cause an "undue hardship," by endorsing a separate "reasonableness" standard into the law's requirement for reasonable accommodation. While the "undue hardship" defense was extensively studied and specific factors negotiated during the legislative process, the "reasonableness" standard created by the Court is subject to subjective and therefore arbitrary decision making. This is all the more problematic because the U.S. Supreme Court reasoning is being stretched by the lower courts beyond the situation of seniority or even employment. This paper will address the implications of *Barnett* by examining the impact of the decision on recent appellate cases. The paper concludes with a brief discussion of some of the larger economic and social issues raised when historically established employment priorities such as seniority are accorded precedence over the civil rights goals of the ADA.

Introduction

Title I of the Americans with Disabilities Act (ADA)[1] was intended to level the employment playing field in the United States for people with disabilities,[2] and critical to this goal is the right to reasonable accommodation[3]. By enumerating a list of possible accommodations available under the ADA and explicitly including "reassignment,"[4] Congress differentiated between the meaning and scope of reasonable accommodation under the ADA and prior court interpretations of the same term under the Rehabilitation Act.[5] Title I also enlarged the scope of the Rehabilitation Act's non-discrimination mandate by applying it to the private sector as well as the public sector,[6] and by making it clear that the obligations of the law extended to *all* major players in the workforce, including labor unions.[7] Furthermore, the ADA—unlike Title VII of the Civil Rights Act[8] and the Age Discrimination in Employment Act (ADEA)[9]—does *not* make any exemption for the provision of reasonable accommodation due to the operation or requirements of bona fide seniority systems.

Most courts faced with apparent conflict between the ADA's reasonable accommodation rights and collectively bargained rights have maintained a traditional preference for giving priority to collectively bargained rights despite the ADA's stated legislative goals, broader mandate, and indications from the Congressional record.[10] In the twelve years since the ADA's enactment, numerous scholars have called attention to the possibility for conflict between the ADA and the National Labor Relations Act (NLRA)[11] and have called on courts to clarify how job reassignment under the ADA interacts with seniority-imposed priorities for filling

employment vacancies.[12]

In *U.S. Airways, Inc., v. Barnett*,[13] the U.S. Supreme Court finally addressed the interaction of job reassignment under the ADA and seniority systems. The case did not involve collective bargaining or union rights, though for the general public and most of the media, this detail was lost in the mis-characterization of the decision as a stark confrontation between seniority rights and disability rights[14]. The Supreme Court's reasoning, while not appearing to give a complete victory to seniority systems over job reassignment for employees with disabilities, ignores certain aspects of the congressional record, and gives lower courts an almost unfettered discretion to extrapolate from *Barnett*'s holding on reasonable accommodation, vis a vis seniority systems, to any other accommodations that could have an impact on fellow employees. Moreover, the decision's implications potentially stretch beyond Title I and employment issues to other rights recognized under the ADA.

This paper will examine the implications of the *Barnett* decision, especially in light of prior circuit court decisions on reasonable accommodation, and look at how subsequent cases are interpreting *Barnett*. The paper will then address some of the larger issues raised by the case; what happens when the employment and economic goals of the ADA seem to clash with already established economic priorities and expectations; who has the higher "right" to a job when demand is higher than supply? If—as the legislative history acknowledges—people with disabilities have been economically and socially marginalized for decades, how could a place be made for these millions of previously excluded people without having *any* effect on those who are already *within* the economic mainstream?

Barnett **and Seniority**

The facts in *Barnett* raised a conflict between a worker's job reassignment under the reasonable accommodation provisions of the ADA and an employer's seniority rules. Robert Barnett had been employed as a cargo handler for U.S. Airways for ten years when he injured his back, thereafter transferring under U.S. Airways' unilaterally adopted personnel policy to a less physically demanding mailroom position that accommodated his disabilities. Two years later, Barnett learned that his position was going to become open for bid under the seniority system established under that same personnel policy. He also learned that two employees with greater seniority intended to bid for his mailroom job. Barnett asked U.S. Airways to not place the mailroom position up for bid as an accommodation to Barnett's disability. After some months of consideration, U.S. Airways rejected his request, refusing also to provide alternative accommodations such as lifting equipment that could have enabled Barnett to perform a cargo position job for which he had adequate seniority. Barnett lost his job and brought an action under Title I of the ADA. The district court granted U.S. Airways summary judgment upon concluding that modification of a seniority system constitutes per se "undue hardship" under the ADA to both the employer and other non-disabled employees. The district court's decision was affirmed

on appeal to the 9th Circuit [15] and subsequently reversed in an en banc rehearing. The en banc panel concluded that the presence of a seniority system was only one factor to consider in the undue hardship analysis.[16]

The U.S. Supreme Court framed the issue before them as a potential conflict between "the interests of a disabled worker who seeks assignment to a particular position as a 'reasonable accommodation'" and "the interests of other workers with superior rights to bid for the job under an employer's seniority system."[17] The majority decision resolved this conflict not by analyzing the statutory factors set forth to determine whether an accommodation would pose an "undue hardship,"[18] but instead, imported a "reasonableness" standard from the term "reasonable accommodation." The court stated:

> The statute does not require proof on a case-by-case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.[19]

