RECORD NO. 19-1069

In The

United States Court Of Appeals

For The Fourth Circuit

CHARLES J. ELLEDGE,

Plaintiff – Appellant,

v.

LOWE'S HOME CENTERS, LLC,

Defendant – Appellee,

and

LOWE'S COMPANIES, INC.,

Defendant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
AT STATESVILLE

BRIEF OF AMICI CURIAE DISABILITY RIGHTS NORTH CAROLINA, PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., DISABILITY LAW CENTER OF VIRGINIA, DISABILITY RIGHTS OF WEST VIRGINIA, DISABILITY RIGHTS MARYLAND, NATIONAL DISABILITY RIGHTS NETWORK IN SUPPORT OF APPELLANT CHARLES J. ELLEDGE

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Attorney for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 19-1069 Caption: Charles J. Elledge v. Lowe's Home Centers, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

DISABILITY RIGHTS NORTH CAROLINA
(name of party/amicus)

---

who is Amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Elizabeth Myerholtz Date: 4/19/2019

Counsel for: Disability Rights North Carolina

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No. 19-1069 Caption: Charles J. Elledge v. Lowe's Home Centers, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Protection and Advocacy for People with Disabilities, Inc.
(name of party/amicus)

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No. 19-1069 Caption: Charles J. Elledge v. Lowe's Home Centers, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

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No. 19-1069 Caption: Charles J. Elledge v. Lowe's Home Centers, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights of West Virginia
(name of party/amicus)

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who is Amicus, makes the following disclosure:
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Counsel for: Disability Rights North Carolina

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Disability Rights Maryland
(name of party/amicus)

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No. 19-1069 Caption: Charles J. Elledge v. Lowe's Home Centers, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Disability Rights Network
(name of party/amicus)

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INTERESTS OF AMICI

Disability Rights North Carolina ("Disability Rights NC") is the federally mandated Protection and Advocacy organization for people with disabilities in North Carolina. Disability Rights NC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e *et. seq.* (2018).

Protection and Advocacy for People with Disabilities, Inc. ("P&A") is designated by the State of South Carolina as the federally mandated Protection and Advocacy system for people with disabilities in South Carolina. P&A is authorized by federal law to protect and advocate for the rights of individuals with disabilities. Pursuant to this mandate, P&A represents individuals with disabilities who have employment issues. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e *et. seq.* (2018); S.C. Code Ann. 43-33-310 *et. seq.* (2015).

disAbility Law Center of Virginia ("dLCV") is the designated Protection and Advocacy agency for the Commonwealth of Virginia. Va. Code § 51.5-39.13 As the designated Protection and Advocacy agency, dLCV is mandated to protect individuals with disabilities from abuse, neglect, and discrimination, and has the authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals." 29 U.S.C. § 794e(f)(3). As the Protection and Advocacy agency for

Virginia, dLCV has a strong interest in enforcement of the Americans with Disabilities Act ("ADA") and other state and federal laws in assuring that gainfully employed Virginians with disabilities are not denied legally appropriate accommodations, including being denied accommodations which provide opportunities for successful employment and community integration.

Disability Rights of West Virginia ("DRWV") is the federally-mandated Protection and Advocacy system for people with disabilities in West Virginia. For more than 40 years, DRWV and the entire Protection and Advocacy network have been litigating in state and federal courts for the protection of the human and legal rights of all persons with disabilities. Preservation and defense of protections provided by the ADA is the primary goal of the Protection and Advocacy Network. The protection of reasonable accommodations afforded under the ADA is of paramount importance to the mission of the Protection and Advocacy system.

Disability Rights Maryland ("DRM") is a non-profit agency and the state designated Protection and Advocacy System authorized by federal law to protect, advocate, and advance the rights of Marylanders with disabilities. DRM works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, full inclusion in our communities, and quality of life. DRM provides legal services to persons with disabilities and has

extensive experience litigating cases involving the ADA. Advancing the interests of people with disabilities is core to DRM's mission.

