No. 19-1069

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES ELLEDGE,
Plaintiff-Appellant,

v.

LOWE'S HOME CENTERS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of North Carolina
The Honorable Robert J. Conrad, Jr., District Judge
No. 5:16-cv-00227-RJC-DCK

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL IN PART

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission" or "EEOC") is charged by Congress with interpreting and enforcing Title I of the Americans with Disabilities Act ("ADA"), as amended, 42 U.S.C. §§ 12101 *et seq*. The ADA specifies that an employer may violate the law if it fails to provide a reasonable accommodation, including reassignment, to an otherwise qualified disabled employee. *Id.* §§ 12112(b)(5), 12111(9)(B). At issue in this case is the scope of the reassignment duty. The district court concluded that an employer's competitive hiring policy effectively trumps the ADA duty to reassign. JA 2332 This ruling misunderstands the ADA and, if upheld on appeal, would undermine enforcement of the law. The Commission therefore offers its views to this Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE[1]

Under the company policy at issue here, defendant generally uses a competitive process for hiring and offers jobs to applicants with the highest score on an interview rubric. The question presented is whether an employer with such a policy complies with its ADA obligation to provide a disabled employee with

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[1] The Commission takes no position on any other issue in the case.

"reassignment to a vacant position" as a reasonable accommodation when the employer merely allows the employee to apply for the position in accordance with its competitive hiring policy.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are included in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background[2]

1. Plaintiff Charles Elledge began working for defendant Lowe's Home Centers ("Lowe's" or "the company") in 1993, shortly after completing his master's degree in business administration. JA 1986. In 2003, he became a Store Manager. In time, Lowe's promoted him to District Manager and placed him in charge of eight stores. JA 157-58. Thereafter, during a reorganization, the District Manager position was renamed Market Director of Stores ("Market Director"). Elledge was selected for the new position and placed in charge of twelve stores. JA 158-61.

[2] Because this is an appeal of a grant of summary judgment for defendant, the following facts are based on the record, with all reasonable inferences drawn in favor of plaintiff.

As Market Director, Elledge was responsible for the "total store operations" at his stores, JA454, and he typically worked fifty to sixty hours a week. JA 1988. Elledge normally spent many hours on his feet, walking throughout stores, discussing all aspects of store management with staff, reviewing merchandise, addressing personnel and other concerns, and checking the books. *Id.* His market "generally ranked within the top markets in the Southeast every year from 2008 until 2015." JA 1988.

In December 2014, Elledge had a total right knee replacement and was on leave until mid-April 2015. JA 1989. As he was preparing to return to work, Elledge and his knee surgeon agreed that, at least for the first six months (through mid-October 2015), Elledge should limit himself to working eight hours a day, and he should spend no more than four hours a day walking or standing. JA 1990 (adding that they would reevaluate the restrictions after six months).

Lowe's initially agreed that these restrictions could last until mid-June 2015, JA 1784; they were then extended twice, until October 13, JA 1788, and finally until January 1, 2016, JA 1797. *But see* JA 893-94 (testimony that, despite contrary personnel records, second extension was not approved because Elledge's boss had not signed off); JA 1799 (email).

In early July 2015, Delno Dryden (Elledge's boss) and Hollie Reinhart (a Human Resources ("HR") official working with Dryden) became concerned that Elledge's restrictions might be permanent. JA 508-09, 514-16. *But see* JA 271-72 (testimony by Elledge that he never said restrictions were permanent). Without consulting Elledge, the company confirmed with Elledge's surgeon that the restrictions would be long term or permanent. JA 529-30. The company decided that Lowe's could not accommodate permanent restrictions. JA 516-17.

In early August 2015, Dryden and Reinhart met with Elledge to inform him that he was being relieved of his position. JA 1994-95. Even though his restrictions had been approved through at least October 13, if not January 1, they told him he would have thirty days to find a new job at Lowe's, go on disability leave, or take a severance package. JA 269, 1994-95. Both Dryden and Reinhart stressed that they would help him; Reinhart added that if he found an open job at Lowe's that was "comparable" to his Market Director position and for which he was qualified, she would work to "transition" him into that job without the usual application process. JA 287. A former Lowe's leave and accommodations specialist opined that thirty days was an unusually short period in which to find a senior-level position. JA 1319, 1346 (agreeing that imposing a thirty-day time

limit was not "a normal thing to do"). She also indicated that it was "[n]ot very common" to revoke or revisit accommodations once approved. JA 1291.