The seniority system and personnel policy at issue in *Barnett* was one that had been unilaterally adopted by an employer. The U.S. Airways Agent Personnel Policy Guide stated that it was not intended to be a contract, and did not create legally enforceable obligations for continued employment. U.S. Airways reserved the right to change any and all of its stated policies and procedures at any time without advance notice.[20] The Supreme Court was not required to read these facts as an actual or potential conflict between the rights of employees since the seniority system in this case did not purport to give any employee vested or legally enforceable rights that could interfere with the accommodation rights given by the ADA.[21] The Supreme Court's intention to develop a new interpretive approach that encompassed not only the interaction of seniority rights and job reassignment, but also the concept of reasonable accommodation is signaled by its decision to read the central issue as a direct conflict between the rights of employees, and its subsequent bypassing of any need for analyzing seniority under the employer's undue hardship defense.

Barnett **and Reasonable Accommodation**

The term "reasonable accommodation" is a term of art that was previously used in the Rehabilitation Act Section 504 regulations. It describes types of accommodations which an employee with a disability may need in order to have an equal opportunity to succeed in an employment position.[22] The focus of the phrase has always been employee need.[23] The phrase "undue hardship," which established a limit to an employer's obligation to provide reasonable accommodation, was also taken from the Section 504 regulations. Virtually all discussion and debate about how an employer could defend itself against a claim for accommodation centered around the "undue hardship" definition.[24] In other words, "reasonable" was never considered by

Congress or the drafters of the legislation as an independent modifier for the kinds of accommodation that employers were legally obligated to provide under the ADA.

A number of circuit courts had considered aspects of reasonable accommodation, including Congress's understanding of the legislative scheme, prior to *Barnett*, though not always within the context of seniority.[25] In developing a new approach to reasonable accommodation, the Supreme Court conclusively addressed some of the issues that previous circuit decisions had raised and about which no judicial consensus had previously emerged. First, the Court firmly acknowledged that an accommodation cannot automatically be deemed unreasonable merely because it requires the employer to give a "preference"—in the sense of different treatment—to employees with disabilities. Second, the court gave independent significance to "reasonable" as a modifier of accommodation. In the majority opinion of Justice Breyer:

> The 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."
> . . . .
> . . . in ordinary English the word "reasonable" does not mean "effective." It is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. . . . The statute refers to an "undue hardship on the operation of the business." Yet a demand for an ineffective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees – say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.[26]

The ADA states in considerable detail the kinds of financial, administrative and structural factors that courts should consider when deciding whether an accommodation will place an undue hardship on employers.[27] The ADA's legislative history also shows that Congress considered, and chose not to include as "reasonable," certain kinds of effective accommodations, even though their provision might not cause undue hardship in specific circumstances (i.e., redistributing essential functions, creating new positions, providing personal prosthetic devices.)[28] Neither the legislative text nor history mention modification of seniority policies as inherently unreasonable, yet the Supreme Court concluded that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable'."[29]

The determination that accommodations under the ADA must be "reasonable" *as well as* not impose an undue hardship on employers, immediately raises at least two further questions. First, what are the criteria by which "reasonable" will be judged? Second, what is the impact of this finding on the evidentiary burden carried by plaintiff employees who must establish that

their requests are reasonable accommodations—are employees placed in the difficult position of having to prove the *absence* of any negative effect on an employer's personnel policies or on other employees? While these questions are clearly related, this paper will first consider how they have been answered previously by two circuit courts, and then look more closely at the implications of the Supreme Court's opinion on the issues.

The 7th Circuit in *Vande Zande v. State of Wisconsin Department of Administration*[30] was the first circuit court to import considerations of proportionality into the term "reasonable." *Vande Zande* involved an employee whose paralysis made her prone to developing pressure ulcers that required home stay for several weeks. During one such period, Vande Zande worked from home for eight weeks using a laptop computer, and was provided with enough work to be able to make up all but 16.5 hours of full time work. She then had to make up the 16.5 hours out of sick leave, which she could otherwise have carried forward indefinitely. Vande Zande also worked on a floor in which the pre-ADA built kitchen sink was set two inches higher than the 34 inches convenient for a person in a wheelchair, though she did have access to a nearby bathroom sink that was 34 inches high. While Vande Zande's workplace made some accommodations for her disability, her supervisor refused to provide Vande Zande with a desktop computer for her home (which she believed would enable her to make up all her full time hours during periods of home stay) and would not spend approximately $150 to lower the kitchen sink on Vande Zande's floor.

The district court entered summary judgment for the employer, and the 7th Circuit affirmed the decision on the grounds that the employee's requested accommodations were not "reasonable" as a matter of law. Employers were not required "to expend even modest amounts of money to bring about an absolute identity in working conditions between disabled and nondisabled workers," but were only obligated to do "what is necessary to enable the disabled worker to work in reasonable comfort."[31] This declaration seems to establish an amorphous "reasonable comfort" limitation on accommodations, one that is wholly disconnected from the employer's undue hardship defense, and not even clearly connected to the employee's subjective comfort level or freedom from discrimination at work. What is the standard for deciding when a worker with a disability is able to work "in reasonable comfort"?[32]

An example of the arbitrariness of the "reasonable" standard is the court's assumption that the plaintiff's request to periodically work at home as an accommodation to flare ups in her disability was not reasonable. The court simply stated, without any evidentiary proof, that "[m]ost jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance. This will no doubt change as communications technology advances, but is the situation today. . . . An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."[33] This pronouncement came during a decade of rapidly expanding telecommunications options that allowed many different kinds of employees the

option of performing their work functions outside of a centralized workplace. Even without a desktop computer, the plaintiff in *Vande Zande* managed to work all but 16.5 hours out of her home in an eight week period. It is difficult to understand how the court could then draw the conclusion that it is generally not reasonable to allow employees to work at home.

