

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division**

UNITED STATES OF AMERICA,
Plaintiff,

v.

C.T. WOODY, JR., SHERIFF, CITY OF
RICHMOND, in his official capacity,
Defendant.

CIVIL NO. 3:16-cv-127

MEMORANDUM IN SUPPORT
OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56, Plaintiff United States of America (United States) submits this Memorandum in Support of its Motion for Summary Judgment, filed separately on this date.

I. INTRODUCTION

Emily Hall served the City of Richmond as a decorated Deputy Sheriff for ten years. In that time she was promoted and awarded Employee of the Month. In September 2012, Ms. Hall was diagnosed with a heart condition that prevented her from continuing to serve as a Deputy Sheriff but which did not prevent her from working in a civilian position. Ms. Hall was qualified for and sought a civilian vacancy in the Sheriff's Office. Despite the availability of several civilian vacancies, Defendant Sheriff C.T. Woody, Jr., did not reassign her to any vacancy. Instead, he fired her. Sheriff Woody's failure to accommodate Ms. Hall violated Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111–12117. The plain language of the statute requires an employer to reassign a qualified employee with a disability to a vacant position when reassignment is a necessary accommodation.

Both parties agree that there are no material facts in dispute and that this matter is capable of resolution on summary judgment.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

In this case, the undisputed material facts are:

1. Emily Hall began working for the Richmond City Sheriff's Office as a Deputy Sheriff in May 2003. Ex. 1, Compl. ¶ 10; Ex. 2, Def.'s Answer to Compl. ¶ 10.
2. Sheriff Woody became Sheriff of Richmond in 2006. He decided to retain Ms. Hall as an employee at that time. Ex. 3, Woody Dep. Tr. 29:11–19.
3. According to Sheriff Woody, Ms. Hall was a "great employee" who did her job

“very well,” “never complained,” and was “loved” and “respected” by her colleagues. Ex. 3, Woody Dep. Tr. 30:12–18, 31:24–32:3.

4. Sheriff Woody “commend[ed] [Ms. Hall] about her work ethic and how she conducted herself as a deputy sheriff.” Ex. 3, Woody Dep. 30:9–11. In January 2006, Sheriff Woody named Ms. Hall Employee of the Month. Ex. 29, Woody 565. In 2010, Sheriff Woody promoted Ms. Hall to Corporal. *Id.* 30:1–11; Ex. 4, Hall Dep. Tr. 31:11–17; Ex. 24, Woody 472.

5. At all relevant times, Ms. Hall worked as a Deputy Sheriff assigned to the court. Ex. 4, Hall Dep. Tr. 63:23–64:8, 121:4–122:3; Ex. 25, Woody 473. Her duties included ensuring order in court, accompanying inmates into and out of court, and providing security for the presiding judge. Ex. 1, Compl. ¶ 11; Ex. 2, Def.’s Answer ¶ 11.

6. Ms. Hall’s duties required that she be prepared to restrain inmates and sustain direct inmate contact. Ex. 1, Compl. ¶ 11; Ex. 2, Def.’s Answer ¶ 11.

7. In September 2012, Ms. Hall was diagnosed with familial dilated cardiomyopathy and supraventricular tachycardia, conditions that, without treatment, would substantially limit the operation of her cardiovascular system. Ex. 5, Shams Decl. ¶ 7–8.

8. On September 21, 2012, Ms. Hall’s doctors implanted an internal cardiac defibrillator and pacemaker to treat these conditions and to prevent heart failure. Ex. 5, Shams Decl. ¶ 6; Ex. 6, Def.’s First Admis. 6.

9. On September 24, 2012, Ms. Hall notified the Sheriff’s Office that she needed to take medical leave due to a serious health condition that made her unable to perform the essential functions of her job. Ex. 2, Def.’s Answer ¶ 13; Ex. 6, Def.’s First Admis. 8; Ex. 7, Hall Dep. Ex. 4 at 3 (Woody 717). Ms. Hall’s cardiologist approved her request and certified that she had developed familial dilated cardiomyopathy, a condition of “indefinite duration.” Ex. 7, Hall Dep.

Ex. 4 at 7 (Woody 721). Sheriff Woody granted Ms. Hall’s request for medical leave. *Id.* at 11 (Woody 725).

10. Also on September 24, 2012, Ms. Hall provided a Notification of Return to Work/School form to the Sheriff’s Office. Ex. 8, Hall Dep. Ex. 5 (Woody 726). Ms. Hall was “really excited about getting back to work” and planned to return to work as soon as she was able. Ex. 4, Hall Dep. Tr. 124:14–19. The form, which was completed by Ms. Hall’s health care provider, stated that she “may be able to return to work” as of October 15, 2012, but only on “light duty” status, with the restriction that she could no longer sustain direct contact with inmates. Ex. 8, Hall Dep. Ex. 5 (Woody 726); Ex. 2, Def.’s Answer ¶ 14; Ex. 6, Def.’s First Admis. 9.

11. Ms. Hall’s health condition and restrictions prevented her from performing the essential functions of her job as a Deputy Sheriff. Ex. 9, Def.’s Interrog. Answers 2. According to the Sheriff’s Office, there was no accommodation that would have allowed Ms. Hall to continue working in her job as Deputy Sheriff, because all Deputy Sheriffs must be able to sustain direct contact from inmates or other individuals. Ex. 10, 30(b)(6) Dep. Tr. 113:13–16 (“The only way Emily Hall could return to work would be to return to full capacity in a sworn [Deputy Sheriff] position or apply for a different position.”), 185:3–13, 186:9–10, 187:1–5.

12. Ms. Hall was, however, physically able to hold a full-time “desk job.” Ex. 5, Shams Decl. ¶ 9.

13. On multiple occasions and starting while Ms. Hall was still on leave in October 2012, Ms. Hall asked the Sheriff’s Office to place her in a position other than Deputy Sheriff—a “light duty” or civilian position. *Infra* ¶ 14, 16, 17–21, 35, 44. Civilian employees, unlike sworn employees (Deputy Sheriffs), do not have police powers. Ex. 10, 30(b)(6) Dep. Tr. 20:20–21:4.

14. In October 2012, while Ms. Hall was still on medical leave, she went to the Sheriff’s

Office to inform Recruitment Manager Patty Nicholas that she was able to return to work in a light duty capacity, *i.e.*, a sworn position in which she would not risk sustaining contact from inmates, or in a civilian role. Ms. Hall requested employment in either capacity. Ex. 4, Hall Dep. Tr. 85:5–16, 104:1–3, 124:12–126:23; Ex. 10, 30(b)(6) Dep. Tr. 19:8–9 & Errata Sheet.

