UNIVERSITY OF SOUTHERN CALIFORNIA
HALE MOOT COURT HONORS PROGRAM

2015-2016
COMPETITION CASE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

AMANDA SARDIS — CASE NO. CIV 13-894-AH

Plaintiff,

v.

CHICK-FOR-ME, INC.,

Defendant.

HONORABLE AMY HULBERT, DISTRICT JUDGE, PRESIDING
EXCERPTS FROM REPORTER'S TRANSCRIPT OF VOIR DIRE
GOULD CITY, GOULD
JANUARY 29, 2014

APPEARANCES BY COUNSEL:

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GOULD CITY, GOULD: JANUARY 29, 2014

(COURT IN SESSION AT 10:00 AM)

CLERK: Calling case number CIV 13-894-AH: Amanda Sardis v. Chick-For-Me, Inc.

COURT: Good morning everyone. We are here today to conduct voir dire. The record should reflect that both parties are present with counsel. A few moments ago, the clerk randomly selected the first panel of prospective jurors, seated them in the jury box, and placed them under oath. I am now going to ask each prospective juror certain questions about their background and qualifications to determine your ability to sit as fair and impartial jurors on this case. If at any time during the questioning, you are uncomfortable answering the questions in open court, please let me know and we will make arrangements to allow you to answer the questions privately. Now, I'm going to begin with Juror 1.

* * *

COURT: Okay, Juror 5, it's your turn. Are you employed?

JUROR 5: Yes.

COURT: And what is your occupation?

JUROR 5: I'm a certified personal trainer at 24/7 Fitness. I motivate people to get fit and healthy and help them make the most out of their gym time. Sometimes I teach proper technique for their workouts or specific exercises to help them reach their personal fitness goals, but mostly I'm there to help them help themselves.

COURT: Are you married?

JUROR 5: No.

COURT: Do you have any children?

JUROR 5: No.

COURT: What are your hobbies?

JUROR 5: I work a lot, so I don't have a ton of hobbies outside of work. I do CrossFit, but that's a lot like work. I cook sometimes. Other than that, I play video games, hang out with friends, nothing too weird.

COURT: Okay, that's all from me for now. Ms. Kitchen, do you have any questions for Juror 5?

PLAINTIFF: No, your Honor.

COURT: Mr. Swensson, how about you?

DEFENSE: Just one, your Honor.

COURT: You may proceed.

DEFENSE: Juror 5, have you ever eaten at one of my client's restaurants?

JUROR 5: Chick-for-Me? Yeah, I have. I don't eat a lot of fast food because it's not healthy, but sometimes it's the only food around, like when you are driving on a long trip and it's the only restaurant by the freeway.

DEFENSE: Thank you. That's all, your Honor.

COURT: Okay, Juror 5, one last question from me: if you are selected to serve on this jury, do you believe that you could be fair and impartial, and could decide this case based solely on my instructions and the evidence admitted at trial?

Juror 5: Yes, I do.

COURT: Thank you. Counsel for the plaintiff, do you accept this juror?

PLAINTIFF: Yes, your Honor. We have no objection to this juror.

COURT: Thank you. Counsel for the defense, do you accept this juror?

DEFENSE: Yes, your Honor, no objection to this juror.

* * *

COURT: Juror 8, it is your turn. First, are you employed?

JUROR 8: Yes, I am.

COURT: What is your occupation?

JUROR 8: I'm a health and wellness coach, and I own my own business providing lifestyle counseling.

COURT: Can you tell us a little more about that? What is that?

JUROR 8: Well, I have a Bachelor's degree in physiology and a certification in wellness coaching. I help people make lifestyle changes because they want to be healthier or because they're suffering from an illness that requires them to make lifestyle changes. People come to me when they want to lose weight or reduce their stress, things like that, but are having trouble motivating themselves. Basically, I help them reach their physical and emotional health goals. I help them, you know, help them live a healthier lifestyle: better diet, better exercise routine, better choices for their mind and body in their daily lives. I provide them with resources or motivation, or just a shoulder to cry on.

COURT: And are you married?

JUROR 8: I am, for about two years now.

COURT: Is your spouse employed?

JUROR 8: She is.

COURT: What is her occupation?

JUROR 8: She’s an ER nurse.

COURT: Do you have any children?

JUROR 8: No.

COURT: Okay, what about hobbies? What do you do for fun?

JUROR 8: Well, I like hiking and running, stuff like that. I like being outside. Oh, and I volunteer at the Gould City LGBT Youth Center. It’s kind of a community center for LGBT kids. You know, someplace they can go to be around other people like them. Someplace they can feel comfortable being themselves. I teach a free yoga class there a few times a week.