In its analysis, the *Vande Zande* court rejected the contention that "reasonable accommodation" is a term that collectively means only an apt or efficacious modification required by the employee with a disability. Instead the court advanced the idea that "'reasonable' may be intended to qualify (in the sense of weaken) 'accommodation' in just the same way that if one requires a 'reasonable effort' of someone this means less than the maximum possible effort, or . . . requires something less than the maximum possible care."[34] The court reasoned that even if an accommodation would not be an "undue hardship" on the employer it could still be unreasonable. The court compares costs to the relative benefit to the employee, a consideration which is not a factor in the undue hardship analysis.[35] Ultimately , the court found that:

> [C]osts enter at two points in the analysis of claims to an accommodation. The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health.[36]

Subsequently, in *Aka v. Washington Hospital Center*,[37] the D.C. Circuit Court considered the issue of the potential priority conflict between reasonable accommodation requirements and requirements of collective bargaining agreements. The majority in this en banc decision did not address the particulars of which factors could be considered under a determination of whether a requested accommodation is "reasonable." The majority simply decided that reassignment to a vacant position in the particular case did not *necessarily* require violation of the collective bargaining agreement in question, and was therefore not *prima facie* unreasonable. Thus, it also did not constitute grounds for granting summary judgment. In *Aka*, the full D.C. Circuit considered "reasonable accommodation" in the context of Plaintiff's status as an employee who had worked for 19 years as an operating room orderly before undergoing bypass surgery, after which, he was restricted to work that involved a "light or moderate level of exertion." The hospital employer declined to transfer the plaintiff to a job compatible with his medical restrictions. Plaintiff was instructed to apply for vacant jobs as the hospital posted them. The district court granted summary judgment to the employer on a number of grounds.[38] The court found that the hospital's collective bargaining agreement prevented the hospital from reassigning employees with disabilities outside of the agreement's usual job-application process. Any conflict between the job reassignment obligations under the ADA and other employees' rights under the collective bargaining agreement had to be resolved in favor of the agreement.[39] On appeal, a majority of the 7th Circuit panel reversed the reasonable accommodation decision.[40] The

hospital moved for a rehearing en banc. The panel decision was upheld by a majority of the full circuit.

The full D.C. Circuit refused to assign priority to either the collective bargaining agreement or the ADA based on a finding of insufficient facts to determine if a conflict existed in the case before them. Implicit in this decision is the understanding that there is no pre-existing legal principle that automatically gives priority to either the ADA or the collective bargaining agreement in the event of a conflict between the action that each requires of employers. According to the D.C. Circuit, such a conflict should be determined and resolved on a case-by-case factual analysis. The majority then applied this understanding by first analyzing the hospital's collective bargaining agreement. In particular, the circuit court noted that the collective bargaining agreement contained a provision stating that any employee who became disabled and consequently unable to perform a job "shall be reassigned to another job he is able to perform whenever, in the sole discretion of the Hospital, such reassignment is feasible and will not interfere with patient care or the orderly operation of the Hospital." The circuit court also reasoned that whenever possible, collective bargaining agreements should be interpreted so as to be consistent with other federal laws. Since the collective bargaining agreement seemed to give the employer the discretion and right to reassign employees with disabilities in at least some circumstances, there was no need to consider whether the agreement would allow for reassignment in every case where it is mandated by the ADA.

Second, the D.C. Circuit Court refuted the hospital's interpretation of the ADA's text. In so doing, it was pointed out that "reassign" under the ADA "must mean more than allowing an employee to apply for a job on the same basis as everyone else."[41] Additionally, the circuit court emphasized that since the ADA already prohibits discrimination in job application procedures, such a narrow interpretation of "reassignment" would render the provision meaningless as a reasonable accommodation. Furthermore, the court rejected the hospital's argument that the ADA can never be interpreted so as to require employers to give a "preference" to an employee with a disability. The majority acknowledged the legislative history's warning against giving preferences to *applicants* with disabilities, but distinguished this from "[t]he ADA's reasonable accommodation requirement [which] treats disabled and non-disabled employees differently." Different treatment under the ADA is not prohibited merely because it could be interpreted as a "preference." The majority reasoned that such actions "need not always be highly disruptive to an employer's operations or seriously infringe the interests of other employees."[42]

The *Aka* decision did not address key issues concerning reasonable accommodation under the ADA, such as how evidentiary presumptions are raised and overcome by the parties and the extent to which courts can consider non-cost-related factors when addressing whether a request for a reasonable accommodation can be denied. However, the decision established an interpretive approach that recognized both the ADA's legislative history and the structural intentions of its drafters. The fact that a requested accommodation may require different treatment for employees with disabilities was acknowledged, and the D.C. Circuit did not grant

independent significance to "reasonable" as a modifier of accommodations. Most importantly, the court refused to allow the mere possibility of conflict with a collective bargaining agreement, in and of itself, to overcome the accommodation mandate of the ADA. In this regard, even the 7th Circuit in *Vande Zande* did not adopt hard and fast rules for deciding when a requested accommodation would not be "reasonable" and therefore not required. Instead, both circuits emphasized a flexible need for proportionality.

