No. 06-2238

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PAM HUBER,

Plaintiff-Appellee,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas, Fort Smith Division
The Honorable Robert T. Dawson, Judge

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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July 26, 2006

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America disclose the following:

1. The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or the Chamber of Commerce of the United States of America.

Respectfully submitted,

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The Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of all parties. The brief urges the court to reverse the district court's ruling and thus supports the position of Defendant-Appellant Wal-Mart Stores, Inc. before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 320 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every

industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq*., and other equal employment statutes and regulations. In addition, many are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. These companies routinely make reasonable accommodations to allow qualified employees with disabilities to perform essential job functions. In some cases, however, neither the employee nor the employer can identify a reasonable accommodation that will allow an employee to perform the essential functions of the employee's current job.

Thus, the issue in this appeal is extremely important to the nationwide constituency that EEAC and the Chamber represent. The district court below incorrectly ruled that the ADA's "reasonable accommodation" mandate goes so far as to require an employer to grant an employee with a disability a competitive disadvantage in reassignment over more qualified candidates. This overly expansive reading of the ADA's prohibition against disability discrimination is

unsupported by the law and would impose on employers and other employees a burden never intended by Congress.

Because of their interest in the application of the nation's civil rights laws, EEAC and the Chamber have filed numerous briefs *amici curiae* in cases before the United States Supreme Court and the United States Circuit Courts of Appeals, including cases involving the proper interpretation of the ADA. Moreover, EEAC filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (1991) (codified at 29 C.F.R. pt. 1630).

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Pam Huber worked as a dry grocery Order Filler at the Wal-Mart distribution center in Clarksville, Arkansas, earning $13.00 per hour and a $.50 shift differential. *Huber v. Wal-Mart Stores, Inc*., 17 A.D. Cas. (BNA) 720, 2005 U.S. Dist. LEXIS 40251, at *2 (W.D. Ark. Dec. 7, 2005). When Huber permanently injured her arm and hand, and could no longer perform the essential functions of her job, she requested a permanent transfer to a vacant, equivalent position. *Id*. at *3.

At the time she made this request, there was an open Router position at the distribution center – a position equivalent to Huber's prior job. *Id*. Wal-Mart did not give Huber the Router Job automatically, but instead required her to compete with other candidates, including some without disabilities, in accordance with company policy. *Id*. Wal-Mart chose another candidate for the Router position, someone even Huber agrees was the most qualified person for the job. *Id*. Because there were no other vacant, equivalent jobs at the distribution center at that time, Wal-Mart offered Huber the job of Maintenance Associate at a different facility. *Id*. at *4. Huber took the job and now makes $7.97 per hour there. *Id*.

Huber sued Wal-Mart, contending that the ADA requires the company to place her in a vacant, equivalent position – even if there are other candidates for

the job who have better qualifications. *Id.* Wal-Mart defended its long-established policy of selecting the most qualified candidate for a position, arguing that the ADA does not require a company to give individuals with disabilities a competitive advantage for jobs. *Id.* The district court ruled in favor of Huber, and Wal-Mart appealed. *Id.* at *21.

SUMMARY OF ARGUMENT

Like other civil rights statutes prohibiting discrimination in employment on the basis of a protected characteristic, Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12117, requires equal opportunity, not equal results. The ADA's plain language requires only nondiscrimination and "reasonable" accommodation, 42 U.S.C. § 12112(b)(5), and not a competitive advantage over other job candidates, as confirmed by both the legislative history, contemporaneous administrative interpretation, and decisions of the courts of appeals. Moreover, as this Court has ruled, accommodation requests that do not serve disability-related needs are "presumptively unreasonable." *Peebles v. Potter*, 354 F.3d 761, 769 (8th Cir. 2004) (citing *US Airways v. Barnett*, 535 U.S. 319, 402-03 (2002)).