Elledge was "shocked," having no idea his job was in jeopardy because of his disability. JA 278-79. Under the metrics used by Lowe's, Elledge reasoned, his stores were "flourishing," JA 250; JA.1996-97, and he had not been disciplined for his performance. *See* JA 410; JA 464 (testimony by Dryden, noting no disciplinary action or written record of "coaching" or complaints). Nevertheless, he agreed to help ease his replacement's transition. JA 1998. He also began looking for other jobs.

2. Lowe's normally fills vacancies according to its "Customer Support Center Employment Procedure." JA 1720-28. Under the policy, most vacancies "are to be posted internally and externally for a minimum of 5 calendar days," and interested persons "must submit an application online." JA 1720-21. "Talent Acquisition" (part of HR) identifies applicants it views as the "top candidates." JA 1723. The hiring manager then decides whom to interview, and the candidate with the "highest interview score . . . should be selected for the position." JA 1723. The hiring manager is the ultimate decisionmaker. *See* JA 952. The procedure applies equally to individuals with a disability, *see* JA 1721; there is no special

procedure for disabled employees needing reassignment as a reasonable accommodation.

The company's job-posting procedure has a few exceptions. For example, the company does not require that jobs be posted in the case of lateral transfers to the same job. JA 1727; *see also* JA 1411 (example of lateral transfer). In addition, an employee being demoted "may be placed in the demoted role without a job posting." JA 1727.

There is conflicting evidence as to whether the company reassigned disabled employees to other positions as a reasonable accommodation without requiring them to comply with the ordinary job-application procedure. On the one hand, a former Lowe's leave and accommodations specialist testified that employees displaced because of disability should not have to compete with other applicants. JA 1321, 1328-29, 1358. The goal was to keep people "as whole as possible" by reassigning them to positions that were "equal to [their] current positions, if possible." JA 1247; *see also* JA 1319 ("onus" was on Lowe's to find the employee another job).

On the other hand, the company offered Elledge no reassignment opportunities beyond the right — shared by all Lowe's employees — to apply for jobs pursuant to the company's general hiring procedure. Reinhart, for example,

told Elledge he was responsible for identifying vacancies, although she and Dryden would also look. JA1994 . She also indicated that, unless one of the exceptions to the hiring policy applied, he would have to apply like any other internal or external applicant. *See* JA 1849 (email advising that Elledge would have to apply as "regular candidate" for position of Merchandising Director for Lawn and Garden); *cf.* JA 952-53 (hiring manager decides if particular position is lateral, in which case an employee need not go through interview process); JA 534-35 (discussing requirements for a lateral transfer, noting hiring manager must agree).

After the fact, Reinhart admitted that the main advantage Elledge had over nondisabled applicants was that she and Dryden "put[] his name out in front of [] hiring managers." JA 192-93 ("helped provide visibility"). Dryden added, "if there was a job that [Elledge's] skill-set fit," then "we would have given him a good recommendation for the role to the hiring manager." JA 533. Some evidence in the record indicates that the company's treatment of Elledge's reassignment request was not unusual. *See, e.g.*, JA 650-51, JA 1406-07.

Shortly before his transition period expired, Elledge applied for a job he thought might be a good fit — Merchandising Director for Lawn and Garden. The job entailed merchandising and "live goods" — flowers, trees, and shrubs. JA 1474-75. Elledge had experience with merchandising as Store Manager, District

Manager, and Market Director. JA 1998-99. In addition, he had worked with vendors and his own merchandising teams to ensure that the "live goods" in his stores suited the clientele and the climate. JA 1999-2000. After reviewing the job description, he concluded that he satisfied both the "Minimum and Preferred Qualifications" for the position. JA 2000-02; *see also* JA 1845-47 (job description).

Reinhart met with the hiring manager, Darryl Tilley, but she never mentioned any reassignment duty. *See* JA 1550-51, 1849 (email summary). Although experience doing "product line reviews" was not listed as a prerequisite, Tilley told Reinhart he was looking for someone with that experience.[3] JA 1499-1500; *cf.* JA 1500 (admitting that Store Managers and Market Directors would have some knowledge of product line reviews as well as merchandising). Despite talking to Reinhart, Tilley did not recall reviewing Elledge's application or his personnel file. JA 1525, 1531, 1535-36 (testimony by Tilley that he did not "know how specific [Elledge's] experience in lawn and garden or live goods" was). Based on his limited knowledge of Elledge, Tilley opined that Elledge would have