Barnett **Aftermath**

Criteria for "Reasonable"

By importing a reasonableness standard without definition, the Supreme Court creates, rather than eliminates or reduces, uncertainty in the ADA about when accommodations are required. The issues in *Barnett* concerned seniority systems and the majority's decision emphasized "the importance of seniority to employee-management relations" and the benefits of "creating, and fulfilling, employee expectations of fair, uniform treatment."[43] However, now that the door is open, the reasonableness standard can be used outside of the seniority context.

The extent to which the *Barnett* analysis could be extended outside of the seniority system analysis is demonstrated in *Mays v. Principi.*[44] In the case, Mays, a staff nurse employed by Department of Veterans Affairs (VA), injured her back and was subsequently placed on a 10 lb. lifting restriction. She was reassigned to a clerical job rather than to a nursing position that did not require patient care. Mays brought action under the ADA for a failure to provide reasonable accommodation. The 7th Circuit Court affirmed the district court's granting of summary judgment to the VA, finding support in:

> [A] recent decision of the Supreme Court [*Barnett*] which 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.[45]

By simply equating "normal method of filling vacancies" with a "seniority system," the decision bypasses any analysis of the employer's "normal method." Seniority rights have an established and historic place in employee-management relations, a judicial history of consideration,[46] and a self-evident effect on the expectations and potentially legal rights of other employees. The manner in which the VA's administration chose to fill vacancies, especially the particular vacancies in question in *Mays v. Principi*, generally may or may not have shared these factors in common with seniority systems. However, the 7th Circuit Court did not even seem to find it necessary to make the analysis.

This lack of critical analysis is especially ominous given the VA's apparent lack of information concerning the existence, requirements, and availability of nursing positions in the VA that did not require patient care. The 7th Circuit Court ruled for the VA merely because it claimed to have better qualified applicants rather than existing employees with a legal right or expectation to the positions in question. In other words, the 7th Circuit ruled against Mays' request for accommodation because even "assuming that she was qualified for such a job, if nevertheless there were better qualified applicants—the evidence is uncontradicted that there were—the VA did not violate its duty of reasonable accommodation by giving the job to them instead of to her."[47]

Fortunately, other circuit courts have not taken *Barnett* to such an unreasoned extreme. In *Dilley v. SuperValu, Inc.*,[48] the court considered a truck driver's request for reassignment to a route that accommodated his back disability by not requiring lifting above 60 lbs. The employer argued that based on the *Barnett* decision, the employee's request was prima facie unreasonable since it "would have required SuperValu to violate the terms of its collective bargaining agreement with the union representing its warehouse employees."[49] The 10th Circuit Court pointed out that "it is the *direct* violation of a seniority system that has been held unreasonable under the governing case law."[50] Based on such reasoning, the 10th Circuit Court thereby concluded that there was only a slim chance that the plaintiff—ranked 5th out of 42 drivers in seniority—might be placed in a position that is later requested by a more senior driver. The plaintiff's present request for accommodation was not rendered unreasonable merely because it might *potentially* violate the seniority system if a more senior employee requested the plaintiff's position.

Other circuit decisions have had the opportunity to read *Barnett* broadly, but have similarly refused to extend the Supreme Court's reasoning beyond the ambit of established seniority rights, or outside the context of a substantive motion to consider the merits of an ADA defense. The 3rd Circuit has declined to grant summary judgment to one employer who claimed that its neutral hiring procedure "policy" constituted a defense to an employee's ADA claim because the employee did not follow the procedure when he requested a transfer.[51] In essence, the 3rd Circuit Court refused to adopt the Supreme Court's creation of a presumptive exception to reasonable accommodation requests that reshapes either the interactive accommodation procedure or the evidentiary defense burden that employers ordinarily must meet when they deny a prima facie reasonable accommodation.[52]

The 10th Circuit considered an employer's refusal to comply with an Equal Employment Opportunity Commission (EEOC) subpoena seeking information about job vacancies, and ultimately dismissed the employer's contention that the existence of a collective bargaining agreement and a well-entrenched seniority system served to "take off the table" those positions for which the plaintiff sought information; therefore, rendering the information irrelevant.[53] The court's decision was influenced by its disinclination to allow the employer's "request to litigate in a subpoena-enforcement proceeding a question that essentially goes to the merits of its ADA defense."[54] The 10th Circuit's clear intimation that the employer's mere assertion of a collective

bargaining agreement or prevailing seniority rights does not necessarily alter the defendant employer's obligation to assert the merits of an ADA defense. This raises another critical issue not adequately addressed in *Barnett*: the evidentiary question of who bears the burden of establishing that a requested accommodation is or is not unreasonable?