15. Ms. Nicholas told Ms. Hall that she was ineligible for a light duty assignment, because her condition was indefinite. Ex. 4, Hall Dep. Tr. 104:1–6, 124:12–125:23. At that time, the Sheriff’s Office did not provide light duty assignments for individuals who required light duty for more than ninety days. Ex. 10, 30(b)(6) Dep. 97:16–20, 141:18–142:4; *see also* Ex. 11, 30(b)(6) Dep. Ex. 3 (Woody 1589–98). Ms. Nicholas also told Ms. Hall that she should talk to the Sheriff about a civilian position, because he would have to approve a reassignment to a civilian position. Ex. 4, Hall Dep. Tr. 125:21–23.

16. In approximately October 2012, Ms. Hall met with Sheriff Woody to tell him that she could no longer work as a Deputy Sheriff but that she wanted to return from leave to a civilian position at the Sheriff’s Office. Ex. 4, Hall Dep. Tr. 85:5–86:7; Ex. 3, Woody Dep. 46:8–47:4.

17. Ms. Hall told Sheriff Woody that she was willing to work in any available civilian position, in “any job,” “anywhere” within the Sheriff’s Office. Ex. 4, Hall Dep. Tr. 86:5–7, 127:4–6 (“I will take anything. I just want to come back and work.”). Sheriff Woody referred Ms. Hall to his Human Resources (HR) Department. *Id.* 88:5–6; Ex. 3, Woody Dep. 46:23–47:4.

18. Ms. Hall then telephoned Billie Winzor, then head of the Sheriff’s Office HR Department, to ask about returning to work. Ex. 4, Hall Dep. Tr. 88:3–23, 126:21–127:11; Ex. 10, 30(b)(6) Dep. 10:16–23. Ms. Winzor told Ms. Hall she would “keep [her] informed” and referred her to the Sheriff’s Office website. Ex. 4, Hall Dep. Tr. 88:15–89:1; Ex. 10, 30(b)(6) Dep. 117:6.

19. Ms. Hall checked the Sheriff’s Office website for vacancies on a weekly basis. Ex.

4, Hall Dep. Tr. 137:21–138:6. Ms. Hall also called Ms. Winzor several more times. *Id.* (“I constantly called . . . I think she got tired of me calling.”).

20. On November 19, 2013, Ms. Hall e-mailed Sheriff Woody asking, “Could you please inform me of my status to return to work? . . . I’m not sure what the policy is but would I be able to handle the civil trials since they are not dealing with inmates?” Ex. 12, 30(b)(6) Dep. Ex. 7 (USA 3). Sheriff Woody interpreted this e-mail as a request for a civilian position. Ex. 3, Woody Dep. Tr. 55:25–56:4. Sheriff Woody replied to the e-mail, copying Ms. Winzor, asking Ms. Winzor to “advise [Ms. Hall] as to light duty assignment” and noting that Ms. Hall “would be very helpful in your office [*i.e.*, HR].” Ex. 12, 30(b)(6) Dep. Ex. 7 (USA 3). Ms. Winzor did not respond.¹

21. On January 23, 2013, Ms. Hall e-mailed Ms. Winzor to ask again about civilian vacancies at the Sheriff’s Office. Ms. Hall also advised that her sick and vacation leave was about to run out. Ex. 13, 30(b)(6) Dep. Ex. 6 (Woody 1403); *see also* Ex. 10, 30(b)(6) Dep. Tr. 116:11–18.

22. On January 23, 2013, Ms. Winzor replied to Ms. Hall advising that a vacant Payroll Technician position was advertised on the Sheriff’s Office website. Ms. Winzor stated, “[y]ou may apply for it.” Ex. 13, 30(b)(6) Dep. Ex. 6 (Woody 1403); *see also* Ex. 10, 30(b)(6) Dep. Tr. 116:11–17; Ex. 9, Def.’s Interrog. Answers 6.

23. The job description for the position of Payroll Technician states that the “preferred candidate will have two (2) years of experience in the administrative or payroll field or related area and have two years’ post-secondary education” and “will possess strong organizational skills and data entry ability.” The description also states that the candidate “[m]ust be proficient in the usage

¹ Defendant has not produced any such response; the United States infers that there was none.

of the English language” and “[s]hould be able to demonstrate competencies in Microsoft applications including Word, Excel and Outlook.” The description also states that salary “is negotiable depending on qualifications and experience.” The ability to sustain direct contact with inmates is not a requirement of the position. Ex. 27, Hall Dep. Ex. 17 (Woody 203); Ex. 2, Def.’s Answer ¶ 21. There were no unwritten or unadvertised essential job qualifications for the position of Payroll Technician. Ex. 9, Def.’s Interrog. Answers 7.

24. Ms. Hall applied for the Payroll Technician position. Ex. 2, Def.’s Answer ¶¶ 22. Her application was received by the Sheriff’s Office on February 7, 2013. Ex. 14, 30(b)(6) Dep. Ex. 21 (Woody 56–71); *see also* Ex. 10, 30(b)(6) Dep. Tr. 253:22–254:12.

25. Ms. Hall’s application reflected that she possessed all of the qualifications for the Payroll Technician position. Ex. 14, 30(b)(6) Dep. Ex. 21 (Woody 56–71). Specifically, her application showed that she had over seven years’ experience as an account manager with a private security firm, where she was responsible for payroll and scheduling assignments for twenty to forty employees; six years’ experience as a convenience store manager, where she was responsible for computing employee payroll; and administrative experience at the Richmond City Sheriff’s Office, including experience docketing video arraignments. *Id.* at 2–3 (Woody 57–58). Her application also reflected that she had two years of post-secondary education through a Data Entry program at J. Sergeant Reynolds Community College. *Id.* at 4 (Woody 59). Her application also listed Microsoft Word and Microsoft Excel as professional skills, *id.*, and reflected English-language proficiency. *See generally id.* Her application further demonstrated her nearly ten years of employment at the Sheriff’s Office. *Id.* at 2 (Woody 57).

26. Ms. Hall was qualified for the position of Payroll Technician. Ex. 6, Def.’s First Admis. 14.

27. The Sheriff's Office received approximately eight other applications for the position of Payroll Technician. Ex. 15, Woody 17–19, 49–51, 75, 159–61, 192–95, 198–202, 222–25, 293–311. All of these applications, except for Ms. Hall's, were from external candidates. *See id.*

28. Ms. Hall was one of four finalists invited for an interview for the Payroll Technician position. Ex. 9, Def.'s Interrog. Answers 8. Sheriff Woody recommended that the HR Department interview her. *Id.* The Sheriff's Office does not interview a candidate for a position unless that individual's application demonstrates that the individual meets the requirements for that position. Ex. 6, Def.'s First Admis. 12, 13.