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[3] According to Tilley, a product line review lasts six to twelve months and includes evaluating the performance of particular products, deciding whether any changes should be made to the current product line, and presenting conclusions to upper-level management. JA 1468.

a "steep and challenging learning curve" in the new position. JA 1499-1502 (testimony by Tilley that Elledge needed merchandising experience). Tilley admitted, however, that two other Market Directors with skill-sets similar to Elledge's had been placed as Merchandising Directors around the same time. JA 1511-12; *cf.* JA 979-81. Tilley never interviewed Elledge and instead filled the position with a merchandising manager he had been grooming. JA 1508-09, 1535-36.

During the discussion between Reinhart and Tilley, Tilley commented that Elledge would have a better chance of getting a Merchandising Director position if he started at the manager level, which would have been a demotion. JA 1549. However, he was unaware of any open manager positions at that time. JA 1548-49 (also admitting that conversation was hypothetical). In any event, Lowe's never offered Elledge such a job, and he would have turned it down because it would have involved a significant cut in pay. *See* JA 314; *see also* JA 2003-04 (noting Elledge did not think he could afford manager positions as the single father of three small children). He did not apply for another manager position for the same reason. JA 2003-04.

Elledge did not identify another vacant equivalent position before his transition period expired. To ensure continuing income, Elledge applied for — and

was granted — leave and disability benefits. JA 336. Reinhart assured him he could continue to apply for jobs while on leave. JA 978-79; *cf.* JA 1413 (testimony by Moore that he has encouraged people on leave to apply for jobs).

While on leave, Elledge's physical condition continued to improve. Effective January 31, 2016, Elledge's disability benefits were terminated based on his surgeon's determination that Elledge was no longer disabled. JA 336-37, 2006-07. In March 2016, Elledge applied for a job as Merchandising Director of Outdoor Power Equipment. JA 2008. The job description closely resembled the description of the Merchandising Director for Lawn and Garden position. *See* JA 1881-87 (job description). Elledge heard nothing about his application, JA 312, and Reinhart did not remember being contacted for a reference. JA 979. The job went to a younger man with no apparent experience marketing outdoor power equipment or doing merchandising or product line reviews. JA 1889-92 (résumé); *see also* JA 100 (individual came from leadership development position).

When Elledge learned that he had not been selected for the second Merchandising Director position, he took early retirement. JA 2008. He later returned to an earlier career as an "Emergency Medical Technician–Paramedic." JA 2008-09.

B. Procedural Background

Elledge filed this action in district court against Lowe's alleging, *inter alia*, that the company violated the ADA by not reasonably accommodating his disability. The court granted summary judgment to Lowe's. The court emphasized that Elledge "appears to have been a loyal, hard-working, productive employee who[], when healthy, rose in rank and made valuable contributions to his company." JA 2340. The court nonetheless concluded that, once Elledge became disabled, the company's actions comported with the requirements of the ADA. *See* JA 2321-35.

Most pertinent here, the district court held that the evidence was insufficient to establish that one of the accommodations Elledge sought — reassignment to another vacant position — was reasonable within the meaning of the ADA. JA 2330-34. The court noted that "Lowe's has a longstanding job posting and standard hiring policy" that generally requires candidates to apply for any position they hope to obtain. JA 2330. The court explained that "the Circuits have split on whether an employer must reassign a disabled employee to a vacant position if that hiring violates or contradicts a neutral, nondiscriminatory hiring policy, such as the policy at issue here." JA 2331 & n.4 (listing cases). The court then concluded that, although this Court "has not squarely addressed the issue," "dicta" in two

Fourth Circuit cases suggest the Court would "probably side[]" with the circuits holding that the ADA "only requires that disabled persons be allowed to compete equally [for jobs] with nondisabled persons." JA 2331-32 (citing cases).

Accordingly, the court determined, Elledge "was required to adhere to Lowe's standard policy and compete on equal footing with other employees and outside applicants." JA 2332 ("no privileged status"). Here, the court concluded, "[t]he evidence reflects that [Elledge] did not obtain [the director-level positions in question] because other applicants were more qualified." JA 2332.

ARGUMENT

The District Court Analyzed The Reassignment Claim Under An Improper Legal Standard.