Evidentiary Burden on Plaintiff

Both *Dilley v. SuperValu* and *Mays v. Principi* illustrate how deeply intertwined substantive and evidentiary issues are in reasonable accommodation cases. Under the ADA, the plaintiff must establish the denial of a reasonable accommodation, but the statute places the burden of proving the defense "undue hardship" on the employer.[55] Placing such a practical burden of proof on defendant employers is justified by the fact that it is much easier for employers, given their position and access to records, to prove the presence of a business hardship than for employees to prove its absence. Since the Supreme Court in *Barnett* decided that requests for modification of a bona fide seniority system are presumptively not "reasonable," the persuasive burdens established by the ADA have been reversed in this context. Employees either accept immediate defeat or must somehow meet the heavy burden of establishing the *absence* of unreasonableness. The Supreme Court attempted to reconcile the introduction of an evidentiary presumption of unreasonableness with the ADA's statutory scheme of placing a defensive burden of proof on employers. The majority decided that even though the employer only needs to show the existence of a seniority system to raise the *presumption* that modification of it would be unreasonable, an employee "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.[56]" The Court mentioned that one way an employee could overcome the presumption is by showing as a matter of fact that the employer retains and frequently uses the unilateral right to alter the seniority system[57]. If an employee succeeds in overturning the presumption, then once again the employer cannot avoid providing accommodation without proving that doing so would be an undue hardship.

The Supreme Court's creation of an extra-legislative *rebuttable* per se exception to the ADA's reasonable accommodation mandate has resulted in a situation that seems to favor employers, but does not necessarily require lower courts to let employers off the evidentiary hook. Most of the circuit decisions that have been decided after *Barnett* have paid more attention to the evidentiary framework established in the decision than to the question of what will be considered "reasonable" in the abstract. Notably, the decisions have mostly refused to grant summary judgment for defendants.

The 3rd Circuit was one of the first appellate courts to implicitly interpret *Barnett* more narrowly.[58] In *Shapiro v. Township of Lakewood*, the plaintiff employee worked as an emergency medical services technician until he injured his back lifting an elderly patient. He wrote a number of letters to his employer requesting "reasonable accommodation" and information about

available positions. The defendant employer's only response was to advise Shapiro to go to the municipal building where vacant municipal positions were posted and apply for a position per the usual procedures. Even though the plaintiff established that at least five positions for which the plaintiff was qualified came open between his first request for accommodation to his bringing of legal action, the district court granted the employer's request for summary judgment on the ground that the plaintiff did not apply for specific transfers by responding to the postings in accordance with the employer's usual "policy." Instead of directly addressing the characterization of the transfer procedure as a disability-neutral rule, the 3rd Circuit chose to emphasize the evidentiary process elaborated in *Barnett* where the court takes a "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."[59] That is, the lower court was not free to enter summary judgment against a plaintiff employee "simply because he did not comply with Lakewood's policy regarding transfer applications." The plaintiff must still be given the opportunity to show that the accommodation he requests is reasonable on its face. The fact that the Supreme Court found *one* type of requested accommodation—waiver of seniority system rules—prima facie unreasonable, did not mean that other types would also be found unreasonable. This conclusion is supported by the Supreme Court's caveat that a plaintiff "remains free to show that special circumstances warrant a finding"[60] that even a seniority system violation is reasonable on the facts of a particular case.

In one of the most recent decisions in this area, the 10th Circuit dealt with an EEOC subpoena issued on behalf of an employee with diabetes whose 20 year employment with the defendant employer ended with the latter's claimed inability to transfer the plaintiff to an equivalent position that would accommodate the restricted work schedule required by the plaintiff's diabetes.[61] Specifically, the employer refused to provide the EEOC with information relating to employees holding All-Purpose Clerk Checker positions (name, date of hire, date in that position, and years of seniority) in any of Defendant's three store locations. The EEOC needed the information to determine whether the defendant could have offered the plaintiff a reasonable accommodation. The defendant asserted that the information regarding the two locations where the plaintiff had not worked was irrelevant. According to the defendant, their hiring at those locations was subject to a collective bargaining agreement under which "vacant" positions were already spoken for[62]. The 10th Circuit found that as a matter of fact, the collective bargaining agreement did not apply to the particular positions for which information was sought. The 10th Circuit Court rejected the defendant's argument that the information was irrelevant because of an entrenched company policy that the other employees at any particular store location had a prevailing right to any vacancy occurring at that location. In the court's analysis, "the information requested by the EEOC remains relevant . . . to determine whether there was in fact a position that was either not offered to any incumbents or not accepted by any incumbent." In other words, the defendant's bald assertion of policy did not foreclose the possibility that the employee's requested transfer could have been factually reasonable. Further, the court explicitly distinguished between *Midland Brake*'s holding with regard to a collective bargaining agreement's effect on the "vacancy" status of an open position, and the defendant's attempt to

extend the holding to a unilaterally asserted employment policy, whether entrenched or not. The holding in *Barnett*, taken at its broadest, could have been interpreted as providing support to the defendant's position since *Barnett* did not distinguish between the rights established under collective bargaining agreements and those given under unilaterally imposed employer seniority systems. However, the 10th Circuit only cited the Supreme Court for the proposition that an accommodation cannot be rendered not "reasonable" by the mere fact that it would result in a "preference.[63]" Also of interest is the fact that the 10th Circuit rebuked the defendant for trying "to turn a summary subpoena-enforcement proceeding into a mini-trial by . . . interpos[ing] defenses that are more properly addressed at trial."[64] The clear implication is that an employer's assertion that an entrenched store policy makes a requested accommodation unreasonable remains something that must be asserted and established by defendants at trial. Still, the 10th Circuit's reasoning in this context does not foreclose summary judgment for the employer if the requested position was desired by an employee with more seniority.