The **National Disability Rights Network ("NDRN")** is the non-profit membership organization for the federally mandated Protection and Advocacy and Client Assistance Program ("CAP") agencies for individuals with disabilities. The Protection and Advocacy and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are Protection and Advocacy agencies and CAPS in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a Protection and Advocacy agency and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the Protection and Advocacy and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

RULE 29(c)(5) DISCLOSURE

No part of this brief was authored by counsel to either party. Neither party, counsel, nor any other person contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION

Congress intended to rectify the historical discrimination against people with disabilities in our society by enacting the Americans with Disabilities Act (ADA). H.R. Rep. 101-485(II) at 32 (1990). Title I of the Act was specifically designed to reduce the "staggering levels of unemployment and poverty" individuals with disabilities face. H.R. Rep. 101-485(II) at 33 (1990). A cornerstone of the promise of the ADA is that employers must provide reasonable accommodations for their employees with disabilities. Providing reasonable accommodations to employees is so important that Congress called it "essential to accomplishing the critical goal of this legislation to allow individuals with disabilities to be part of the economic mainstream of our society." H.R. Rep. 101-485(II) at 34-35 (1990).

The question in this case is whether a very specific legislative mandate contained in the ADA can be read out of the statute by the judiciary. This case provides an opportunity to ensure courts in this Circuit enforce an employer's duty to reassign an employee as a reasonable accommodation.[1] The District Court in this case failed to accede to the legislative mandate requiring an employer to reassign an employee with a disability to a vacant position for which he is

[1] This issue is not unique to this case; other district courts in the Fourth Circuit have similarly relied on incorrect interpretations of the reassignment provision of the ADA. *See, e.g., U.S. v. Woody*, 220 F. Supp. 3d 682 (E.D. Va. 2016); *Williams v. UPS*, 2012 U.S. Dist. LEXIS 23080 (D.S.C. Feb. 23, 2012) (citing *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001)).

qualified. Reversal of the District Court decision is necessary to comply with *U.S. Airways v. Barnett* and the text of the ADA. If affirmed, the District Court opinion would contravene *Barnett*, make empty the statutory promise of reassignment as a reasonable accommodation, unjustifiably limit an employer's duty to engage in the interactive process to assist employees in identifying and receiving reasonable accommodations, and ultimately undermine the central principles of Title I of the ADA.

I. The plain language of the ADA, the legislative intent behind it, and the Supreme Court's interpretation of the statute require an employer to transfer a qualified employee with a disability to an equivalent, vacant position.

In Title I of the ADA, Congress explicitly stated that if an employee, due to his disability, can no longer perform the essential functions of his current position, with or without reasonable accommodations, then the employer must reassign the employee to a vacant position for which he is qualified and able to perform the essential functions if such a position is available. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

When defining reassignment as a reasonable accommodation, Congress intended that employers would retain valuable employees and that employees would maintain employment should their disability prevent them from performing in their current positions. H.R. Rep. No. 101-485(II), at 55 (1990); S. Rep. No. 101-116, at 29 (1989) ("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").

In enacting the ADA, Congress understood that providing accommodations may impose some "reasonable" costs on employers, but nevertheless expressly provided for accommodations – including reassignment – for employees with disabilities because:

> Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy . . . When one considers the social costs which would flow from the exclusion of persons [with disabilities] from the pursuit of their profession, the cost of accommodation – a cost which seems likely to diminish, as technology advances and proliferates – seems, by comparison, quite small.

Nelson v. Thornburgh, 567 F. Supp. 369, 382 (E.D. Pa. 1983), *aff'd without op.*, 732 F.2d 146 (3d Cir. 1984), *cert den.*, 469 U.S. 1188 (1985). Thus, Congress determined that the benefits of providing reasonable accommodations to employees with disabilities far outweigh the burden placed on the employers that must provide reasonable accommodations. S. Rep. 101-116 at 81 (1989) (discussing economic impact of passing the ADA).

A. The plain language of the ADA requires employers to reasonably accommodate employees with disabilities through reassignment to a vacant position.