A key issue on appeal is whether an employer satisfies its ADA reassignment obligations to employees with disabilities by doing nothing other than allowing those employees to compete with other applicants for vacant positions. Many companies, including Lowe's, have adopted nondiscriminatory policies under which the company uses a competitive process for filling open positions and purports to offer jobs only to the best-qualified or highest-scoring applicants ("competitive hiring policies"). The district court concluded that, as long as an employer has a competitive hiring policy, the employer need not reassign disabled employees to vacant equivalent positions for which they are

qualified and instead may require them to compete for those jobs pursuant to the policy.

The district court misunderstood the ADA. As three courts of appeals and the Commission have recognized, the plain language and legislative history of the reasonable accommodation and reassignment provisions, along with the statutory structure and purpose of the ADA, confirm that "reassignment" means "reassignment," not just "permission to compete." Notwithstanding any competitive hiring policies, absent undue hardship, employers like Lowe's normally must reassign — *i.e.*, appoint — employees to vacant positions for which they are qualified when, due to disability, they can no longer do the essential functions of their current jobs.

A. The ADA requires reassignment, not just permission to compete.

The "starting point for any issue of statutory interpretation is the language of the statute itself." *D.B. v. Cardall*, 826 F.3d 721, 734 (4th Cir. 2016) (citation omitted). If the language "has a plain and unambiguous meaning with regard to the particular dispute, that meaning controls." *Id.* (citation omitted); *see also Hately v. Watts*, 917 F.3d 770, 784 (4th Cir. 2019).

The ADA generally requires employers to provide "reasonable accommodations" to an "otherwise qualified individual with a disability" and defines the failure to do so as one form of discrimination. 42 U.S.C. §§ 12112(a), 12112(b)(5). An individual is "qualified" if, "with or without reasonable accommodation," he can do the "essential functions" of the job he "holds or desires." *Id.* § 12111(8). "The term 'reasonable accommodation' may include" a variety of options, including "reassignment to a vacant position" and "appropriate adjustment or modifications of . . . policies." *Id.* § 12111(9)(B). The statutory defense to claims for failure to accommodate is "undue hardship." *Id.* § 12112(b)(5). Thus, under the plain language of the statute, absent undue hardship, an employer must reasonably accommodate otherwise-qualified disabled employees, including, where appropriate, by reassigning them to a vacant position for which they are qualified. *Cf. Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 432 (4th Cir. 2015) (explaining that not providing such accommodations is "impermissible discrimination").

As three courts of appeals have held, the statutory term "reassignment to a vacant position" does not mean "permission to compete for jobs with other employees." Rather, the plain meaning of the "core" phrase "to assign" is "to appoint [one] to a post or duty." *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1302,

1304 (D.C. Cir. 1998) (en banc) (alteration in original) (quoting *Webster's Third New Int'l Dictionary*). A "reassignment" thus involves appointment to a different position and would logically entail "some active effort on the part of the employer." *Id.* at 1304; *see Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-66 (10th Cir. 1999) (en banc) (explaining, *e.g.*, that "reassignment must mean more than the mere opportunity to apply for a job with the rest of the world"); *see also EEOC v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) ("the ADA does indeed mandate that an employer appoint employees to vacant positions for which they are qualified provided that such accommodation would be ordinarily reasonable and would not present an undue hardship to that employer").[4] "An employee who on his own initiative applies for and obtains a job elsewhere in the enterprise would not be described as having been 'reassigned'" in any ordinary sense of that word. *Aka*, 156 F.3d at 1304. He may have changed jobs, but he has done so "under his own power, rather than having been appointed to a new

[4] *United Airlines* overruled *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000), and although *United Airlines* was issued by a panel of three judges, it was supported by all active members of the Seventh Circuit. *See United Airlines*, 693 F.3d at 760-61 (explaining that prior to the issuance of the *United Airlines* opinion, every member of the Seventh Circuit in active service approved overruling *Humiston-Keeling*, and no member of the Court asked to rehear the case *en banc*).

position." *Id.* at 1302; *see also Smith*, 180 F.3d at 1164, 1167-68 (noting that "literal language" is "reassignment," not "consideration of a reassignment" or permission to compete for jobs).

To the extent that the term "reassignment," viewed in isolation, were open to competing interpretations, the statutory structure and purpose may also be consulted. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997); *In re Maharaj*, 681 F.3d 558, 568-72 (4th Cir. 2012). Here, the structure of the statute strongly suggests that "reassignment" means more than allowing disabled employees to seek positions through competition with other employees. Importantly, "reassignment" is a form of "reasonable accommodation," 42 U.S.C. § 12111(9), but permitting a disabled employee to apply for open positions on an equal footing with other applicants would not be considered an accommodation at all — it would simply be non-discriminatory treatment during the hiring process. But the ADA separately prohibits an employer from discriminating against disabled applicants for a vacant job. *See* 42 U.S.C. § 12112(a).