29. Ms. Hall interviewed for the Payroll Technician position in February 2013. Ex. 1, Compl. ¶ 23; Ex. 2, Def.'s Answer ¶ 23. The Sheriff's Office did not give Ms. Hall priority for placement into the Payroll Technician position. Ex. 2, Def.'s Answer ¶ 26.

30. Ms. Hall was not hired for the position. Ex. 2, Def.'s Answer ¶ 24.

31. Ms. Hall learned that she had not been selected when she heard from a coworker that another candidate had been hired. Ex. 4, Hall Dep. Tr. 96:25–97:3.

32. Sheriff Woody had the authority to hire any candidate for the Payroll Technician position. Ex. 10, 30(b)(6) Dep. Tr. 136:5–19, 139:1–7.

33. According to the Sheriff, the sole reason he did not hire Ms. Hall for the Payroll Technician position is that she was not the “most qualified” candidate according to the Sheriff's Office internal evaluation system. Ex. 9, Def.'s Interrog. Answers 11, 13.

34. According to the Sheriff's Office, Sheriff Woody hired Camille Christian for the position, because she was the “most qualified” candidate. Ex. 10, 30(b)(6) Dep. Tr. 188:14–20. In July 2013, just 5 months after the interviews, Sheriff Woody transferred Ms. Christian to a different position and, in September 2014, fired her for insubordination. Ex. 16, 30(b)(6) Ex. 13

(Woody 1480), Ex. 14 (Woody 1488), 16 (Woody 1489).

35. On March 15, 2013, Ms. Hall again e-mailed Sheriff Woody, stating:

I have been out of work since September [] 2012 due to medical issues . . . My doctor informed me that I am no longer able to perform my duties as a Deputy Sheriff due to the defib[rillator] and pacemaker I now have . . . I really need a job, full or part-time as a civilian if there is one open. I have spoken to Ms. Winzor about this situation and have followed her advice and have been applying to jobs on our Richmond website as well as other positions outside of Richmond. I have had no call backs as of yet. If you can help me with anything I would greatly appreciate it. Thank you ever so much for reading this.

Ex. 17, 30(b)(6) Dep. Ex. 8 (Woody 1429). Sheriff Woody forwarded this e-mail to Billie Winzor, who advised him that Ms. Hall had interviewed for the Payroll Technician position. *Id.*

36. During the time Ms. Hall was seeking a civilian position within the Sheriff's Office, Sheriff Woody filled five civilian vacancies other than the Payroll Technician position. On January 7, 2013, Sheriff Woody filled an Accounting Clerk vacancy. On February 14, 2013, Sheriff Woody filled a Recruitment Manager vacancy. On March 11, 2013, Sheriff Woody filled a Jury Office Manager vacancy. On June 3, 2013, Sheriff Woody filled a Jury Clerk vacancy. On August 12, 2013, Sheriff Woody filled a Records File Clerk vacancy. Ex. 18, Ex. 2 to Def.'s Second Supplemental Interrog. Answers.

37. Sheriff Woody filled four of these vacancies (all but Accounting Clerk) without publicly advertising them. Ex. 26, Def.'s Second Admis. 9–12.

38. Each of these vacancies required a high school education or had no educational qualification requirement. Ex. 19, Woody 1585–88, 1608–09, 1628–29. Ms. Hall had a high school equivalency certification. Ex. 4, Hall Dep. Tr. 166:2–14.

39. According to Ms. Hall, she would have applied for each of these positions had she been aware of them. Ex. 4, Hall Dep. Tr. 128–37. Ms. Hall would have accepted an offer to fill each of these positions, had she received such an offer. *Id.*

40. Neither Sheriff Woody nor Billie Winzor told Ms. Hall about any of these vacancies or any other vacancy, other than the Payroll Technician position. Ex. 26, Def.'s Second Admis. 13. With respect to the Jury Office Manager vacancy, Sheriff Woody offered a "candidate [who] performed strongly in [the] payroll technician interview" a "follow up interview" for the position, but he did not offer Ms. Hall a "follow up interview" for that position or any other. Ex. 18, Ex. 2 to Def.'s Second Supplemental Interrog. Answers; Ex. 26, Def.'s Second Admis. 13.

41. According to Sheriff Woody, it is a challenge to find qualified people to fill vacancies at the Sheriff's Office. Ex. 3, Woody Dep. Tr. 14:3-9.

42. According to Sheriff Woody, at all relevant times, his policy was "to provide the citizens of the City of Richmond with the most qualified employees possible." Ex. 20, 30(b)(6) Dep. Ex. 1 at 1 (Woody 1599); *see also* Ex. 10, 30(b)(6) Dep. Tr. 21:22-22:24. Despite this policy, Sheriff Woody has on multiple occasions rejected the candidate ranked highest under the Sheriff's Office internal evaluation system and instead hired another candidate. Ex. 10, 30(b)(6) Dep. Tr. 69:4-72:13.

43. According to Sheriff Woody, "the Code of Virginia specifically requires Sheriffs . . . to hire civilian employees through an open and competitive hiring process." Ex. 9, Def.'s Interrog. Answers 17.

44. Ms. Hall telephoned Billie Winzor approximately twice more to ask about civilian vacancies after she learned that she had not been selected for the Payroll Technician position. Ex. 4, Hall Dep. Tr. 100:7-13.

45. In May 2013, Ms. Hall received a letter from Sheriff Woody terminating her from her position as Deputy Sheriff, effective May 10, 2013, due to "organizational need." Ex. 21, Hall Dep. Ex. 10; *see also* Ex. 1, Compl. ¶ 27; Ex. 2, Def.'s Answer ¶ 27.

46. At the time of Ms. Hall's termination, she was on unpaid leave. Ex. 6, Def.'s First Admis. 19. Ms. Hall's continued employment did not prevent the Sheriff's Office from hiring another Deputy Sheriff to replace her on active duty. Ex. 10, 30(b)(6) Dep. Tr. 213:19–24. In other words, Ms. Hall was not "taking up a spot" when she was on unpaid leave. *Id.*

47. Sheriff Woody terminated Ms. Hall solely because she had a disability and could no longer perform the essential functions of the position of Deputy Sheriff due to her disability. Ex. 9, Def.'s Interrog. Answers 2, 14.

48. On or before October 10, 2013,² Ms. Hall filed a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging that Defendant discriminated against her in violation of the ADA by denying her a reasonable accommodation. Ex. 2, Def.'s Answer ¶ 7.