The ADA expressly identifies reassignment to a vacant position as a reasonable accommodation. 42 U.S.C. § 12111(9)(B). Reassignment as a

reasonable accommodation has two requirements: that the employee is qualified for the position to which he seeks to be reassigned, and that the position in question is vacant. EEOC Enforcement Guidance on Reasonable Accommodation & Undue Hardship Under the ADA, No. 915.002, at *15 (Oct. 17, 2002), available at www.eeoc.gov/policy/docs/accommodation/html [hereinafter EEOC Enforcement Guidance]. A position is considered vacant if the employer has posted a notice or announcement seeking applications for that position. EEOC Enforcement Guidance at *16.

Critically, reassignment as a reasonable accommodation does not mean that the employee is merely permitted to compete for a vacant position; rather, it means that an employee with a disability will actually be placed in a vacant position if he is qualified for and is able to perform the essential functions of the reassigned position, with or without additional reasonable accommodations.[2] *See* 42 U.S.C. § 12111(8), 12111(9)(B), 12112(b)(5)(A); EEOC Enforcement Guidance at *17 ("Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be

[2] There is a Circuit split regarding this issue that is discussed at length *infra* Section II. Some Circuits continue to hold that that reassignment is not necessary when doing so would violate a disability neutral rule, in direct contradiction to the plain language of the statute and the EEOC Enforcement Guidance. *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007).

implemented the way Congress intended").[3] To hold that reassignment merely means the employee receives an opportunity to compete for a vacant position "nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position." EEOC Enforcement Guidance at *36 n. 90.

In analogous situations to the one here, courts have recognized this plain meaning of reassignment under the ADA. In *Smith v. Midland Brake, Inc.*, Smith came into contact with chemicals at work and thus needed to be reassigned to a different position to avoid additional exposure. 180 F.3d 1154, 1160 (10th Cir. 1999). When Midland Brake was unable to find an assignment that would work for Smith and his limitations within Smith's department, Midland Brake terminated his employment. 180 F.3d at 1159. To inform its decision, the Tenth Circuit looked at the plain language of the statute: "As to the literal language, the ADA defines the

[3] The Code of Federal Regulations explicitly states that "reassignment to a vacant position for which an employee is qualified, and not just permission to compete for such a position, is a reasonable accommodation" for federal employees under the Rehabilitation Act. 29 C.F.R. § 1614.203(d)(3)(B). Regulations from the Rehabilitation Act have been interpreted consistent with those from the ADA. 29 C.F.R. § 1614.203(b) (2016) ("The standards used to determine whether section 501 of the Rehabilitation Act of 1973, as amended, has been violated in a complaint alleging nonaffirmative action employment discrimination under this part shall be the standards applied under Titles I and v. of the Americans with Disabilities Act of 1990, as amended, as such sections relate to employment") (internal citations omitted).

term 'reasonable accommodation' to include 'reassignment to a vacant position.' The statute does not say 'consideration of a reassignment to a vacant position.'" *Id.* at 1163. The court further rejected arguments that the ADA does not require preferential treatment by noting:

> Congress defined the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . ." Then, in § 12111(9)(B), Congress defined the term "reasonable accommodation" to include "reassignment to a vacant position." Thus, although the dissent would prefer to view the reasonable accommodation of reassignment as "affirmative action," Congress chose to consider it otherwise when it defined the failure to reasonably accommodate (including reassignment) as a prohibited act of discrimination.

180 F.3d at 1167 (emphasis in original).

The Tenth Circuit's reasoning was echoed by the Seventh Circuit in *EEOC v. United Airlines, Inc*. 693 F.3d 760 (7th Cir. 2012). United Airlines adopted a transfer policy for employees who wished to be reassigned as a reasonable accommodation. *EEOC v. United Airlines, Inc.*, 673 F.3d 543, 544 (7th Cir. 2012). This policy did not place employees into vacant positions, but merely gave them preference by guaranteeing those employees an interview for the positions to which they applied. 673 F.3d at 544. In light of the decision in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) (*see infra* Section II.A), the Seventh Circuit determined that such a policy was insufficient to serve as a legitimate reassignment process for reasonable accommodation requests. Instead, the court held that the

ADA requires employers to place employees in vacant positions, not merely give them preference in the application process to fill those vacant positions. 693 F.3d at 765.