COURT: Ms. Kitchen, do you any questions for this juror?

PLAINTIFF: No, you Honor. We are satisfied with this juror.

COURT: What about you, Mr. Swensson? Any questions?

DEFENSE: I have just one question your honor.

COURT: That’s fine. Please proceed.

DEFENSE: Juror 8, have you ever eaten at one of my client’s restaurants?

JUROR 8: No, I haven’t. I don’t eat fast food. I mean, that would kind of make me a hypocrite, wouldn’t

it? When I'm telling my clients to eat only healthy foods.

DEFENSE: Thank you. No further question, your Honor.

COURT: Alright, one last question from me: if you are selected to serve on this jury, do you believe that you could be fair and impartial, and could decide this case based solely on my instructions and the evidence admitted at trial?

JUROR 8: Yes, I could.

COURT: Thank you. Counsel for the plaintiff, do you accept this juror?

PLAINTIFF: Yes, you Honor. We have no objection to this juror.

COURT: Thank you. What about the defense? Do you accept this this juror?

DEFENSE: No, your Honor. The Defense moves to strike Juror 8.

PLAINTIFF: Your Honor, Plaintiff objects to that strike pursuant to *Batson v Kentucky*.

COURT: Okay. Counsel, please approach the bench. I'll hear arguments on this matter at sidebar. (Brief pause). Okay. I'll hear argument from the Plaintiff first.

PLAINTIFF: Your Honor, the defense is clearly removing Juror 8 because of her sexual orientation. Counsel is using his final peremptory challenge in a discriminatory way.

COURT: Why do you think that?

PLAINTIFF: Juror 8 is the only juror whose answers imply that she is gay. Given the fact that the owner of the Chick-for-Me chain is notorious for his anti-LGBT activism, it is obvious that the defense wants to exclude anyone who might be homosexual from the juror pool. That's unconstitutional discrimination in violation of *Batson v. Kentucky*.

COURT: Counsel for the defense, how do you respond?

DEFENSE: First of all, we don't even know what Juror 8's sexuality is. She wasn't asked so it's impossible to know, meaning that my opponent's argument has no basis in the record.

PLAINTIFF: That is not true, you Honor. Juror 8's answers clearly implied that she is homosexual. Most important, she talked about having a female spouse.

DEFENSE: Maybe she said that she had a female spouse, but that answer was incidental, unprovoked, and

cannot form the grounds for a *Batson* objection. Sexuality is not an issue in this case, and no one was asked about their sexuality. We're not striking her, or anyone else, because she might be gay.

PLAINTIFF: The Defense won't admit their real motive, but it's obvious. They're eliminating the only juror who we have reason to believe is homosexual. Everyone knows that the owner of Chick-For-Me, who is currently sitting at the counsel's table, has been openly, frequently, and publicly critical of the LGBT community. As I'm sure the Court knows, the owner has donated millions of dollars to right-wing groups that are anti-gay. "Chick-for-Me" is synonymous with anti-LGBT rhetoric in pop culture.

COURT: Well, although it is probably true that the owner of Chick-For-Me has been quite public about his personal opinions relating to gays and gay marriage, I'm also not sure that *Batson* even applies to challenges based on sexual orientation. Plus, even if it does, there's no real way to know who on the panel is or isn't gay because no one was directly asked that question.

Counsel for the defense, assuming for the sake of argument that *Batson* does apply to sexual orientation, what was your reason for striking Juror 8?

DEFENSE: It was absolutely nondiscriminatory, your Honor. Juror 8 is a health and wellness coach, who admitted that she doesn't eat at fast-food restaurants because it is too unhealthy. We don't believe she can be impartial in this case when her entire career is about telling people not to eat at restaurants like Chick-for-Me. It's perfectly reasonable to think her life experiences might bias her against my client, and that's grounds for a peremptory strike. My opponent is reading too much into this.

PLAINTIFF: Your Honor, the record belies my opponent's claimed reason. Juror 5 is also a personal trainer, and the defense did not strike him.

DEFENSE: But Juror 5 admitted to eating fast food on occasion, meaning he does not have the same extreme attitude regarding my client's restaurants. Juror 8 called eating fast food "hypocrisy."

PLAINTIFF: She’s still the only juror on the panel who we know is homosexual. Given Chick-for-Me’s owner’s well-known, past anti-gay advocacy, I renew my objection to striking Juror 8 from this jury.