49. Pursuant to 42 U.S.C. § 2000e-5, incorporated by reference in 42 U.S.C. § 12117(a), the EEOC investigated Ms. Hall's charge. Ex. 2, Def.'s Answer ¶ 8. The EEOC found reasonable cause to believe that Defendant discriminated against Ms. Hall in violation of the ADA. Ex. 22, USA 15–16. After the EEOC's conciliation efforts failed, the EEOC referred the matter to the United States Department of Justice. Ex. 23, USA 345.

50. At all relevant times, Ms. Hall was an individual with a disability within the meaning of 42 U.S.C. § 12102 and 29 C.F.R. § 1630.2. Ex. 6, Def.'s First Admis. 4. At all relevant times, Ms. Hall had nonischemic familial dilated cardiomyopathy and supraventricular tachycardia, physical impairments that substantially limited the operation of her cardiovascular

² Sheriff Woody admitted that "Ms. Hall filed a charge of discrimination with the EEOC on October 10, 2013." Ex. 2, Def.'s Answer ¶ 7. Sheriff Woody also produced to the United States, however, a Notice of a Charge of Discrimination dated August 14, 2013, which it admitted it had received. Ex. 28, 30(b)(6) Ex. 19 (Woody 683–84); Ex. 10, 30(b)(6) Dep. Tr. 225:1–15. Ms. Hall's charge was timely on either date.

function. Ex. 5, Shams Decl. ¶ 7–8.

51. Defendant is a covered entity within the meaning of 42 U.S.C. § 12111(2) and 29 C.F.R. § 1630.2(b). Ex. 6, Def.’s First Admis. 1.

III. STANDARD OF REVIEW

Summary judgment is appropriate where the movant shows that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Once the movant has met its initial burden of showing that there is no such dispute, the non-moving party must demonstrate that an issue of material fact exists. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986). A court considering a motion for summary judgment “consider[s] the evidence in the light most favorable to the non-moving party.” *Milbourne v. JRK Residential Am., LLC*, 92 F. Supp. 3d 425, 427 (E.D. Va. 2015) (Payne, J.) (citing *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996)).

A fact is material if its “existence or non-existence . . . could lead a jury to different resolutions of the case.” *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). To establish a material fact, the movant must point to “particular parts of materials in the record,” such as depositions, declarations, admissions, documents, and interrogatory answers, or show “that the materials cited do not establish the absence or presence of a genuine dispute.” Fed. R. Civ. P. 56(c)(1)(A), (B).

IV. ARGUMENT

The facts are undisputed: Emily Hall, a decorated ten-year veteran of the Richmond City Sheriff’s Office, developed a disability that prevented her from serving as a Deputy Sheriff but did not prevent her from serving in a civilian position. She asked Sheriff Woody for a civilian job. After she made that request, at least one position for which she was qualified became vacant.

Sheriff Woody nevertheless denied her request to remain employed and fired her. The only dispute is a legal question: whether Title I of the ADA prohibited Sheriff Woody's actions. It does.

A. There are no material disputes of fact regarding the elements of the United States' prima facie case

The ADA prohibits an employer from discriminating against a qualified employee because of the employee's disability. 42 U.S.C. § 12112(a). The statute defines "discrimination" to include "not making reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [a] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the [entity's] business." *Id.* § 12112(b)(5)(A).

To establish a prima facie case for failure to accommodate under the ADA in the Fourth Circuit, the United States must show: "(1) that [Emily Hall] was an individual who had a disability within the meaning of the statute; (2) that [Sheriff Woody] had notice of [her] disability; (3) that with reasonable accommodation [s]he could perform the essential functions of [a held or desired] position; and (4) that [Sheriff Woody] refused to make such accommodations." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 (4th Cir. 2013) (quoting *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n.11 (4th Cir. 2001)) (brackets omitted); *see also Reyazuddin v. Montgomery Cnty., Md.*, 789 F.3d 407, 414 (4th Cir. 2015); 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o). Other circuits have held that an employee who seeks reassignment as an accommodation must also show:

[A]ccommodation within the employee's existing job cannot reasonably be accomplished[;]

The employee requested the employer reasonably to accommodate his or her disability by reassignment to a vacant position . . . which the employee may request the employer identify through an interactive process, in which the employee in good faith was willing to, or did, cooperate;

[] The employee was qualified, with or without reasonable accommodation, to

perform one or more appropriate vacant jobs within the [organization] that the employee must, at the time of the summary judgment proceeding, specifically identify and show were available within the company at or about the time the request for reassignment was made; and

[] The employee suffered injury because the employer did not offer to reassign the employee to any appropriate vacant position.

Smith v. Midland Brake, Inc., a Div. of Echlin, Inc., 180 F.3d 1154, 1179 (10th Cir. 1999) (en banc). Under either or both tests, Sheriff Woody has admitted to each of these elements.

Once the United States establishes the elements of the prima facie case, the burden shifts to Sheriff Woody to “show as a matter of law that the proposed accommodation will cause undue hardship in the particular circumstances.” *Reyazuddin*, 789 F.3d at 414 (quoting *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012) and *U.S. Airways v. Barnett*, 535 U.S. 391, 401–02 (2002)) (internal quotation marks omitted). Sheriff Woody cannot establish the “special, typically case-specific circumstances that demonstrate undue hardship” on the undisputed facts of this case. *Id.* (quoting *Barnett*, 535 U.S. at 401–02) (internal alterations).

1. It is undisputed that Emily Hall is an individual with a disability

First, Sheriff Woody admits that Emily Hall is an individual with a disability within the meaning of the ADA. Ex. 6, Def.’s First Admis. 4. At all relevant times, Emily Hall had familial dilated cardiomyopathy and supraventricular tachycardia, conditions that—without treatment—would substantially limit the operation of her cardiovascular system. Ex. 5, Shams Decl. ¶ 7–8. Such conditions are disabilities under the ADA. *See* 42 U.S.C. § 12102(1)(A), (2)(B) (defining “disability” as “a physical . . . impairment that substantially limits one or more major life activities,” which include “the operation of a major bodily function”); *id.* § 12102(4)(E)(i) (“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication.”); *see*

also 29 C.F.R. § 1630.2(i)(1)(ii) (defining “major bodily function” to include the “circulatory [and] cardiovascular” functions).