Congress explicitly provided for reassignment itself, not the opportunity for reassignment, as an accommodation. The EEOC and the Federal Circuit courts cited above have faithfully applied that congressional mandate. The District Court erred in deviating from the express language of the statute.

B. The ADA requires employers to modify normal reassignment procedures when necessary to accommodate employees with disabilities who need to be reassigned.

An employer may be required to modify its normal policies governing job transfers to provide reassignment as a reasonable accommodation. 29 C.F.R. § 1630.2(o), App. at 414; *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 398 (2002). Thus, although an employer may normally decline to transfer employees, the employer still must reassign a qualified employee with a disability, unless it can show undue hardship. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); *see Barnett*, 535 U.S. at 397 (noting that providing an accommodation in violation of an employer's disability-neutral rule does not automatically mean the accommodation is unreasonable); *see also AKA v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (concluding that "[a]n employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be

described as having been 'reassigned'; the core word 'assign' implies some active effort on the part of the employer").

The duty to modify policies to provide reasonable accommodations also applies to a policy of hiring the most qualified candidate for a position. *See* 29 C.F.R. § 1630.2(o). A policy to only hire the most qualified candidate, regardless of the need of an employee to be transferred, has been held to violate the requirement of "reassignment" as a reasonable accommodation. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1205 (10th Cir. 2018). In *Lincoln*, two employees sought reassignment after being injured on the job. 900 F.3d at 1176. Each employee submitted over twenty applications to vacant positions, but neither was selected for any of the positions to which he applied. *Id.* at 1178. BNSF argued that the employees were not hired for any such positions because BNSF had a policy of only hiring the most qualified applicant for a position, and neither of the employees were the most qualified for any of the positions. *Id.* at 1204-05. The court rejected this argument, noting "the ADA's 'basic equal opportunity goal' sometimes requires an employer to afford a disabled employee preference in the hiring process" and enforcing a policy of hiring the most qualified applicant would read "reassignment to a vacant position" out of the definition of "reasonable accommodation." *Id.* at 1205.

C. Whether Elledge was qualified for specific positions is a disputed factual issue and thus was inappropriate to resolve at summary judgment.

On a motion for summary judgment, "the court . . . cannot weigh the evidence or make credibility determinations." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015). When evaluating disability discrimination claims at the summary judgment stage, the court's responsibility "is only to determine whether the [nonmoving party] has produced more than 'a mere scintilla of evidence' in support of its position . . . ." *EEOC v. McLeod Health Inc.*, 2019 U.S. App. LEXIS 3179, at *12 (4th Cir. 2019) (quoting *Hodgin v. UTC Fire and Sec. Americans Corp.*, 885 F.3d 243, 252 (4th Cir. 2018)). The question as to whether the employee is qualified for the position is one of material fact and is therefore inappropriate for summary judgment. *Harris v. Chao*, 257 F. Supp. 3d 67, 88, 91 (D.D.C. 2017).

The positions Elledge identified were "vacant," as that term is used in the ADA, because Lowe's posted that it was accepting applications for the positions. EEOC Enforcement Guidance at *16. Elledge produced evidence that he identified two vacant lateral positions in different departments to which he could have been reassigned through the reasonable accommodation process: Merchandising Director for Lawn and Garden and Merchandising Director of Outdoor Power Equipment. *Elledge v. Lowe's Home Ctrs., LLC*, 2018 U.S. Dist. LEXIS 214333 at

*12, 15 (W.D.N.C. 2018). However, he was not reassigned to either of those positions. Elledge produced evidence that he had skills and experience that qualified him for both of the Merchandising Director positions overall, that he had other "transferrable skills" from his prior experience, and that he had superior qualifications compared to the applicant who was eventually hired for the Merchandising Director of Outdoor Power Equipment position. *Elledge*, 2018 U.S. Dist. LEXIS 214333 at *34.