For these reasons, the ADA's requirement of reasonable accommodation does not obligate an employer to disregard the legitimate rights and expectations of

other employees. *US Airways v. Barnett*, 535 U.S. 391 (2002) (ruling that a request for an accommodation under the ADA that violates a bona fide seniority system ordinarily will be "unreasonable" unless the individual can show "special circumstances" that call for an exception). Indeed, the ADA does not supersede other legitimate, nondiscriminatory employer policies, including the management prerogative to choose the best candidates for positions. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000).

ARGUMENT

AN EMPLOYER'S OBLIGATION UNDER THE ADA TO MAKE REASONABLE ACCOMMODATION STOPS SHORT OF PROVIDING A COMPETITIVE ADVANTAGE FOR AN EMPLOYEE WITH A DISABILITY OVER OTHER CANDIDATES FOR INTERNAL POSITIONS

I. THE ADA MANDATES EQUALITY OF OPPORTUNITY – NOT EQUAL RESULTS

A. Like Other Civil Rights Laws, The ADA Prohibits Discrimination Against, But Does Not Promote Discrimination For, Its Protected Class

Civil rights laws prohibiting discrimination in employment, such as the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, secure the rights of individuals not to be treated unfavorably by employers

due to a protected characteristic. These laws stop short, however, of requiring that any particular group be afforded a competitive advantage over all others when it comes to hiring or other job placement decisions.

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

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

The ADA's statutory language does not depart from this basic principle. It directs that individuals with disabilities be afforded equal employment opportunities, and recognizes that reasonable accommodation may be needed to remove barriers where appropriate. It stops short, however, of requiring that such individuals be granted a competitive advantage in hiring, promotions, transfer or any other job placement decisions. The ADA reflects Congress' findings that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the *opportunity to compete on an equal basis . . . ,*" 42 U.S.C. § 12101(a)(9) (emphasis added), and that "the Nation's proper goals regarding individuals with disabilities are to assure *equality of opportunity . . . .*" 42 U.S.C. § 12101(a)(8) (emphasis added). Accordingly, the Congressional

purpose in enacting the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

B. The ADA Requires Only An Objectively "Reasonable" Accommodation

While the ADA recognizes that individuals with disabilities may need some extra assistance in order to obtain an equal opportunity to compete in the workforce, its plain language requires only those accommodations that are objectively reasonable. The ADA prohibits discrimination in employment "against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a). It defines "discrimination" to include "not making *reasonable* accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business . . . ." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). In tandem with § 12112(b)(5), the ADA defines "qualified individual with a disability" as "an individual with a disability who, with or without *reasonable* accommodation, can perform the essential functions of the employment position that such individual holds or desires," 42 U.S.C. § 12111(8) (emphasis added). Thus, because an employer owes no duty to

an individual who could do the job only with an *un*reasonable accommodation that person would not be "qualified" under the law.

In requiring reasonable accommodation, the ADA acknowledges that equal employment opportunity for individuals with disabilities means something more than merely treating all employees the same. For these individuals, the employer is expected to do something extra—reasonable accommodation—to allow them to perform essential job functions, thereby giving individuals with disabilities "an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (*en banc*).

At the same time, however, the law does not require action "beyond the realm of the reasonable." *US Airways v. Barnett*, 535 U.S. 391, 401 (2002). In *US Airways v. Barnett*, the Supreme Court concluded that whether or not a proposed accommodation is objectively reasonable is an analysis separate and apart from any consideration of either the degree to which it would be effective in allowing the individual to do the job or whether making the accommodation would impose an undue hardship on the employer's business, observing that "a demand for an effective accommodation could prove unreasonable because of its impact, not on

business operations, but on fellow employees." *Id*. at 400. Accordingly, the ADA does not require an accommodation that exceeds what is objectively reasonable.