2. *It is undisputed that Sheriff Woody had notice of Emily Hall’s disability and her need for reassignment as a reasonable accommodation*

Second, Sheriff Woody admits that he had notice of Emily Hall’s disability and that Ms. Hall requested and required an accommodation as a result of her disability. Ex. 10, 30(b)(6) Dep. Tr. 109:9–15, 110:23–111:25; Ex. 2, Def.’s Answer ¶ 13; Ex. 6, Def.’s First Admis. 8; Ex. 7, Hall Dep. Ex. 4 at 3 (Woody 717). Specifically, he admits that Ms. Hall repeatedly requested the accommodation of reassignment, *i.e.*, to be placed in a different position, because she could no longer work as a Deputy Sheriff due to her disability. *See supra* ¶ 14, 16, 17–21, 35, 44. Ms. Hall did not need to say the words “reasonable accommodation” in order to request an accommodation. *See Parkinson v. Anne Arundel Med. Cen.*, 79 F. App’x 602, 604–05 (4th Cir. 2003) (unpublished) (“[A] request for accommodation need not . . . formally invoke the magic words ‘reasonable accommodation.’” (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999))).

3. *It is undisputed that Emily Hall was qualified for a vacant reassignment position and that such vacancy was available*

Third, Sheriff Woody admits that Ms. Hall was qualified for at least one position, the Payroll Technician position, which became vacant during the time she sought a reassignment position. Ex. 6, Def.’s First Admis. 14. He also admits that he would not have interviewed her had she been unqualified. *Id.* 13. Ms. Hall’s application for the Payroll Technician position reflected that Ms. Hall had the qualifications listed in the job description, Ex. 14, 30(b)(6) Dep. Ex. 21 (Woody 56–71), and she was physically able to hold a full-time “desk job,” Ex. 5, Shams Decl. ¶ 9. *See* 29 C.F.R. § 1630.2(m) (“The term ‘qualified’ . . . means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment

position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.”). Ms. Hall requested information about the position, applied for the position once the Sheriff’s Office identified it to her, and interviewed for the position. Ex. 13, 30(b)(6) Dep. Ex. 6 (Woody 1403); Ex. 14, 30(b)(6) Dep. Ex. 21 (Woody 56–71); Ex. 1, Compl. ¶ 23; Ex. 2, Def.’s Answer ¶ 22, 23.

Further, Ms. Hall sought to be reassigned to any civilian position that was available, of which there were several. *See* Ex. 4, Hall Dep. Tr. 86:5–7, 127:4–6. Despite her active and multiple inquiries through meetings, phone calls, and emails to Sheriff Woody and Billie Winzor seeking reassignment, Sheriff Woody failed to notify Ms. Hall of several additional civilian vacancies, depriving her of even the chance to compete through a competitive process for those vacancies. Ex. 26, Def.’s Second Admis. 13. Further, Sheriff Woody admits that he failed to advertise several civilian vacancies during the relevant period, thereby depriving Ms. Hall of the opportunity to learn about these vacancies on her own through her diligent weekly monitoring of the Sheriff’s Office’s website. Ex. 26, Def.’s Second Admis. 9–12.³

4. It is undisputed that Sheriff Woody refused to reassign Ms. Hall to a vacant position for which she was qualified as a necessary reasonable accommodation

³ This failure may also have violated Sheriff Woody’s obligation “to engage in an ‘interactive process’ to determine the appropriate accommodation under the circumstances,” once the “employer’s responsibility to provide a reasonable accommodation [was] triggered.” *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 F. App’x 314, 322 (4th Cir. 2011) (unpublished); *see also Taylor*, 184 F.3d at 316 (“While an employee who wants a transfer to another position ultimately has the burden of showing that he or she can perform the essential functions of an open position, the employee does not have the burden of identifying open positions without the employer’s assistance.”). The Court need not determine whether Sheriff Woody failed to engage in the “good faith interactive process,” *Wilson*, 717 F.3d at 347, by failing to disclose or publicly advertise these vacancies, nor does it need to decide whether Ms. Hall was qualified for all of these positions. Sheriff Woody does not dispute that Ms. Hall was qualified for at least one vacant position. The United States highlights these vacancies to emphasize that Ms. Hall did all she could to find a reassignment position. Sheriff Woody nevertheless failed to notify her of potential placements, let alone place her in a vacant position for which she was qualified.

Fourth, Sheriff Woody admits that he did not grant Ms. Hall the only reasonable accommodation that would have allowed her to remain employed by him, reassignment. *See* Ex. 10, 30(b)(6) Dep. Tr. 113:13–16 (“The only way Emily Hall could return to work would be to return to full capacity in a sworn position or apply for a different position.”). He also admits that he terminated her employment because she could no longer perform the essential functions of her job as Deputy Sheriff due to her disability. Ex. 2, Def.’s Answer ¶ 27; Ex. 9, Def.’s Interrog. Answer 14.

In sum, there is no material factual dispute about what happened between Ms. Hall and the Sheriff’s Office. The only dispute is the legal question of whether Sheriff Woody’s actions violated the ADA. As the majority of circuits have held, the plain language of the ADA required Sheriff Woody to reassign Ms. Hall to a vacant position for which she was qualified.

B. The plain language of the ADA required Sheriff Woody to reassign Emily Hall

As most courts agree, the plain language of the ADA requires an employer to reassign a qualified employee with a disability to a vacant position when the employee needs the reassignment to stay employed, unless the employer can show that the reassignment would cause an undue hardship. 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.2(o); *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 765 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2734 (2013); *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1179 (10th Cir. 1999) (en banc); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc).

Two provisions of the statute establish this requirement. First, unless an employer can show undue hardship, the ADA requires the employer to provide needed reasonable accommodations to an employee with a disability. 42 U.S.C. § 12112(b)(5)(A). Second, the ADA *defines* reasonable accommodations to include “reassignment to a vacant position.” *Id.*

§ 12111(9)(B).⁴ Thus, reassignment is ordinarily a reasonable accommodation, and when reassignment to a vacant position is the *only* accommodation that would accommodate an employee's disability, the employer *must* provide that accommodation, unless it would impose an undue hardship. *See id.* § 12112(a), (b)(5)(A).

Sheriff Woody has argued that the ADA always permits, but never requires, reassignment. Ex. 9, Def.'s Answers to Interrog. 17. But that reading of the statute renders the reassignment provision superfluous. *See Smith*, 180 F.3d at 1164–65; *Aka*, 156 F.3d at 1304. “A statute should be constructed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Reardon v. Herring*, No. 3:16-CV-34, 2016 WL 3181138, at *12 (E.D. Va. June 3, 2016) (Payne, J.) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)) (internal alterations). If the reassignment provision meant only that an employee with a disability could apply and compete for a vacant position just like any other applicant, the term would add nothing to the employment protections of the statute. That is because a separate part of the statute protects against discrimination in application and hiring processes, *see* 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures [or] hiring”), so the statute *already* compels employers to allow employees with disabilities to apply and compete for vacant positions like any other person. As the Tenth Circuit, sitting en banc, held, “if the reassignment language merely requires employers to consider on an equal basis with all other applicants an otherwise qualified existing employee with a disability for reassignment to a vacant position, that language would add nothing to the obligation not to discriminate, and would thereby be redundant.” *Smith*, 180 F.3d at 1164–65. And “then this promise [of reassignment] within the ADA would be empty.” *Id.* at

⁴ The ADA's implementing regulation reinforces these statutory provisions. *See* 29 C.F.R. §§ 1630.9, 1630.2(o).