In light of this overlap, both *Smith* and *Aka* reasoned that including "reassignment" as a potential "reasonable accommodation" in 42 U.S.C. § 12111(9)(B) would be redundant if it required only non-discriminatory consideration of an employee with a disability in competition with other

applicants. *Smith*, 180 F.3d at 1164-65; *Aka*, 156 F.3d at 1304. It "is a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted); *see also Hately*, 917 F.3d at 787. Because the "duty" is "to give effect, if possible, to every clause and word of a statute," this Court should be "reluctant to treat statutory terms as surplusage." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted).

Construing the statute generally to require reassignment to a position for which an employee is qualified, absent undue hardship, accords with the underlying purposes of the ADA. The statute was designed, *inter alia*, to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" as well as "clear, strong, consistent, enforceable standards addressing discrimination" against such individuals. 42 U.S.C. § 12101(b). In passing the legislation, Congress explained that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for such individuals. *Id.* § 12101(a)(7); *see also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999) ("The ADA seeks to eliminate

unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity.”); *Smith*, 180 F.3d at 1168 (noting that “one of Congress’ [multiple] objectives” in requiring reasonable accommodation “was to facilitate economic independence for otherwise qualified disabled individuals”). By enabling employees to remain in the workforce doing work for which they are qualified when they would otherwise be forced out because of disability, the reassignment provision furthers these purposes.

The legislative history of the reassignment provision confirms this interpretation of the statute, making clear that Congress intended for the reassignment provision to enable current employees who would otherwise lose their jobs due to disability to remain in the workforce as productive workers as long as there was a vacancy for which they are qualified. As a committee report explained,

> 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.

H.R. Rep. No. 101-485, pt. 2, at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345 (adding that, if possible, employees should be accommodated in their present

positions, and "bumping" incumbents from their positions is not required); *see also* S. Rep. No. 101-116, at 31-32 (1989) (adding that reassignment is "not available to applicants for employment").

Finally, the Commission has long taken the position that "reassignment" does not mean "permission to compete." The EEOC's interpretative guidance explains that "[e]mployers should reassign [an] individual 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. pt. 1630, app. § 1630.2(o). Enforcement guidance issued by the Commission is even more specific, answering "[n]o" to the question whether "reassignment mean[s] that the employee is permitted to compete for a vacant position." EEOC, *Enforcement Guidance: Reasonable Accommodation & Undue Hardship Under the Americans with Disabilities Act*, 2002 WL 31994335, at *23 (2002) ("*Enforcement Guidance*"). As the Commission elaborated, "[r]eassignment 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 implemented as Congress intended." *Id.*; *see also id.* at *20 ("The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment."). EEOC's "policy statements, embodied in its compliance manual and internal

directives . . . reflect 'a body of experience and informed judgment.'" *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (citations omitted). As such, they warrant a measure of respect and deference. *See, e.g.*, *id.*; *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15-16 (2011).

There are, of course, important limits on the duty to reassign. *See generally Smith*, 180 F.3d at 1170 (summarizing some limitations). As already noted, an employee is entitled to reassignment to another position only if she is qualified for that position. *See, e.g.*, *id.* In addition, the duty to reassign extends only to current employees, not applicants, and only to existing positions that are vacant or will become vacant within a reasonable amount of time. *See* 42 U.S.C. § 12111(9)(B) ("*re*assignment to a *vacant* position" (emphasis added)); 29 C.F.R. pt. 1630, app. § 1630.2(o). "Bumping" an incumbent from her position is not required. 42 U.S.C. § 12111(9)(B); S. Rep. No. 101-116, at 32. And the employer need not promote the employee seeking reassignment as an accommodation, although demotion should be considered only as a last resort. *See* 29 C.F.R. pt. 1630, app. § 1630.2(o).

As explained in more detail below, reassignment also is not ordinarily required if it would violate a seniority system. *US Airways v. Barnett*, 535 U.S. 391, 403-06 (2002). And reassignment is unnecessary if the employee can be

accommodated in his current position. *See Enforcement Guidance*, 2002 WL 31994335, at *20. Furthermore, although the employer should take the employee's interests into account, in the end, the employer may place the employee into any equivalent position for which he is qualified. *Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 415 (4th Cir. 2015). Finally, reassignment, like any other reasonable accommodation, is not required if it imposes an undue hardship on an employer. 42 U.S.C. § 12112(b)(5).