II. PROVIDING A COMPETITIVE ADVANTAGE GOES BEYOND WHAT IS OBJECTIVELY REASONABLE

A. Accommodation Requests, Such As Competitive Advantages, That Do Not Serve Disability-Related Needs Are "Presumptively Unreasonable"

Because the ADA's fundamental purpose is to enable individuals with disabilities to participate on an equal footing in the workplace *despite* their disabilities, not to propel them to the head of the line *because of* disability, requiring an employer to bypass a decidedly more qualified candidate for a job to accommodate a less qualified disabled candidate is not "reasonable" under the law. As this Court has recognized, requests for accommodation that are unrelated to a person's disability are "presumptively unreasonable" under the ADA. In *Peebles v. Potter*, 354 F.3d 761 (8th Cir. 2004), for example, the employer was not required to exempt a disabled employee from a rule requiring medical documentation to support a request for light duty where the employee's failure to comply with rule had nothing to do with his disability and his exemption from the rule would not have served disability-related needs. This Court reasoned that, "[w]hile excusing [the employee's] non-compliance would, in a broad sense, enable the employee to go back to work, it does not enable the disabled employee

to stand on the same footing as the employee who is not disabled, for the non-compliance has nothing to do with the disability." *Id.* at 768-69.

Similarly, in *Allen v. Interior Construction Services, Ltd.*, 214 F.3d 978 (8th Cir. 2000), a construction company had no obligation to contact a carpenter with a back injury about available work as a reasonable accommodation. The carpenter's disability did not prevent him from contacting the employer about possible jobs, this Court reasoned, and all other carpenters were expected to call in for work assignments. Because the employee's "back injury did not hinder [the employee's] ability to telephone or otherwise communicate with [the company] regarding employment . . . ," the company had no legal duty to contact him about available work. *Id.* at 982. *See also, U.S. Airways v. Barnett*, 535 U.S. 391, 413, 416 (2002) ("the ADA eliminates workplace barriers only if a disability prevents an employee from overcoming them – those barriers that would not be barriers *but for* the employee's disability . . . . '[R]eassignment to a vacant position' does *not* envision the elimination of obstacles to the employee's service in the new position that have nothing to do with his disability—for example, another employee's claim to that position under a seniority system, or another employee's superior qualifications") (Scalia, J., dissenting).

These same principles apply in this case, as the "accommodation" required by the court below (excusing Huber from having to compete with others for the Router position) in no way accommodates Huber's disability, which was not a factor in her non-selection, but rather compensates for her relatively weaker employment credentials (something that has nothing to do with her disability). Wal-Mart has a long-standing, disability-neutral policy of selecting the most qualified candidates for positions. Huber concedes that she was denied the Router position because, regardless of her disability, she was *not* the most qualified candidate for the job. Moreover, Huber agrees that the person selected *was* the best qualified.

Accordingly, Huber's disability did not place her at a competitive disadvantage for the Router job – her work history did. And requiring Wal-Mart to automatically place her in the Routing position would not accommodate Huber's disability, inasmuch as it would serve to offset her comparatively weaker job qualifications (which have nothing to do with disability). *EEOC v. Humiston-Keeling Inc.*, 227 F.3d 1024, 1027 (7th Cir. 2000) (upholding employer's decision not to transfer plaintiff to an office job, the court reasoned that plaintiff's disability "put her at no disadvantage in competing for . . . [the] job," which was ultimately awarded to a more qualified candidate). Because this Court has correctly

determined that accommodations unconnected with a person's disability are "presumptively unreasonable," the decision below should be reversed. *Peebles*, 354 F.3d at 769.

B. Both The ADA's Legislative History And The Contemporaneous Administrative Interpretation Eschew Competitive Advantages For One Group Over Another

When Congress passed the ADA in 1990, it confirmed that it did not intend to give disabled applicants a competitive advantage for jobs. In addition to the legislative findings discussed above, both the House and Senate Committees with jurisdiction over the employment provisions of the ADA stated:

> By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.
>
> * * *
>
> [T]he employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, *the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.*

S. Rep. No. 101-116, at 26-27 (1989); H.R. Rep. No. 101-485, pt. 2, at 55-56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337-38 (emphasis added).