1167. Likewise, the D.C. Circuit, also sitting en banc, held that “the word ‘reassign’ *must* mean more than allowing an employee to apply for a job on the same basis as anyone else,” and that, accordingly, the ADA requires employers to provide reassignment when necessary. *Aka*, 156 F.3d at 1304 (emphasis added).

Additionally, the plain and ordinary meaning of the word “reassignment” entails action and initiative on the part of the employer. *See Reassignment, Cambridge Essential Am. English Dictionary* (2016) (defining “reassignment” as “the process of *giving* an employee a different job, or *arranging for* an employee to work in a different place” (emphasis added)); *Reassignment, Oxford English Dictionary* (2016) (defining “reassignment” as “[a]ppointment to a different post or role” (emphasis added)). Per “standard principles of statutory interpretation, ‘absent explicit legislative intent to the contrary,’ [a] term . . . is to be given its ‘plain and ordinary meaning.’” *Reardon*, 2016 WL 3181138, at *5 (quoting *Broughman v. Carver*, 624 F.3d 670, 675 (4th Cir. 2010)). Thus, “reassignment” under the ADA does not mean passive consideration of an employee’s self-initiated job application. It means affirmative placement in a different position.

Interpretive guidance from the Equal Employment Opportunity Commission (EEOC) supports this reading of the statute:

The ADA specifically lists “reassignment to a vacant position” as a form of reasonable accommodation. This type of reasonable accommodation *must be provided* to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.⁵

⁵ EEOC, No. 915.002, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), <https://www.eeoc.gov/policy/docs/accommodation.html#reassignment> (emphasis added). *See Taylor v. Fed. Express Corp.*, 429 F.3d 461, 464 n.3 (4th Cir. 2005) (EEOC guidelines “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986))).

In other words, “reassignment” does not mean that the employee merely “is permitted to compete for a vacant position.” *Id.* Rather, “[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.* (emphasis added).

Reassignment is not always mandatory under the ADA. As the EEOC has explained, reassignment is the “reasonable accommodation of last resort.” *Id.* Only when an employee cannot be accommodated by any other means does the ADA require reassignment. Additionally, the ADA mandates reassignment only to a vacant position for which the employee is qualified. *Id.* An employer has no obligation to (1) reassign an employee to a position for which she is unqualified; (2) create a vacancy; or (3) provide extra training to an employee so that she can meet the minimum qualifications for a vacant position. *Id.* But where, as here, an employee cannot be accommodated by any other measure, and the employee is qualified for a position that is vacant or will become vacant, the ADA requires that the employer reassign the employee. *See id.* (“‘Vacant’ means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time.”). This is true even if the employee seeking the accommodation is merely qualified, and not the best qualified, for the vacant position. *See id.* (“The employee *does not need to be the best qualified individual* for the position in order to obtain it as a reassignment.” (emphasis added)).

C. Fourth Circuit precedent recognizes the reassignment obligation

The Fourth Circuit has not answered the question of when the ADA requires reassignment, but the court has repeatedly recognized the reassignment obligation. In *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000), the court reversed a district court’s grant of summary judgment to an employer on the grounds that the EEOC had presented “evidence . . . that [the

plaintiff] was able to work with reasonable accommodation, that is, [via a transfer from a concrete-floored plant to] a wooden-floored plant.” *Id.* at 380.⁶ In *Craddock v. Lincoln National Life Insurance Co.*, 533 F. App’x 333 (4th Cir. 2013) (unpublished), the court reversed the dismissal of a complaint in which the employee alleged that she was qualified for vacant positions. The court noted that “[t]he ADA expressly recognizes ‘reassignment to a vacant position’ as a reasonable accommodation.”” *Id.* at 337.

Although the Fourth Circuit once, in dicta, suggested that “the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position,” *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (citing *Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992)), the court later explicitly advised district courts to reject this non-precedential language, as discussed below. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 350 & n.4 (4th Cir. 1996), *abrogation on other grounds recognized by Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 350 & n.4 (4th Cir. 2013); *Petty v. Freightliner Corp.*, 123 F. Supp. 2d 979, 984 (W.D.N.C. 2000) (“[A]lthough the Circuit has not expressly overruled *Myers*, it has [] recognized the preference for reassignment as a reasonable accommodation found in 29 C.F.R. § 1630.2(o)(2)(ii).” (citing *Stowe–Pharr Mills, Inc.*, 216 F.3d at 377)). Additionally, intervening Supreme Court precedent requires this Court to reject *Myers*, most circuits have rejected *Myers*’ approach, and *Myers* reflects a legal error.

While Defendant may argue otherwise, *Myers* was not about reassignment. Rather, the plaintiff in that case, whose disabilities prevented him from continuing to work as a bus driver, sought indefinite leave as an accommodation under the ADA. *Myers*, 50 F.3d at 280–81. The

⁶ The fact of Emily Hall’s ability to work with the accommodation of reassignment is undisputed in this case. *See Ex. 6, Def.’s First Admis. 14.*

Fourth Circuit held that “reasonable accommodation does not require [an employer] to wait indefinitely for [a plaintiff’s] medical conditions to be corrected, especially in light of the uncertainty of cure.” *Id.* at 283. The court rejected the plaintiff’s argument that he was entitled to indefinite leave under the ADA because his employer’s policies allowed for unlimited leave. The court explained that “[a] particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy.” *Id.* at 284.

To “illustrate” that point, the court observed that the employer’s policies “also require[d] a disabled employee’s supervisor to ‘attempt to place the employee in another position which he/she can perform,’” *id.*, even though the Fourth Circuit had held, in a Rehabilitation Act case, that “the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position.” *Id.*⁷ The reassignment language from *Myers* is non-precedential dicta, because the Court used the reassignment example merely to “illustrate” the uncontroversial point that an employer’s internal policies do not create federal employment law obligations. *See Hernandez v. Caldwell*, 225 F.3d 435, 439 (4th Cir. 2000) (passage “best characterized as an *illustration* of [a] rule rather than a statement of the rule itself” is “dictum and does not control the outcome” of a case) (emphasis added) (citing *Black’s Law Dictionary* 465 (7th ed. 1999)).