COURT: Okay, thank you. I hear you, counsel, but I’m going to allow the strike. I think the defense has articulated a reasonable nondiscriminatory concern about Juror 8’s potential bias because of her profession. Let’s move on.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GOULD

AMANDA SARDIS,

CASE NO. CIV 13-894-AH

PLAINTIFF,

v.

CHICK-FOR-ME, INC.,

DEFENDANT.

HONORABLE AMY HULBERT, DISTRICT JUDGE, PRESIDING
REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION FOR JUDGMENT AS A MATTER OF LAW
GOULD CITY, GOULD
FEBRUARY 27, 2014

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GOULD CITY, GOULD: FEBRUARY 27, 2014

(COURT IN SESSION AT 10:00 AM)

THE CLERK: Calling case number CIV 13-894-AH: Amanda Sardis v. Chick-For-Me, Inc.

COURT: Counsel please state your appearances.

PLAINTIFF: Hello, your Honor. Brittany Kitchen for the Plaintiff, Ms. Amanda Sardis.

DEFENDANT: Good morning your Honor. Mark Swensson for the Defendant Chick-For-Me.

COURT: Good afternoon to you both. Now that both parties have rested their cases, the matter is ready to go to the jury. First, however, it is my understanding that we have two matters that we need to discuss outside the presence of the jury. Last night, Plaintiff filed a motion for judgment as a matter of law, which needs to be decided. Second, if the Court denies that motion, we need to go over jury instructions. Is that correct?

PLAINTIFF: Yes, your Honor, that is correct.

COURT: I have reviewed Plaintiff’s motion. It is my understanding that you are basically arguing that your client is entitled to judgment as a matter of law because the ADA mandated that your client

be reassigned into the vacant job as a data analyst, and Defendant failed to do that. Is that correct Ms. Kitchen? Would you like to be heard?

PLAINTIFF: Yes, your honor. Ms. Sardis is moving for judgment as a matter of law under Rule 50(a) because, after she became disabled, she was legally entitled to be reassigned to any open job within Defendant's company for which she was qualified, but Defendant refused to comply with the law. All the material facts in this case are undisputed. My client worked for Defendant as a "Spot Checker," which meant that she had to spend long hours on her feet inspecting Defendant's restaurants. She became disabled and was no longer able to perform the duties of that job. At the time, there was an open position within Defendant's company for a data analyst. Because she met the qualifications for that job, Plaintiff was legally entitled to be reassigned into that open job, but Defendant refused to do so. By doing that, Defendant violated the ADA. Our position is supported both by recent case law and the EEOC's policies. This is an issue of

first impression in this circuit, but other courts have held that reassignment is required in exactly this type of situation. For example, in *EEOC v. United Airlines*, the Seventh Circuit recently held that the ADA mandates that an employer appoint employees with disabilities to vacant positions for which they are qualified as long as doing so is reasonable and does not impose an undue hardship on the employer. There is absolutely no evidence in this case that appointing my client to the vacant data analyst position would have imposed an undue hardship on Defendant. In addition, the EEOC has taken the position that as long as reassignment does not place an undue burden on the employer, a disabled employee must be automatically reassigned into a vacant position for which the employee is qualified. My client is a hardworking employee who has been with this company for eight years. It's just unfair and illegal to demote her because of her disability!

COURT: Okay. I'd like to hear from the defense on this.

DEFENDANT: Well, your Honor, what Plaintiff is arguing is contrary to both the plain language and the

legislative history of the ADA. First, the ADA's actual language states that reasonable accommodations, and I'm quoting here, "may include" reassignment. That wording is simply not mandatory. The ADA is not an affirmative action statute. Instead it just requires employers to consider reassignment as an option, which my client did. Further, in House Report Number 101-485, pages 35 to 36, Congress specifically stated that employers do not have an obligation to prefer applicants with disabilities over other applicants on the basis of a disability. To Plaintiff's argument that she was somehow "demoted," that is just absurd. My client offered her another full-time position after she became disabled, but just not the one she wanted. The position she wanted was given to a better-qualified applicant, which was consistent with my client's standard policy of giving all jobs to the best-qualified applicants. My client was well within its rights in doing that. Finally, it would place an undue burden on Chick-For-Me if they were to go against their best-qualified policy in this case because the

three Chick-For-Me analysts complete all of the data analysis for the whole company–all eighty restaurants! They train each other, and the other two analysts have degrees in statistics. It makes no sense for Chick-For-Me to have to hurt their productivity and efficiency by taking a less-qualified applicant over a more-qualified one.

COURT: Ms. Kitchen, do you wish to respond?