Mays v. Principi interpreted the evidentiary principles set out in *Barnett* in a particularly invidious way. The defendant employer merely gave evidence that there were more qualified applicants for the positions that plaintiff employee requested as an accommodation. There was no further inquiry into how, or by whom, those positions were actually filled. Yet, such evidence was held sufficient for obtaining summary judgment. On the other hand, a number of other circuit courts have interpreted *Barnett* in ways that actually help the plaintiff—softening the pre-Barnett situation whereby some circuits had applied a pure per se exception rule once seniority system or collective bargaining rights had been established. A few circuits refer to *Barnett* in rather idiosyncratic ways. The 9th Circuit, in *Zivkovic v. Southern California Edison Company* simply used the Supreme Court's *Barnett* decision as an implicit (explicit in Justice Stevenson's concurring judgment) affirmation of the 9th Circuit's interpretation of the interactive process as an independent requirement of the ADA's reasonable accommodation provision.[65] The 7th Circuit in *Oconomowoc Residential Programs, Inc., v. City of Milwaukee*, deciding an ADA Title II and Fair Housing Amendments Act case that occurs completely outside of the employment context, cites *Barnett* for the proposition that "[t]he burden is on the plaintiffs to show that the accommodation it seeks is reasonable on its face."[66] Further, *Barnett* is cited for the proposition that after the plaintiff succeeds in its prima facie showing, "the defendant must come forward to demonstrate unreasonableness or undue hardship in the particular circumstances." *Oconomowoc* therefore reveals the clear danger that *Barnett*'s requirement for "reasonableness" will be extended beyond the employment arena, providing courts the interpretive license to impose limits on all rights extended under the ADA simply by deciding whether a given accommodation or modification is "reasonable."

Conclusion

Fundamentally, *Barnett* elevates workplace norms over individualized assessment. As a remedial measure for historic and systemic discrimination against people with disabilities, the ADA requires "reasonable accommodation." Reasonable accommodation is not direct

"affirmative action". Rather, it requires individualized assessments of what a job requires and what a given person with a disability can do. If the Court elevates American workplace goals of consistency and impersonal rule-based management above individual assessment, seniority and other union-based rules will always have the advantage over ADA and other civil rights laws[67]. The Supreme Court stated that:

> [T]o require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment – expectations upon which the seniority system's benefits depend. That is because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform, impersonal operation of seniority rules.[68]

The Supreme Court refuses to place a greater evidentiary burden on employers with regard to seniority systems other than showing they exist, because the court is afraid of undermining employee expectations, and does not want to encourage employers to "substitute a complex case-specific 'accommodation' decision made by management for the more uniform, impersonal operation of seniority rules." Yet, such an individualized approach lies at the very *heart* of ADA reasonable accommodation. The court is essentially making a value decision: it is more important to preserve impersonal systemic rules than evaluate the real abilities of individuals with disabilities and the essential requirements of jobs. *This* is the message that many lower courts will pick up on, and the process has already begun: *Mays v. Principi*.

Post-Script

Robert Barnett first learned in 1992 that his job at U.S. Airways was being opened for seniority bidding. Six months later, U.S. Airways officially refused his request for accommodation under the ADA. Ten years later, the U.S. Supreme Court decided that employer seniority rules take precedence over ADA reassignment rights "in the run of cases."[69] Since being laid off by U.S. Airways in 1993, Mr. Barnett's life essentially has been placed on hold. He has been both unemployed and underemployed, working in temporary data entry, property maintenance and seasonal positions.[70] Currently in his 40s, he essentially faces the same bleak employment statistics that people with disabilities face generally, despite his experience and proven 12 year employment record with U.S. Airways. Furthermore, the Supreme Court's remand of his case to district court has been stayed due to U.S. Airways' declaration of bankruptcy in the fall of 2002.

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1. 42 U.S.C. §§ 12101 *et seq.*

2. Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment" and that "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." One of the purposes of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *See* 42 U.S.C. §§ 12101 (a)(3), (a)(6) and (b)(1).

3. "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 modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). *See also* 29 C.F.R. § 1630.2(o).

4. *See* 42 U.S.C. § 12111(9): "The term 'reasonable accommodation' may include: . . . reassignment to a vacant position . . ." *See also* H.R. REP. NO. 485(II), 101st Cong., 2d Sess. at 63 (199), *reprinted in* 1990 U.S.C.C.A.N. 267, 345: "Reasonable accommodation may also include reassignment to a vacant position. If an employee because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered."

5. 29 U.S.C. § 794(a). *See also* 29 C.F.R. § 1613.704(b)(1)-(2) (1995): "[r]easonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers or interpreters, and other similar actions."