⁷ The Rehabilitation Act case relied on in *Myers*, *Guillot v. Garrett*, 970 F.2d 1320 (4th Cir. 1992), was decided prior to that Act’s 1992 amendment, which expressly added reassignment as a form of reasonable accommodation in order to conform the Rehabilitation Act to the ADA. *See Woodman v. Runyon*, 132 F.3d 1330, 1339 n.8 (10th Cir. 1997) (“[T]he Rehabilitation Act was amended effective October 29, 1992, to incorporate into sections 501 and 504 the ADA’s express provision for reassignment as a potential form of reasonable accommodation.”). Consequently, “pre-1992 Rehabilitation Act decisions such as *Guillot* holding that re-assignment is not a reasonable accommodation are no longer good law . . . and *Myers* was wrong to suggest otherwise.” *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 633–34 (6th Cir. 1999); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1019 n.4 (8th Cir. 2000) (“*Myers* has been sharply criticized for basing its proposition on case law now apparently superseded by statute.”).

The Fourth Circuit has expressly instructed district courts to reject *Myers*' reassignment dicta. In *Williams*, the Fourth Circuit rejected the district court's reliance on *Myers*, explaining that "the district court [] erred in suggesting that a qualified ADA plaintiff can never rely on reassignment to a vacant position as a reasonable accommodation." 101 F.3d at 350 (emphasis removed). The court went on to explain that the ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation, so "obviously Congress considered these types of accommodations to be reasonable." *Id.* The court reasoned that *Myers*' discussion of reassignment establishes "only that a particular accommodation does not become federally mandated merely because an employer 'elects to establish it as a matter of policy.'" *Id.* at 350 n.4 (emphasis added). The suggestion that "reassignment to a vacant position can never be a reasonable accommodation . . . is contrary to congressional direction and is in no way required by our *Myers* decision." *Id.* (emphasis omitted). The Fourth Circuit has never favorably cited the reassignment passage from *Myers* in a published case. See *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 634 (6th Cir. 1999) ("[T]he Fourth Circuit itself has [] acknowledged its mistake . . . in *Myers*." (citing *Williams*, 101 F.3d at 350 n.4).

Six years later, the Supreme Court confirmed the conclusion in *Williams* that reassignment is ordinarily a reasonable accommodation. In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Supreme Court considered whether the ADA required an employer to grant an employee's reassignment request when the reassignment would have required the employer to depart from a well-established seniority system. The Court concluded that an employer ordinarily would not have to depart from its seniority system to provide reassignment as an accommodation, because such a departure generally would not be "reasonable." *Id.* at 402–03. The Court explained, however, that "[t]he simple fact that an accommodation [like reassignment] would provide a

‘preference’—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot in and of itself, automatically show that the accommodation is not ‘reasonable,’” *id.* at 398 (emphasis omitted), because “preferences will sometimes prove necessary to achieve the [ADA]’s basic equal opportunity goal,” *id.* at 397.

The Supreme Court introduced a two-step process for determining whether an accommodation request, including a reassignment request, is reasonable as a matter of law: First, the plaintiff must show that her reassignment request “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.” *Id.* at 401. As the Fourth Circuit noted in *Williams*, Congress’s inclusion of “reassignment to a vacant position” as a reasonable accommodation in the statute indicates that it is ordinarily reasonable. *Williams*, 101 F.3d at 350. If the plaintiff shows that her request is reasonable, the burden shifts to her employer to show “special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances” and justify a refusal to reassign. *Barnett*, 535 U.S. at 402. If the employer is unable to show special circumstances, such as a seniority policy, that make reassignment unusually difficult, the plaintiff must prevail. *See id.* Thus, the reassignment dicta in *Myers* is irreconcilable with Supreme Court precedent.

Fortunately, in *Williams*, “the Fourth Circuit . . . acknowledged its mistake” in *Myers*. *Bratten*, 185 F.3d at 634. This Court should follow the Fourth Circuit’s *Williams* directive and join the other district courts in the Fourth Circuit that have properly rejected or disregarded *Myers* to conclude that the ADA requires reassignment of a qualified employee to a vacant position unless the employer can show an undue hardship. *See, e.g., Petty*, 123 F. Supp. 2d at 984 (“[T]he Circuit . . . has recently recognized the preference for reassignment as a reasonable accommodation [U]nder this more accommodating standard the Plaintiff has the burden of showing that reasonable

accommodations are available and that he is qualified for the position to which he seeks reassignment.”).

D. Most circuits have held that the ADA requires reassignment to a vacant position for a qualified employee when necessary as an accommodation

Almost every circuit that has considered the question—including the D.C., Tenth, and Seventh Circuits—has held that the ADA compels employers to reassign a qualified employee with a disability to a vacant position when reassignment is the only modification that would accommodate the employee. As discussed in Section IV.B, *supra*, these decisions have relied on the plain language of the statute. *See, e.g., Aka*, 156 F.3d at 1303–04; *Smith*, 180 F.3d at 1165–67.

Additionally and most recently, the Seventh Circuit held that, absent a showing of undue hardship, the ADA requires employers to reassign qualified disabled employees to vacant positions when necessary, even if better qualified individuals apply for those positions. *See United Airlines*, 693 F.3d at 765. In reaching that conclusion, the court overruled its own older precedent, *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000). “[E]very member of the [Seventh Circuit] in active service approved overruling *Humiston-Keeling*” on the ground that decision “did not survive *Barnett*.” *United Airlines*, 693 F.3d at 761.

United Airlines, like Sheriff Woody, claimed to use a “best qualified” system and did not provide employees with disabilities the right to be reassigned to a vacant position as an ADA accommodation. *Id.* Unlike Sheriff Woody, United granted employees with disabilities needing accommodation preferential treatment, in that the employees could submit an unlimited number of transfer applications, be guaranteed an interview, and receive priority consideration over a similarly qualified applicant, but they were not *appointed* to a vacant position for which they were qualified. *Id.*

The Seventh Circuit held that this preferential “reassignment” process was insufficient under the ADA, because the Supreme Court in *Barnett* established that, as a general matter, “accommodation through appointment to a vacant position is reasonable.” *Id.* at 764. Thus, without a showing of undue hardship, such as the disruption of a well-established seniority system, “an employer *must* implement such a reassignment policy.” *Id.* (emphasis added). The court rejected the argument that the hardship imposed upon an employer forced to abandon its “best qualified” system was comparable to the hardship imposed upon an employer forced to disrupt its established seniority system. Such a conclusion, the court reasoned, would “so enlarge[] the narrow, fact-specific exception set out in *Barnett* as to swallow the rule.” *Id.* The court remanded the case for the district court to determine whether there were any other fact-specific considerations particular to United’s employment system, such as a seniority system, that would create an undue hardship. *Id.* at 764–65.