As per its transfer policy, Lowe's posted the vacant positions internally and Elledge was forced to compete with other applicants for them. By refusing to modify its process, Lowe's failed to provide a reasonable accommodation. Lowe's did not argue that Elledge was *unqualified* for the positions he wanted, only that he was *less* qualified than other applicants for the positions. Thus, there was a question of material fact as to whether Elledge was qualified for a vacant position and the District Court erred in granting summary judgment on this issue. *Jacobs*, 780 F.3d at 569; *Harris*, 257 F. Supp. 3d at 88 and 91.[4]

[4] Additionally, the District Court adopted Lowe's' position that Elledge refused a reasonable accommodation to use a scooter when inspecting the stores in his jurisdiction while he was the Merchandising Director. Elledge stated that he never refused such an offer. This is a question of material fact as to whether Elledge did or did not refuse an offer for a reasonable accommodation. As such, this issue should not have been resolved at summary judgment, but rather should have been determined by a jury. *Jacobs*, 780 F.3d at 569.

II. The District Court improperly evaluated prior Fourth Circuit cases related to reassignment.

The District Court identified a Circuit split regarding the scope of an employer's obligation to reassign an employee who, for reasons related to his disability, can no longer perform the essential functions of his current position. *Elledge v. Lowe's Home Ctrs., LLC*, 2018 U.S. Dist. LEXIS 214333 at *31 (W.D.N.C. 2018). The D.C., Seventh, and Tenth Circuits have adopted a rule that is consistent with the plain language, legislative intent, and the Supreme Court's interpretation of the ADA.[5] However, the District Court mistakenly concluded that the Fourth Circuit has forecast a position that the ADA "only requires that disabled persons be allowed to compete equally with nondisabled persons." 2018 U.S. Dist. LEXIS 214333 at *31. The District Court looked to *EEOC v. Sara Lee Corp.* in

[5] *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) ("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"); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167 (10th Cir. 1999) ("If a disabled employee had only a right to require the employer to consider his application for reassignment but had no right to the reassignment itself, even if the consideration revealed that the reassignment would be reasonable, then this promise within the ADA would be empty"); *AKA v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1304-05 (D.C. Cir. 1998) (noting that the "interpretation of the reassignment provision as mandating nothing more than that the employer allow the disabled employee to submit his application along with all of the other candidates…would render that provision a nullity"); *Harris v. Chao*, 257 F. Supp. 3d 67, 79 (D.D.C. 2017) ("To suffice as a reasonable accommodation, an employer must actually offer the employee a position, not provide merely an illusory discussion of alternative work").

concluding that ""an employer must be able to treat a disabled employee as it would any other worker when the company operates a legitimate, nondiscriminatory policy."" 2018 U.S. Dist. LEXIS 214333 at *32 (quoting *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354-55 (4th Cir. 2001)).

Although the premise underlying the quoted statement from *EEOC v. Sara Lee Corp*. complements the views taken by the Eighth and Eleventh Circuits,[6] it was disapproved by the Supreme Court of the United States' decision in *U.S. Airways v. Barnett*. 535 U.S. 391 (2002) (holding that normally an employer must provide reassignment unless it would violate terms of a collective bargaining agreement or true seniority system). In fact, the Supreme Court's reasoning in *Barnett* was the catalyst for the Seventh Circuit to overturn the oft-cited case supporting the proposition that employers need not violate disability-neutral rules in order to provide reasonable accommodations, *EEOC v. Humiston-Keeling*[7]:

> Several courts . . . 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 . . . we now make clear that *Humiston-Keeling* did not survive *Barnett*.

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[6] *EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1347 (11th Cir. 2016) ("[T]he ADA does not automatically mandate reassignment without competition"); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) ("[T]he 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").

[7] 227 F.3d 1024 (7th Cir. 2000).

EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012). Although the existing Circuit split regarding reassignment stems from other jurisdictions holding that the ADA does not require such modifications, those jurisdictions relied on *Humiston-Keeling* to inform their analyses.[8] As *Humiston-Keeling* has since been overruled, the Fourth Circuit should not follow the examples of the Eighth and Eleventh Circuits by perpetuating misplaced reliance on reasoning that has been disavowed by the Supreme Court. Rather, the Fourth Circuit should follow the examples of the Seventh, Tenth, and D.C. Circuits by adopting a rule consistent with the statutory mandate of reassignment as a reasonable accommodation.

Post-*Barnett*, the appropriate analysis to determine whether reassignment is reasonable for a qualified employee is whether any other employee has an enforceable right to the position in question. *Infra* Section II.B. That is, in the absence of a collective bargaining agreement or true seniority system, employers must provide reassignment to an employee with a disability when it is necessary as a reasonable accommodation. No other Lowe's employee had an enforceable right to any of the positions which Elledge identified as possible reassignments, and therefore Lowe's should have placed Elledge in one of the vacant positions he

[8] *See EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333 (11th Cir. 2016); *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007). Although *Huber* and *St. Joseph's* have not been expressly overturned in their Circuits, the analysis the courts used to come to their conclusions has now been criticized and overruled.

identified. To hold otherwise relegates the right of reassignment under the ADA to the exceptional case rather than the general rule that applies with all other reasonable accommodations.

A. *U.S. Airways v. Barnett* holds employers must modify transfer policies to reassign employees who need reasonable accommodations unless those policies are part of valid seniority systems or collective bargaining agreements.

In *U.S. Airways v. Barnett*, an employee requested reassignment after being injured on the job. 535 U.S. at 394. After he was reassigned, the position to which he was placed was subject to the company's seniority-based bidding system, and Barnett's position was bid on by a more senior employee. *Id.* U.S Airways refused to modify the seniority system to allow Barnett to remain in the position and, as a result, Barnett lost his job. *Id.* The Supreme Court stated that the ADA requires employers to reasonably modify neutral policies during the reassignment process:

> By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach . . . 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 others must obey – cannot, in and of itself, automatically show that the accommodation is not "reasonable."

Barnett, 535 U.S. at 397-98.

However, the Court identified exceptions for bona fide seniority systems or collective bargaining agreements because such systems provide employees with

the benefit of reliable, uniform treatment. 535 U.S. at 404. As the Supreme Court noted, seniority systems include an element of due process for employees by limiting potential unfairness in personnel decisions. *Id.* at 404. Therefore, such systems "give[] rise to legitimate expectations by other [employees]" that they are entitled to the position to which the employee with a disability seeks to be reassigned. *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir. 2001) (citing *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1176 (10th Cir. 1999)).

In her concurrence, Justice O'Connor expressed that she disagreed with the majority opinion but without her vote, there would be no majority. Thus she outlined her position that the focus should be on whether the seniority system was "legally enforceable":

> In the context of a workplace, a vacant position is a position in which no employee currently works and to which no individual has a legal entitlement . . . when an employee ceases working in a workplace with a legally enforceable seniority system, the employee's former position does not become vacant if the seniority system entitles another employee to it.

535 U.S. at 409 (O'Connor, J., concurring).

In Justice O'Connor's articulation of the rule, if the seniority system does not create a legal right and a particular employee is not automatically entitled to a position upon its opening, then that position is actually vacant; in such a case, the ADA requires that the employer place the employee with a disability into that position. 535 U.S. at 409. Both the majority and Justice O'Connor's opinion

require a focus on the actual provision of rights to other employees. No such rights are at issue in this case.