Likewise, the Equal Employment Opportunity Commission (EEOC), the federal agency with enforcement authority over the employment provisions of the

ADA, took this same position in its 1991 guidance supporting its regulations interpreting the ADA:

> Like the Civil Rights Act of 1964 . . . , the ADA seeks to ensure access to equal employment opportunities based on merit. *It does not* guarantee equal results, establish quotas, or *require preferences favoring individuals with disabilities over those without disabilities.*

29 C.F.R. pt. 1630 app. (2005) (Background) (emphasis added). Thus, while the ADA requires an employer to expend extra effort on behalf of an individual with a disability, that obligation does not mandate reassignment nor require the employer to grant the individual a competitive advantage in reassignment over a nondisabled candidate who is better qualified.

C. The Consistent Interpretations Of A Majority Of The Courts Of Appeals Confirm That The ADA Does Not Mandate Competitive Advantages For Disabled Individuals

A majority of the circuit courts of appeals to have addressed the issue have adhered to these important principles of equality of opportunity, taking affirmative steps in the form of accommodation to ensure a level playing field for people with disabilities, while drawing the line when a disabled individual claims he or she is automatically entitled to a job. In *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), the Fifth Circuit stated:

> [W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring *or* reassignment over those who are

> not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less.

Id. at 700 (emphasis added). The Seventh Circuit, citing *Daugherty*, followed suit in *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998), noting that "[w]hile Congress enacted the ADA to establish a 'level playing field' for our nation's disabled workers . . . it did not do so in the name of discriminating against persons free from disability." (citation omitted). *See also Williams v. United Ins. Co.*, 253 F.3d 280, 282 (7th Cir. 2001) ("[the ADA] is not an affirmative action statute in the sense of requiring an employer to give preferential treatment to a disabled employee merely on account of the employee's disability") (citations omitted). Also citing *Daugherty*, the Eleventh Circuit has stated, "[w]e cannot accept that Congress, in enacting the ADA, intended to grant preferential treatment for disabled workers." *Terrell v. US Air*, 132 F.3d 621, 627 (11th Cir. 1998). *See also Wernick v. Federal Reserve Bank*, 91 F.3d 379, 384-85 (2d Cir. 1996) (noting, with respect to an employee who sought a transfer away from a supervisor who was causing her stress, that the employer "only had an obligation to treat [the plaintiff] in the same manner that it treated other similarly qualified candidates") (citing *Daugherty*).

D. Competitive Advantages Would Require Employers To Disregard The Legitimate Rights And Expectations Of Other Employees

Because the ADA does not mandate reassignment, and at most requires "reasonable" accommodations, it does not require an employer to place an employee with a disability in a position when doing so would conflict with the legitimate rights and expectations of other employees. Such rights and expectations can be based on a collective bargaining agreement, an employer-created policy or practice, or merely the other employee's superior qualifications for the position.

Courts have recognized that legitimate employer policies and practices limit the circumstances under which reassignment may be a reasonable accommodation. The U.S. Supreme Court held in *US Airways v. Barnett*, 535 U.S. 391 (2002), that a request for an accommodation under the ADA that violates a bona fide seniority system ordinarily will be "unreasonable" unless the individual can show "special circumstances" that call for an exception. Declining to recognize reassignment as an automatic right under the ADA, as the trial court did below, the High Court found that reassignment as an accommodation may be unreasonable because, among other things, of its impact on other employees. A request for accommodation that conflicts with a bona fide seniority system usually will be

unreasonable, the Court said, because such systems provide "important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment."

Giving disabled employees a competitive advantage also would unfairly penalize other employees — those who otherwise would have been selected for the position — merely because they do not have a disability. This is true regardless of whether the employer's practice is to choose employees based on comparative qualifications or whether placement follows a seniority system. In either situation, another employee has a legitimate expectation that he or she will be placed in the open position. If the lower court's view were to prevail, every employee with superior qualifications for a job could be displaced by an individual whose disability constitutes a trump card. This cannot be the law.