PLAINTIFF: Yes, your honor. To the statutory interpretation point, the fact that the ADA used the word "reassignment" at all shows that the ADA was supposed to include a mandatory component. The word "assign" in its most basic sense suggests an active effort by the employer. The statute doesn't say that a reasonable accommodation may include competition for a vacant position.

COURT: I do see your point, Ms. Kitchen, but the Court is inclined to agree with defense counsel. It seems to me that the plain language and the legislative history of the ADA show that it was intended to provide a level playing field for the disabled workforce, but it is not an affirmative action statute. I am going to find that

automatic reassignment of a disabled employee to a vacant position in contravention of an employer's best-qualified hiring policy is not mandatory. I am therefore denying Plaintiff's motion for judgment as a matter of law. Now we need to go over the jury instructions.

PLAINTIFF: Yes, your Honor. As requested by the Court, Defendant's counsel and I met yesterday to discuss jury instructions. We were able to agree on all of the jury instructions except for the one addressing whether reassignment is required in this case. You should have the instructions that we jointly submitted.

COURT: Yes. I have the instructions that you jointly submitted, and I plan to use them to instruct the jury. I also have the Plaintiff's single special instruction, stating essentially that the ADA requires an employer to automatically reassign a disabled employee to a vacant job position. For the same reasons that I denied Plaintiff's Rule 50(a) motion, I am going to reject that instruction. I am going instead to use the Defendant's alternative instruction, which basically states that reassignment is not

required if the employer has a standard policy of hiring the most-qualified applicants.

PLAINTIFF: For the record, your Honor, Plaintiff objects to the use of that instruction.

COURT: I expected that counsel, but my ruling remains the same. Anything else or can we bring the jury in to be instructed?

PLAINTIFF: Plaintiff would respectfully request that the Court order copies of the Plaintiff's and the Defendant's special jury instructions to be attached to the transcript of today's hearing.

COURT: So ordered. Anything else counsel?

PLAINTIFF: Nothing further, your Honor.

DEFENDANT: Nothing further, your Honor.

COURT: Okay. Let's take a ten minute break and then return for jury instructions.

Plaintiff's Proposed Special Jury Instruction

If an employee has become unable to perform his or her current job duties due to a disability, and the employer has a vacant position with approximately equal pay and status for which the employee is qualified, the employer must reassign the employee to that vacant position.

Defendant's Proposed Special Jury Instruction

Reassignment of a disabled employee who is not the most qualified applicant to a vacant position in contravention of an employer's "most qualified" hiring policy is presumptively unreasonable. To overcome this presumption, the disabled employee must show that it was unreasonable for the employer not to make an exception to its "most qualified" hiring policy.

UNITED STATES DISTRICT COURT

DISTRICT OF GOULD

AMANDA SARDIS,	)	Case No. CIV-13-894-AH
	)	
Plaintiff,	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR JUDGMENT AS A
v.	)	MATTER OF LAW UNDER
	)	RULE 50(b) AND MOTION FOR A
	)	NEW TRIAL UNDER RULE 59
	)	
CHICK-FOR-ME, INC.,	)	
	)	
Defendant.	)	
	)	

I. Introduction

After the jury in the above-captioned matter returned a verdict for the defense, Plaintiff Amanda Sardis filed (1) a motion under Federal Rule of Civil Procedure 50(b), renewing its previous motion for judgment as a matter of law; and (2) a motion under Federal Rule of Civil Procedure 59 for new trial. In her Rule 50(b) motion, Sardis argued that she was entitled to judgment as a matter of law because the Americans with Disabilities Act ("ADA") required Defendant Chick-For-Me to reassign her to a vacant position as a data analyst after a disability prevented her from fulfilling her previous job duties. She further argued that the undisputed evidence showed that Chick-for-Me violated that legal requirement, meaning that

the jury's verdict in favor of Chick-for-Me was wrong as a matter of law. In her new trial motion, Sardis argued that a new trial is required under Federal Rule of Civil Procedure 59(a)(1)(A) because the Court erred when it failed to apply strict scrutiny to find that Chick-for-Me's use of a preemptory challenge to strike Juror 8 from the venire was unconstitutional under the Equal Protection Clause and the principles articulated in *Batson v. Kentucky,* 476 U.S. 79 (1986).

Having considered the parties' pleadings and arguments, the Court hereby makes the following findings of fact and law.

II. Summary of Facts

Chick-For-Me is a "fast-food" company with approximately 5,000 employees, employed in approximately 80 restaurants across the country. In addition to being known for its unhealthy food—although it has recently added healthier alternatives—the owner of Chick-For-Me publicly and frequently advocates against gay rights and has contributed millions to anti-gay, conservative groups. As a result, Chick-for-Me is now commonly associated in the public's minds with the anti-gay movement.