Within these parameters, however, reassignment to another equivalent position for which an employee is qualified is normally required. "Anything else, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history." *Smith*, 180 F.3d at 1169.

B. There is no exception for competitive hiring policies.

In ruling that employers like Lowe's may require disabled employees in need of a reassignment accommodation to compete for jobs with other employees, the district court ignored the plain language of the ADA's reasonable accommodation and reassignment provisions. Instead, the court focused on the company's competitive hiring policy. JA 2330-31. In the court's view, disabled employees like Elledge who need reassignment to remain employed are "not

entitled to special treatment" in violation of the policy. JA 2331. Rather, the court concluded, employers with such policies may treat disabled employees just as they would any other worker; employers may thus require that employees "compete equally [for jobs] with nondisabled employees." JA 2331-32. The district court apparently concluded that requiring an employer to make an exception to its competitive hiring policy would always be "unreasonable" within the meaning of the ADA. *See* JA 2331-32. That is incorrect.

An employer made a similar argument in *US Airways v. Barnett*, 535 U.S. at 397-99. Like Lowe's, the employer in that case argued that the ADA "seeks only 'equal' treatment for those with disabilities." *Id.* at 397. Thus, the employer continued, it was not required to grant a reassignment accommodation that would violate a disability-neutral rule — there, the employer's seniority system. Any such accommodation, the employer asserted, would give the disabled employee a benefit that other workers could not receive, and the Act "does not require an employer to grant preferential treatment." *Id.*

The Supreme Court flatly rejected this anti-preference interpretation of the ADA. *See Barnett*, 535 U.S. at 397. The Court explained, "[b]y definition, any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." *Id.* And the "simple fact that an

accommodation would provide a 'preference' — in the sense that it would permit the [disabled employee] to violate a rule that others must obey — cannot *in and of itself* automatically show that the accommodation is not 'reasonable.'" *Id.* at 398. Rather, the employer may be required to make exceptions to its nondiscriminatory rules or policies in order to reasonably accommodate disabled employees.[5] *Id.*; *cf.* 42 U.S.C. § 12111(9)(B) (defining "reasonable accommodation" to include "appropriate adjustment or modifications of . . . policies").

The Court then went on to outline a two-step approach for analyzing reasonable-accommodation cases, including those where reassignment would violate an employer's nondiscriminatory rule or policy. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 360-61 (3d Cir. 2002) (Alito, J.) (discussing *Barnett*). To withstand summary judgment, the plaintiff need only show that a particular

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[5] In a case arising under Title VII of the Civil Rights Act of 1964, the Supreme Court similarly held that exceptions to neutral rules and policies may be required as a reasonable accommodation to an employee's religious practices. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015). The Court explained that while an employer is "surely entitled to have, for example, a no-headgear policy" in its dress code, "when a [Muslim] applicant requires an accommodation" — to wear a headscarf — "as an 'aspec[t] of religious . . . practice,' it is no response that the subsequent 'fail[ure] . . . to hire' was due to an otherwise-neutral policy." *Id.* (citing Title VII's reasonable accommodation provision, 42 U.S.C. § 2000e(j)). Like the ADA, "Title VII requires otherwise neutral policies to give way to the need for an accommodation." *Id.*

accommodation or "method of accommodation" seems "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401-02. Once the plaintiff has made this showing, the defendant "must then show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402; *see also Reyazuddin*, 789 F.3d at 414.

Applying that test, the Supreme Court assumed that, "normally," a request for reassignment is reasonable in "the run of cases" because the ADA specifically lists "reassignment to a vacant position" as a potential "reasonable accommodation." 535 U.S. at 402-03 (citing 42 U.S.C. § 12111(9)). The Court held that the type of reassignment at issue in *Barnett* was nonetheless "ordinarily" unreasonable for one reason only: it would violate a seniority system, which, the Court explained, holds a special status in American labor law. *Id.* at 402-05 (detailing unique features and benefits of seniority systems and adding that a plaintiff may still show "special circumstances" making reassignment in violation of a seniority system reasonable on the specific facts); *see also EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001) (explaining that reassignment in violation of a seniority system would trample other employees' rights, disrupt settled expectations, and expose the employer to possible lawsuits).