Indeed, if the ADA obligated an employer to give individual's with disabilities a competitive advantage in job assignments, much of the burden would fall on the coworkers displaced by the move. While the employer ostensibly is making the "accommodation," in the sense that it facilitates the placement and accepts a less-than-optimal performer in the job, it is the employee who would have had the job whom the action affects most directly. Whether this employee has superior qualifications or merely seniority, losing out to the individual with a

disability who is less qualified means that this other candidate did not get the job that he or she had every reason to expect.

E. Competitive Advantages Would Supersede Other Legitimate Nondiscriminatory Employer Policies, Including The Management Prerogative To Choose The Best Candidates For Positions

Courts have recognized that legitimate employer policies and practices limit the circumstances under which reassignment may be a reasonable accommodation. In *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998), the Seventh Circuit concluded generally that an employer need not "reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer . . . . " *Id.* at 679. The Seventh Circuit collected examples of such legitimate policies from other circuits, such as a requirement that the individual be neither underqualified nor overqualified for the job; a policy of preferring full-time over part-time employees for internal transfers; an "up or out" policy under which employees who do not progress at the expected pace are terminated, and a "non-demotion" policy under which employees who are removed from their jobs for performance or business reasons are not entitled to a lower position. *Id.* The Seventh Circuit concluded:

> In fact, we have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a

> legitimate, nondiscriminatory policy of the employer, . . . and for good reason. The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result that would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees.

Id. (citation omitted). *See also Burns v. Coca Cola Enters., Inc.*, 222 F.3d 247, 257 (6th Cir. 2000) (holding that while employer has a duty to consider transferring employee who cannot perform current job with reasonable accommodation, "[w]e do not, however, hold that the employer must reassign the disabled employee to a position for which he is not otherwise qualified, or that the employer must waive legitimate, nondiscriminatory employment policies or displace other employees' rights to be considered in order to accommodate the disabled individual").

More recently, in a case similar to this one, the Seventh Circuit concluded correctly that the ADA does not require an employer to award a vacant position to an individual with a disability as a reasonable accommodation when another candidate for the position is better qualified. *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024 (7th Cir. 2000). Writing for the court, then Chief Judge Richard Posner explained that because the ADA does not require employers to "give bonus points to people with disabilities, much as veterans' preference statutes do," *id.* at 1029, the ADA does not require reassignment to a job for which there is a better

applicant, "provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." *Id.* Distinguishing reasonable accommodation from a request to exempt a disabled employee from having to compete for a job, the court further reasoned:

> "[T]here is a difference . . . between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group . . . . That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace . . . ."

Id. at 1028-29.

Selection decisions are the most basic—and the most common—management judgments. Employers filling vacant positions want to choose the best candidate, using criteria such as past performance, seniority, length of service, knowledge, skill level, education and experience. When such a decision is made for a legitimate, nondiscriminatory business reason, it falls within the realm of business judgment unaffected by antidiscrimination laws. Requiring a company to go beyond the reasonable accommodation obligation, however, and accord individuals with disabilities privileged status irrespective of how well they fulfill

the selection criteria applied to other candidates for a position would prevent employers from exercising their business judgment to make the best selections for open positions.

For this reason, the opposite view, taken by the Court of Appeals for the Tenth Circuit in *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*) and adopted by the trial court below, is simply wrong and should not be considered persuasive by this Court. Both courts assumed (incorrectly) that where an employee with a disability cannot be accommodated in his or her current position, the employer *must* reassign that employee to a vacant position for which he or she is minimally qualified even if another candidate is more qualified, absent some intervening policy such as a well-established seniority system. In so ruling, they reasoned that reassignment "must mean something more than merely allowing a disabled person to compete equally." *Id.* at 1165; *Huber v. Wal-Mart*, U.S. Dist. LEXIS 40251, at *15 (W.D. Ark. Dec. 7, 2006) (any other reading of the law would "render that portion of the ADA meaningless").

As discussed above, such a broad reading is both antithetical to basic principles of equal employment opportunity and contrary to the statute. *See generally*, Edward G. Guedes, *Smith v. Midland Brake, Inc. —Writing Affirmative Action Into the Americans with Disabilities Act?*, 73 Fla. Bar J. 68 (Oct. 1999).