B. *U.S. Airways v. Barnett* narrowed the scope of *EEOC v. Sara Lee Corp.*'s holding.

The District Court cited *EEOC v. Sara Lee Corp.* for the proposition that employers are not required to violate disability-neutral rules in order to provide reasonable accommodations to employees with disabilities. *Elledge v. Lowe's Home Ctrs., LLC*, 2018 U.S. Dist. LEXIS 214333 at *31-32 (W.D.N.C. 2018). Such a rule is too broad in scope after *Barnett* and contradicts *Barnett* itself. *Supra* Section II.A. The holding of *Barnett* is that, typically, a true seniority system need not be violated in order to accommodate an employee with a disability; however, if the employer does not actually vest employees with rights under the system, then an ADA reassignment may be reasonable under the circumstances. 535 U.S. at 405. The facts of *Sara Lee* also included a seniority system, and based on the facts of the case, the outcome would likely remain unchanged after *Barnett*. However, *Barnett* limited the scope of *Sara Lee*'s holding that an employer's disability-neutral rule with regard to transfers need not be violated to provide a reasonable accommodation to a narrow set of bona fide, enforceable seniority systems. In the absence of such a seniority system, an employer's transfer policy must be modified in order to accommodate employees with disabilities who need reassignment to a vacant position as a reasonable accommodation. *Barnett*, 535 U.S. at 405.

The District Court also relied on the unpublished, and therefore not binding, case *Schneider v. Giant of Maryland* to conclude that reassignment under the ADA merely requires that employees with disabilities compete on equal footing with other employees and outside applicants for a new position, noting that "an employer is not required to violate another employee's rights in favor of an employee with a disability in order to give the disabled employee a reasonable accommodation." 389 F. App'x 263, 271 (4th Cir. 2010). But this reading also ignores the limitations set by Supreme Court's decision in *Barnett* as to what constitutes "another employee's rights."

The record does not indicate that other Lowe's employees had an enforceable right to any of the vacant positions under a collective bargaining agreement or established seniority system. The Lowe's Enterprise Succession Management Process identifies individuals who demonstrate leadership talent and then includes them in the candidate pool for various positions. 2018 U.S. Dist. LEXIS 214333 at *11-12. Such a system does not give rise to legitimate expectations by those selected employees that they are entitled to a particular position, as was the emphasis in *Barnett*. 535 U.S. at 403-04. Thus, Lowe's did not establish as a matter of law that some other employee's entitlement to the vacant positions precluded Elledge's reassignment to those positions. The Fourth Circuit should affirmatively clarify that *EEOC v. Sara Lee Corp.* did not survive *Barnett*

and that reassignment, even in the face of a disability-neutral rule, may be required in the absence of a bona fide seniority system.

III. Giving Elledge 30 days to find a new position did not constitute an interactive process.

Employers have a duty to work collaboratively with employees to identify an appropriate reasonable accommodation that will meet the employee's needs. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015) ("The ADA imposes upon employers a good-faith duty to engage [with their employees] in an interactive process to identify a reasonable accommodation") (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346 (4th Cir. 2013)). When reassignment is the reasonable accommodation that has been identified through the interactive process, such reassignment should occur "within a reasonable amount of time." 29 C.F.R. § 1630 App. at 415. A "reasonable amount of time" is determined based on the totality of the circumstances. 29 C.F.R. § 1630 App. at 415. Employers are in the best position to know which jobs are vacant or will become vacant within a reasonable period of time; therefore the employer is obligated to inform an employee about the vacant positions for which the employee may be eligible for reassignment. EEOC Enforcement Guidance at *17. Giving an employee an ultimatum to accept a job or an unreasonable timeline to find a new job within the organization does not constitute an interactive process because the employee is unable to enter into the process voluntarily under those

circumstances. *See Feeney v. Dakota Minn. R.R. Co.*, 327 F.3d 707, 718 (8th Cir. 2003) (holding that giving an employee who has requested a reasonable accommodation no choice but to accept a demotion is an adverse employment action).

Lowe's failed to engage in the interactive process of finding a reasonable accommodation that would appropriately meet Elledge's needs. Rather than referring Elledge to vacant positions for which he was qualified, Lowe's simply gave Elledge a thirty day ultimatum to find a new position using the internal application process. This sort of passive approach abdicates the employer's responsibility to engage in the interactive process by placing the responsibilities solely on the shoulders of the employee and thus violates the requirements of the ADA.