The district court apparently concluded that *Barnett*'s exemption for most seniority systems should extend to competitive hiring policies. *See* JA 2331-32. But that conclusion cannot be squared with *Barnett*. In rejecting a similar argument involving a competitive hiring policy, the Seventh Circuit explained, "[m]erely following a 'neutral rule' did not allow [the employer in *Barnett*] to claim an 'automatic exemption' from the accommodation requirement of the Act." *United Airlines*, 693 F.3d at 763. "Instead, [the employer] prevailed because its situation satisfied a much narrower, fact-specific exception based on the hardship that could be imposed on an employer utilizing a seniority system." *Id.* "[V]iolation of a [competitive hiring] policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy." *Id.* at 764.

The Tenth Circuit has also held that a competitive hiring policy does not automatically excuse a failure to reassign, explaining that a contrary holding would mean that "every employer could adopt [a competitive hiring policy] such that a disabled employee could never rely on reassignment to establish the existence of a reasonable accommodation." *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1205 (10th Cir. 2018); *see also United Airlines*, 693 F.3d at 764 (noting that because most employers have competitive hiring policies, extending *Barnett*'s narrow exception

to such policies would "swallow the rule"). "Such a result would effectively and improperly read 'reassignment to a vacant position' out of the ADA's definition of 'reasonable accommodation.'" *Lincoln*, 900 F.3d at 1205.[6]

In holding that the competitive hiring policy adopted by Lowe's necessarily trumps the company's ADA duty to reassign, the district court noted that there is no definitive Fourth Circuit authority on point, and other circuits are split on the question. JA 2331 n.4 (listing cases). Although the court noted that the en banc Tenth and D.C. Circuits have issued decisions supporting Elledge's position, the court did not cite the Seventh Circuit's decision in *United Airlines* or the Tenth Circuit's decision in *Lincoln*, both of which rejected the position the district court adopted. *Id.* (citing *Aka*, 156 F.3d 1284 (D.C. Cir.) (en banc), and *Smith*, 180 F.3d 1154 (10th Cir.) (en banc), but not *Lincoln*, 900 F.3d 1166 (10th Cir.), or *United Airlines*, 693 F.3d 760 (7th Cir.)).

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[6] In dictum, the Tenth Circuit suggested that where, for example, the employee's qualifications fell "significantly" below those of the other applicants, the employer might be able to cite the policy as part of its attempt to show that reassignment in a particular case would be unreasonable or cause undue hardship. *See Lincoln*, 900 F.3d at 1166. However, this Court need not address that suggestion here because the district court concluded that reassignment is never required.

The district court cited three other court of appeals decisions holding or suggesting that competitive hiring policies always — or usually — trump the ADA's reassignment obligation, JA 2331 n.4, but all three cases were wrongly decided. Each reasoned, at least in part, that a contrary holding "would convert a nondiscrimination statute into a mandatory preference statute," and yet the ADA "is not a mandatory preference act." *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007) (footnote omitted) (quoting *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1028 (7th Cir. 2000)); *see EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333, 1346-47 (11th Cir. 2016); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995) (pre-*Barnett* decision that did not address a competitive hiring policy like the one at issue here). But, as noted above, *Barnett* squarely rejected that rationale for denying a reasonable accommodation, explaining that "preferences" in "violat[ion] [of] an employer's disability-neutral rule" will "sometimes prove necessary to achieve the Act's basic equal opportunity goal." 535 U.S. at 397; *see also United Airlines*, 693 F.3d at 762-64 (explaining the conflict between the anti-preference rationale and *Barnett*).

Moreover, in *Huber*, the Eighth Circuit relied heavily on the Seventh Circuit's decision in *Humiston-Keeling*, 227 F.3d 1024. *See Huber*, 486 F.3d at 483-84. But *United Airlines* later overruled *Humiston-Keeling* in light of *Barnett*.

See United Airlines, 693 F.3d at 760-65 (also noting that *Huber* adopted *Humiston-Keeling* "without analysis, much less an analysis . . . in the context of *Barnett*"). The legal underpinnings of *Huber* have therefore been removed. *Cf. Huber v. Wal-Mart Stores, Inc.*, 493 F.3d 1002 (8th Cir. 2007) (Murphy, J., joined by three other judges, dissenting from denial of rehearing en banc) (explaining that the "panel's opinion renders a statutory provision in the ADA superfluous, overlooks EEOC guidance, and is contrary to" *Barnett*).