Compare with the scope of "reasonable accommodation" under the ADA, 42 U.S.C. § 12111(9).

6. The ADA applies to all business entities that employ fifteen or more persons: 42 U.S.C. § 12111(5)(A)(1994).

7. *See* § 12111(2).

8. Under Title VII, employers may "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system":
42 U.S.C. § 2000e-2(h)(1994). ADEA states that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system": 29 U.S.C. § 623(f)(2)(1994).

9. 29 U.S.C. § 621 *et seq.*

10. S. REP. No. 116 at 32: "the provision of all types of reasonable accommodations is essential to accomplishing the critical goal of this legislation – to allow individuals with disabilities to be part of the economic mainstream of our society."

11. 29 U.S.C. §§ 151-169 (1994).

12. *See* for example R. Bales, "Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining," in 2 Cornell J. of L. and Pub. Pol'y 161; Brian P. Kavanaugh, "Collective Bargaining Agreements and the Americans with Disabilities Act: A Problematic Limitation on 'Reasonable Accommodation for the Union Employee," 1999 U. Ill. L. Rev. 751.

13. 122 S.Ct. 1516 (2002).

14. Headlines like "Justices: Seniority trumps disability - In S.F. case, Supreme Court limits law's scope," Bob Egelko, *San Francisco Chronicle*, April 30, 2002, and "Does Seniority Trump Accommodation," Business Resource Center, USA *at* http://www.brcweb.net/test/informed_management_seniority.html follow a trend of presenting ADA issues as direct conflicts between the rights of people with disabilities and the rights of everyone else. The tendency to perceive disability rights as a kind of "privilege" that requires infringing on "normal" rights is especially prevalent in a time of economic slow-down and increasing unemployment when a "survival of the fittest" attitude flourishes.

15. 196 F.3d 979 (9th Cir. 1998, as am. 1999).

16. 228 F.3d 1105 (9th Cir. 2000).

17. 122 S.Ct. 1516, 1519 (2002).

18. *See* 42 U.S.C. 12111(10)(B): 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 Act;
(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.

19. *Id*. at 1518.

20. Brief for Respondent at 2, *U.S. Airways, Inc., v. Barnett*, 122 S.Ct. 1516 (2002) (No. 00--1250).

21. The American Federation of Labor and Congress of Industrial Organizations, a federation of 66 national and international labor organizations, filed an Amicus brief in support of Barnett, pointing out that collectively bargained "seniority rights are judicially enforceable by the employees as a matter of federal law, and employers are forbidden from unilaterally modifying such rights until certain statutory conditions are fulfilled" but "an employer-initiated 'seniority policy' is merely a non-binding guideline for the exercise of management discretion." Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent at 6, *U.S. Airways, Inc., v. Barnett*, 122 S.Ct. 1516 (2002) (No. 00--1250).

22. 42 U.S.C. § 12111(9), *supra* note 3.

23. The Equal Employment Opportunity Commission (EEOC) regulations on the ADA state that: "1) The term reasonable accommodation means:
(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(o).

24. "The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)": 42 U.S.C. 12111(10). Subparagraph (B) lists four factors, which broadly speaking, relate to financial considerations, *see supra* note 18. "Undue hardship" was the topic of considerable debate at the ADA's enactment. *See* for example 135 Cong. Rec. S10735, S10736 (daily ed. Sept. 7, 1989) (Statements of Sens. Hatch and Harkin); 135 Cong. Rec. S10773 (daily ed. Sept. 7, 1989) (Statements of Sens. Helms and Harkin); 136 Cong. Rec. H2429 (daily ed. May 17, 1990) (Statement of Rep. Bartlett); and 136 Cong. Rec. H2471-H2475 (daily ed. May 17, 1990) (Debate on Rep. Olin Amendment to Put Cap on Undue Burden).

25. *See for example Vande Zande v. State of Wisconsin Department of Administration*, 44.F.3d 538 (7th Cir. 1996), and *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998).

26. 122 S.Ct. 1516, 1521-22 (2002).

27. *See* 42 U.S.C. § 12111(10)(A).

28. *See* 42 U.S.C. § 12111(8), (9); S.REP. No. 116 at 31, 33.

29. 122 S.Ct. 1516, 1519 (2002).

30. 44 F.3d 538 (7th Cir. 1996).

31. *Id*. at 546.

32. At trial, the district court was concerned with the plaintiff's potentially endless list of picayune accommodations, none of which involved any degree of undue hardship for the employer. The problem with the court's reasoning is that it continues to mis-characterize accommodations as a kind of charitable favor on the part of the employer; employers could stop short of providing further accommodations once they had expanded enough 'goodwill' on an employee.

33. *Id*. at 544-45.

34. 44.F.3d 538, 542 (7th Cir. 1996).

35. *Id*. at 542-43.

36. *Id*. at 543.

37. 156 F.3d 1284 (D.C. Cir. 1998).

38. Much of the case, at all levels of hearing, revolved around the evidentiary standard that an employment discrimination plaintiff must meet to survive summary judgment once the employer

has provided a legitimate, nondiscriminatory reason for his actions.

39. *Aka v. Washington Hospital Center*, 1996 WL 435026 (D.C. Dist.).