What both courts fail to understand is that allowing an employee the opportunity to compete for a transfer to another position when he or she is not performing adequately in the current position *is* an alteration of the employer's usual and customary procedures. This special consideration, which would not be allowed absent the disability, in and of itself is a reasonable accommodation.[1]

Furthermore, it is important to note that, in addition to allowing Huber to compete for the Router position, Wal-Mart also actively facilitated her application for other jobs. Although the only other vacant position available at the time paid less, Wal-Mart's persistence in finding Huber a job ultimately "prevent[ed her] from being out of work"—the precise outcome Congress intended when it included reassignment as a possible accommodation in the first place. S. Rep. No. 101-116, at 32 (1989); H.R. Rep. No. 101-485, pt. 2, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("[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").

As the Interpretive Guidance to the EEOC's regulations makes clear, an employer is not required to promote an employee and may, in fact, "reassign an

[1] For the same reasons, the District of Columbia Circuit's *dicta* in *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1304 (D.C. Cir. 1998) (*en banc*), on which the Tenth Circuit relied, misinterprets the ADA.

individual to a *lower* graded position" as a reasonable accommodation. 29 C.F.R. pt. 1630 app. (2005) (Section 1630.2(o) Reasonable Accommodation) (emphasis added). The guidelines further state that an employer is not required to "maintain the reassigned individual with a disability at the salary of the higher graded position if it does not so maintain reassigned employees who are not disabled." *Id*. In other words, there is no *absolute* right to reassignment to an "equivalent" position, in terms of pay or status, under the ADA. Where, as the case was here, an employer makes every reasonable effort to place the individual in an equivalent position, but ultimately determines that reassignment to a lower-paying position is the only *reasonable* accommodation option available, that employer has more than satisfied its reasonable accommodation obligation under the law.

What's more, the trial court's reliance on *Barnett* for the proposition that the ADA actually requires "preferences," such as automatically reassigning a person with a disability to a vacant position for which there are other, more qualified candidates, is misplaced. The language the trial court relies on has to do with the High Court's observation that any ADA accommodation, in essence, is a "preference" because the employer is treating an employee with a disability more favorably than other workers. Yet it does not necessarily follow from the Supreme Court's discussion that it intended to exempt disabled employees from having to

compete for jobs. Indeed other language in the opinion (as well as the Court's ultimate decision in the case, which declined to mandate reassignment where other, more senior employees had a right to the job) suggests the opposite is true. The Supreme Court pointed out, for example, that preferences in the form of reasonable accommodations may be necessary to achieve "*equal* opportunity" and to ensure that individuals with disabilities "obtain the *same* workplace opportunities that those without disabilities automatically enjoy"—not greater opportunities or an automatic entitlement to jobs. *Barnett*, 535 U.S. at 398 (first emphasis added). What is clear from this language is that the trial court and the Supreme Court are simply talking about different kinds of "preferences," with the High Court addressing preferences that may be necessary to level the playing field and the trial court talking about those that give the worker with a disability a competitive advantage. The trial court's view of the law, however, is neither supported by the statute, nor the Supreme Court's reading of the statute and must be reversed.

CONCLUSION

For the foregoing reasons, *amici curiae* Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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July 26, 2006

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Defendant-Appellant and in Support of Reversal complies with Fed. R. App. P. 32(a)(7)(B) and pertinent provisions of Eighth Circuit Rule 28A. The brief has 5,292 words, from the Interest of the *Amicus Curiae* through the Conclusion, according to the word processing program Microsoft Word 2000. A 3 ½ inch diskette containing this brief in .pdf format has been filed with the Court. It has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2006, two (2) paper copies of, and one (1) computer disk containing, this Brief *Amici Curiae* of the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America in Support of Defendant-Appellant and in Support of Reversal were sent via first class U.S. Mail, postage prepaid, on this day to each of the following:

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