The Supreme Court denied *certiorari* in *United Airlines*, leaving undisturbed the Seventh Circuit’s ruling that a “best qualified” policy cannot trump the ADA’s reassignment obligation. *See United Airlines, Inc. v. EEOC*, 133 S. Ct. 2734 (2013). This denial is unsurprising, because the circuit “split” on reassignment is a shallow one. The only circuit to have held that the ADA “does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscrimination policy of the employer to hire the most qualified candidate” relied heavily on the now-overruled *Humiston-Keeling* case. *See Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007). The overruling of *Humiston-Keeling* in light of *Barnett* calls *Huber*’s continuing vitality into question. *See United Airlines*, 693 F.3d at 764 & n.4 (“[*Huber*] adopts *Humiston-Keeling* without analysis, much less an analysis of *Humiston-Keeling* in the context of *Barnett*.”). And “[i]t is also worth noting that

the Supreme Court granted *certiorari* in *Huber*, but the parties settled and the Supreme Court dismissed the case.” *Id.* The only other circuit to apparently agree with the minority position of the Eighth Circuit is the Fifth Circuit, but only in pre-*Barnett* dicta. *See Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

District courts around the country have also recognized the reassignment obligation and the policy rationales underlying Congress’s judgment. *See, e.g., United States v. City & Cnty. of Denver*, 943 F. Supp. 1304, 1310–11 (D. Colo. 1996), *aff’d sub nom. Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999) (“[T]he ADA requires employers to move beyond the traditional analysis used to appraise non-disabled workers and to consider reassignment to a vacant position as a method of enabling a disabled worker to do the job without creating undue hardship.”); *Ransom v. State of Arizona Bd. of Regents*, 983 F. Supp. 895, 901 (D. Ariz. 1997) (the reassignment provision “level[s] the playing field between disabled and nondisabled employees, in the sense of enabling a disabled worker to do the job without creating undue hardship on the employer. In addition to providing individuals with disabilities an equal opportunity to pursue employment opportunities, the purpose of the ADA is to reduce societal costs of dependency and nonproductivity.”).

E. Ms. Hall’s requested accommodation would not have imposed an undue hardship on Sheriff Woody

Sheriff Woody cannot show “as a matter of law that the proposed accommodation [would have] cause[d] undue hardship in the particular circumstances” of this case. *Reyazuddin*, 789 F.3d at 414 (internal quotation marks omitted) (“[A]t the summary judgment stage, the employee ‘need only show that an “accommodation” seems reasonable on its face,’ and then the employer ‘must show special (typically case-specific) circumstances that demonstrate undue hardship.’” (quoting *Barnett*, 535 U.S. at 401–02)). According to Sheriff Woody, Ms. Hall was a “great

employee,” Ex. 3, Woody Dep. Tr. 30:12–18, who was qualified for at least one vacant position that his Office needed to fill at the time she sought reassignment. Ex. 6, Def.’s First Admis. 12–14. Sheriff Woody did not need to create a new position or give Ms. Hall a job she could not do.

The only undue hardship defense Sheriff Woody has raised thus far is his claim that reassigning Ms. Hall would have prevented him from making “merit based personnel decisions when hiring civilian staff.” Ex. 9, Def.’s Interrog. Answers 17. But the ADA does not require employers to place employees who lack merit, or who are unqualified, into positions they cannot do. Rather, an employer need only reassign a *qualified* employee when the employee needs that accommodation, and Ms. Hall was qualified for at least one civilian vacancy.

Further, Sheriff Woody’s argument that departure from that process would impose an undue burden “so enlarge[s] the narrow, fact-specific [seniority policy] exception set out in *Barnett* as to swallow the rule.” *United Airlines*, 693 F.3d at 764. “While employers may prefer to hire the best qualified applicant,” departure from a “best-qualified selection policy does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy.” *Id.* Thus, departing from a best-qualified selection policy in order to reassign an employee with a disability as a necessary accommodation does not impose an undue hardship.

Sheriff Woody has also asserted that “the Code of Virginia specifically requires Sheriffs . . . to hire civilian employees through an open and competitive hiring process.” Ex. 9, Def.’s Interrog. Answers 17. As a result, he argues, reassigning Ms. Hall would have required him to violate Virginia law. Not so. The Virginia Code provision applicable to the hiring of “civilian” employees prohibits discrimination in the hiring, appointment, or treatment of employees on the

basis of race, color, religion, sex, or national origin. Va. Code § 15.2-1604(A). It also provides:

Every constitutional officer [such as a Sheriff] shall, prior to hiring any employee, advertise such employment position in a newspaper having general circulation or a state or local government job placement service in such constitutional officer's locality except where the vacancy is to be used . . . as a transfer opportunity or demotion for an incumbent [or] to fill positions to be filled by appointees or employees returning from leave with or without pay

Va. Code § 15.2-1604(C). In other words, the Code explicitly allows Sheriffs to forgo the advertising process where the vacancy is to be used “as a transfer opportunity . . . for an incumbent” or “to fill positions to be filled by . . . employees returning from leave with or without pay.” *Id.* Ms. Hall was both an incumbent seeking a transfer and an employee returning from leave. Her reassignment would not have required Sheriff Woody to violate the Code.

Sheriff Woody's admission that on multiple occasions he failed to use “an open and competitive hiring process” further undermines his undue hardship defense. Sheriff Woody has on multiple occasions rejected HR's recommended, highest-ranked candidate and instead hired a “less qualified” individual. Ex. 10, 30(b)(6) Dep. Tr. 69:4–72:13. Sheriff Woody has also failed to publicly advertise several vacant positions during the relevant period. Ex. 26, Def.'s Second Admis. 9–12. These practices call into question his claimed “most qualified” policy and fatally undercut his purported state law defense.

Even if there were a conflict between the ADA and state law, which there is not, the ADA prevails. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (“[A] federal statute implicitly overrides state law . . . where it is ‘impossible for a private party to comply with both state and federal requirements,’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (citations omitted)); *cf. Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d

597, 602 (4th Cir. 2010) (citing *Myrick* to conclude the ADA preempts state law claims).

V. CONCLUSION

In sum, and as a matter of law, the plain language of the ADA, Supreme Court precedent, Fourth Circuit precedent, and other circuit precedent support the conclusion that the ADA required Sheriff Woody to reassign Ms. Hall. The parties do not dispute any of the material facts underlying the United States' claim or Sheriff Woody's defense. The United States therefore requests that this Court grant summary judgment to the United States.

Respectfully submitted this 2nd day of September, 2016,

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I hereby certify that on this, the 2nd day of September, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to:

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