40. *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997).

41. 156 F.3d 1284, 1304 (D.C. Cir. 1998).

42. *Id*. at 1305 (fn. 29). The majority's last point was given significant weight in the dissenting opinion of Silberman, J. (joined by Williams and Ginsburg, JJ.), who argued for a narrow understanding of "reassignment to a vacant position" as merely the chance to compete on equal terms for a vacant position, as this "fits in with the common theme of regulating the relationship between disabled employee and employer without directly affecting non-disabled employees."

43. *Id*. at 1524.

44. 301 F.3d 866 (7th Cir. 2002).

45. *Id*. at 872.

46. A number of courts have given collectively bargained seniority systems priority over the similarly-worded accommodation rights accorded under Title V of the Rehabilitation Act, 29 U.S.C. § 790 et.seq. *See Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989); *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985). Cases that address collectively bargained seniority systems in the context of the ADA have generally reached the same conclusion: *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1175 (10th Cir. 1999); *Feliciano v. Rhode Island*, 160 F.3d 780 (1st Cir., 1998).

47. 301 F.3d 866, 872 (7th Cir. 20002).

48. 296 F.3d 958 (10th Cir. 2002).

49. *Id*. at 963.

50. *Id*.

51. Shapiro v. Township of Lakewood, 292 F.3d 356 (3rd Cir. 2002).

52. *Id*. at 360-61.

53. Equal Employment Opportunity Commission v. Dillon Companies, Inc., 2002 WL 31516342 at 5 (10th Cir. 2002).

54. *Id*.

55. *Board of Trustees of The Univ. of Ala. v. Garrett*, 121 S.Ct. 955, 967 (2001).

56. 122 S.Ct. 1516, 1525 (2002).

57. *Id.*

58. Shapiro v. Township of Lakewood, 292 F.3d 356 (3rd Cir. 2002).

59. *Id*. at 361.

60. U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516, 1525 (2002).

61. Equal Employment Opportunity Commission v. Dillon Companies, Inc., 2002 WL 31516342 (10th Cir. 2002).

62. The Defendants cited Smith v. Midland Brake, Inc., 180 F.3d 1154, 1177 (10th Cir. 1999) in support of this proposition. This approach was endorsed by Justice O'Connor in her concurring majority opinion in Barnett, 122 S.Ct. 1516, 1526-28 (2002).

63. Equal Employment Opportunity Commission v. Dillon Companies, Inc., 2002 WL 31516342, at 5 (10th Cir. 2002).

64. *Id*. at 5.

65. 2002 WL 31027935, at 7 (9th Cir. 2002). The 9th Circuit acknowledged that the district court, which had granted the Defendant employer's summary judgment motion, did not have the benefit of the *Barnett* ruling, but in its own decision barely references the Supreme Court decision, mentioning only that it vacated the 9th Circuit's own *Barnett* decision on other grounds.

66. 2002 WL 1811325, at 7 (7th Cir. 2002). *Oconomowoc* involved the city of Milwaukee's denial of a zoning variance for the plaintiff's operation of a community living facility for brain injured and developmentally disabled individuals in the city. The proposed facility was for a six-person home with non-live-in, 24-hour staff, and required a waiver of the city's ordinance restricting group homes from operating within 2500 feet of one another. The plaintiffs brought their case under the Fair Housing Amendments Act (FHAA) and the ADA. The FHAA does use the actual phrase "reasonable accommodation" in its definition of unlawful discrimination ("a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling": 42 U.S.C., § 3604(f)(3)(B)). Title II of the ADA actually uses the phrase "reasonable modifications", and the regulations interpreting Title II require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity": 42 U.S.C. §12115(2). While the 7th Circuit has interpreted substantive

requirements for reasonable accommodation under the FHAA and the ADA as comparable (*see Dadian v. Village of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001)), by simply citing *Barnett* in a Title II case without any actual analysis, the 7th Circuit in *Oconomowoc* potentially opens the door to importing the Supreme Court's specific reading of "reasonable accommodation," and general rationale for developing per se exceptions to accommodation in the employment context, to reasonable modifications required under Title II.

67. There is the further point that the exclusion of people with disabilities from the workforce means that *all* aspects of the workforce as it has historically evolved, including seniority rules, can be understood as having a negative impact on employees with disabilities. Vikram David Amar & Alan Brownstein ("Reasonable Accommodations Under the ADA" in 5 Greenbag 2d 361, 366 (2002)), in analyzing Justice Scalia's dissent in Barnett, point out:

> Don't seniority rules "bear more heavily" on disabled workers because such workers have shorter work histories with particular employers, in part due to an historical (and economically rational) pre-ADA unwillingness by employers to modify workplace rules to accommodate the physical needs of the disabled? Don't disabilities alter a person's vocational path and make longevity at any one employer less likely? Robert Barnett may be the exception – he became disabled after he was employed and remained (or rather tried to remain) with his existing employer. But don't seniority rules more generally hurt disabled persons more than others and thereby pose "distinctive" problems for the disabled?

68. 122 S.Ct. 1516, 1524 (2002).

69. 122 S.Ct. 1516, 1518 (2002).

70. Personal Communication with Robert Barnett's counsel, February 2, 2003.