This Court should not follow *St. Joseph's* not only because it is inconsistent with *Barnett*, but also because the court incorrectly concluded that "[p]assing over" an employer's preferred candidate in favor of an employee with a disability "is not a reasonable way to promote efficiency or good performance," 842 F.3d at 1346. In reaching that conclusion, the court overlooked the fact that employees with disabilities are entitled to reassignment to a vacant position only if, *inter alia*, they are qualified to perform the essential functions of the position in question. *See, e.g.*, *United Airlines*, 693 F.3d 761; *Smith*, 180 F.3d at 1170. In addition, *St. Joseph's* did not grapple with the consequences of its holding: because most employers have competitive hiring policies, the court's holding would essentially "swallow the rule" that reassignment is ordinarily reasonable, *United Airlines*, 693

F.3d at 764, and "improperly read 'reassignment to a vacant position' out of the ADA's definition of 'reasonable accommodation,'" *Lincoln*, 900 F.3d at 1205.[7]

Based on "dicta" in two Fourth Circuit decisions, *Schneider v. Giant of Maryland*, 389 F. App'x 263 (4th Cir. 2010), and *Sara Lee*, 237 F.3d 349, the district court predicted that this Court would likely "side with the Circuits that have held that the ADA is not an affirmative action statute and only requires that disabled persons be allowed to compete equally with nondisabled persons." JA2331-32. But *Schneider* is unpublished; moreover, the plaintiff there was requesting reinstatement into a position that the company had already filled. 389 F. App'x at 271-72. This Court correctly concluded that the duty to provide reassignment does not require an employer to bump an incumbent in order to accommodate a disabled employee. *See id.*; 42 U.S.C. § 12111(9)(B) ("reassignment to a vacant position").

And although *Sara Lee* stated that employers need not "disrupt" the operation of a non-discriminatory company policy in order to provide a reasonable

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[7] Even *St. Joseph's* did not announce a categorical rule like that embraced by the district court in this case. Instead, *St. Joseph's* acknowledged that, "[c]onsistent with the second step in *Barnett*, a plaintiff can show that special circumstances warrant a finding that reassignment is a required accommodation under the particular facts of her case." 842 F.3d at 1347 n.7.

accommodation, 237 F.3d at 353-54, the proposed reassignment there would have conflicted with a seniority system, which presents very different questions from the competitive hiring policy at issue here. *See Barnett*, 535 U.S. at 403-05 (holding that, as an exception to the assumed rule that reassignment is reasonable, employers ordinarily need not reassign employees in violation of a seniority system because of considerations unique to seniority systems). In addition, *Sara Lee* pre-dates *Barnett*, so *Sara Lee* never considered *Barnett*'s holding that "preferences" in "violat[ion] [of] an employer's disability-neutral rule" may well "prove necessary to achieve the Act's basic equal opportunity goal." *Id.* at 397.

Turning to this case, because the district court wrongly believed that Lowe's did not have to make an exception to its hiring policy and could require Elledge to "compete [for jobs] on equal footing with other employees and outside applicants," JA 2331-32, the court never considered whether a jury could find that Elledge was entitled to reassignment under the correct legal standard. This Court should therefore reverse and remand for reconsideration of the reassignment issue under the proper legal standard.

CONCLUSION

For the foregoing reasons, the judgment should be reversed in part and remanded.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, Times New Roman 14-point font.

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ADDENDUM

PERTINENT STATUTORY AND REGULATORY PROVISIONS

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42 U.S.C. § 12101 (Findings and purpose)

(a) Findings

The Congress finds that —

. . . .

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

42 U.S.C. § 12111 (Definitions)

As used in this subchapter:

. . . .

(8) Qualified individual

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

(9) Reasonable accommodation

The term "reasonable accommodation" may include —

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

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

42 U.S.C. § 12112 (Discrimination)

(a) General rule

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

(b) Construction

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

. . . .

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

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

29 C.F.R. pt. 1630, app. § 1630.2(o) (excerpts)

. . .

Employers should reassign the individual 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.

. . .

An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employer to remain in the current position there are no vacant equivalent positions for which the individual is qualified, with or without reasonable accommodation.

CERTIFICATE OF SERVICE

I certify that I filed the foregoing brief with the Clerk of the Court this 19th day of April, 2019, by uploading an electronic version of the brief via this Court's Case Management/Electronic Case Filing (CM/ECF) system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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