IV. Unless there are no equivalent positions available, a reassignment that results in a demotion is unreasonable.

The Title I regulations expressly provide that reassignment should be "to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time." 29 C.F.R. § 1630.2(o) App. at 415.[9] Only if there are no vacant, equivalent positions available within a reasonable amount of time may the employer reassign the employee to a lower graded position.

[9] The Fourth Circuit has previously used the Title I regulations to inform decisions related to reasonable accommodations because they "provide additional guidance" when evaluating discrimination claims. *Stephenson v. Pfizer, Inc.*, 641 Fed. App'x 214, 220 (4th Cir. 2016). Thus, the additional guidance provided by the regulations should be given the same weight here.

See 29 C.F.R. § 1630.2(o) App. at 415 ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation").

When an employee is merely given a choice between taking a lower-paying job or risking discharge from employment altogether, this is an adverse employment action because it is not a truly voluntary choice. *Feeney v. Dakota Minn. R.R. Co.*, 327 F.3d 707, 718 (8th Cir. 2003). In *Feeney*, a change in company policy resulted in Feeney needing a reassignment, but because Feeney lacked seniority, the only position available for which he was qualified was one that resulted in a pay reduction and fewer work hours. 327 F.3d at 711. Rather than risk unemployment due to his inability to comply with the new company policy as a result of his disability, Feeney took the demotion. *Id.* The Eighth Circuit determined that Feeney "was faced with the following choice – take a lower paying job, one that he could report to on time, or show up to work late repeatedly, and risk discharge. Therefore, a reasonable person could conclude that Feeney had no choice at all." *Id.* at 718.

If there are vacant positions that are equivalent to the one the employee previously held and the employee is qualified for one of those vacant positions, but the employer reassigns the employee to a lower graded position instead, this action may constitute an adverse employment action. *See Harris v. Chao*, 257 F. Supp. 3d

67 (D.D.C. 2017). In *Harris*, the position to which Harris was ultimately reassigned was equivalent to his former position in terms of pay and benefits, but was nonetheless a demotion in terms of Harris' professional responsibilities and advancement opportunities. 257 F. Supp. 3d at 81-82. The court determined that the difficulty of the work and the opportunity for promotion were factors that should be considered in determining whether a reassignment was equivalent to the employee's original job. *Id.* at 82. Because the position to which Harris was ultimately reassigned did not have the same level of difficulty of work and limited his opportunities for advancement, the court found that this reassignment resulted in a demotion that could be considered an adverse employment action and overturned the grant of summary judgment to the employer. *Id.* at 83.

Lowe's suggested that Elledge apply for lower-level manager positions, which would have cut Elledge's pay by 50% and would have resulted in a loss of stock benefits. Thus, Elledge was forced to consider a drastic demotion or lose his job as a result of Lowe's refusing to accommodate him by reassigning him to either of the two existing, equivalent, vacant positions. Thus, Elledge was faced with the following choice – take a lower paying job that cost him benefits and professional responsibilities in addition to a significant salary cut, or wait to see if another equivalent position was posted as his 30-day deadline was quickly expiring. This was not a voluntary choice; it was a proposal for an adverse

employment action. Therefore, it was in error for the District Court to conclude as a matter of law that offering Elledge the opportunity to apply for a position that resulted in a demotion was a sufficient reasonable accommodation.

CONCLUSION

One of the core principles of the ADA is that qualified employees with disabilities are entitled to reasonable accommodations. When Congress enacted the ADA, it explicitly provided that reassignment to a vacant position should be permitted as a reasonable accommodation. The District Court's decision in *Elledge v. Lowe's Home Centers* contravenes the statutory provision of reassignment as a reasonable accommodation, contradicts the mandate of an interactive process between the employer and the employee, and disregards the limitations on when an employee may be demoted under reassignment as a reasonable accommodation. Furthermore, the District Court's opinion usurps the role of the jury in making factual determinations. The Fourth Circuit should therefore reverse the grant of summary judgment on the issue of failure to provide a reasonable accommodation.

Respectfully submitted,

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