Sardis is a thirty-five-year-old woman who worked at Chick-For-Me's corporate headquarters in Gould, California. Although she has a four-year bachelor's degree in Business Economics, Sardis does not have any graduate degrees. Sardis worked for Chick-For-Me as a "Spot Checker I" ("Checker") for eight years

before the onset of her disability. As a Checker, Sardis worked approximately thirty hours per week, driving to each Chick-For-Me location within a 200-mile radius of Gould. She would then check to make sure that each store was complying with Chick-For-Me's standards concerning cleanliness, service, and food quality. The job involved a great deal of walking. About six and a half years into her time at Chick-For-Me, Sardis developed Fibromyalgia, which made her unable to stand for more than fifteen minutes or drive for longer than two hours at a time. Her doctor determined that she was unable to perform her duties as a Checker.

At the time, Chick-For-Me's headquarters had one vacant, full-time position that was of approximately equal pay and status for which Sardis was qualified: Data Analyst I ("Analyst"). There are only three Analyst positions in Chick-For-Me and, although the Analysts do not go through a formal training process, they generally train one another. The job posting for the Analyst position said that a four-year degree (or the equivalent work experience) was required and a higher graduate degree in a relevant field was highly recommended. The Analyst position is generally equivalent to the Checker position in that they are both entry level, require a four-year degree, and pay roughly the same amount ($25 per hour).

Chick-For-Me has a "best qualified" hiring policy. This policy is set forth in the employee handbook and attached to all job postings, including the one for the Analyst position. The policy states that the company will hire the best-qualified applicant for each vacant position. The best-qualified applicant is determined by: (1) the length of time at the company, if applicable; (2) the applicant's level of education; (3) the applicant's interview; (4) if the applicant is already an employee, whether the applicant is currently part-time or full-time; (5) the applicant's past job reviews (if applicable) and (6) the applicant's resume and recommendations. This policy has been consistently and uniformly applied by Chick-For-Me for more than ten years.

Sardis applied for the Data Analyst position but another employee, Cody DeCamp, was chosen. According to Chick-For-Me, DeCamp was chosen because he had a Masters in Statistics and had been working full-time at Chick-For-Me "Assistant Analyst" for two years. Sardis and DeCamp both had consistent "above average" reviews from their past supervisors.

After being denied the Analyst position, Sardis was offered an Administrative Assistant position, which was also full-time and paid $19 per hour. Sardis was irate given that she believed she was overqualified to be an Administrative Assistant (which does not require a four-year degree), and taking the position

would result in her taking an hourly pay cut. The full-time positions within Chick-For-Me provide benefits, but the part-time positions do not.

On February 21, 2013, Sardis filed a complaint against Chick-For-Me, for violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213, alleging that Chick-For-Me discriminated against her when it failed to reassign her to the open Analyst position The matter was set for trial in January 2015.

During jury selection, this Court questioned all the potential jurors to determine if they could be fair and impartial jurors. During this questioning, when she was asked about her employment, Juror 8 stated that she was a health and wellness coach. When asked the same question, Juror 5 stated that he was a personal trainer. Both jurors emphasized their role in helping improve their clients' health. Another question revealed that Juror 8 volunteered as a yoga instructor at a local "LGBT" youth center. It was also revealed that Juror 8 was married, and she referred to her partner as "she." Juror 8 was the only juror whose answers implied that she was homosexual. When defense counsel asked whether Juror 8 had ever eaten at one of Chick-For-Me's restaurants, Juror 8 answered negatively, stating that she did not eat fast food. Juror 5 was

asked the same question and admitted that he did occasionally eat food from Chick-for-Me's restaurants.

Defense counsel used a preemptory challenge to ask the Court to strike Juror 8. The defense did not ask to strike Juror 5. Sardis's counsel immediately raised a *Batson* objection, on the grounds that the company was using the peremptory strike in a discriminatory way to eliminate the only openly homosexual juror on the panel. Defense counsel responded that the reason for the strike was that, as a health and wellness coach, Juror 8 could not be impartial in a case involving a fast-food company. This Court allowed the strike, holding that it is unclear whether *Batson* applies to sexual orientation, but even if it does, the strike was constitutional because the defense offered a nondiscriminatory justification for its strike.

After the close of evidence, Sardis renewed her motion for judgment as a matter of law under Rule 50(b), arguing that reassignment under the ADA was mandatory and that Sardis was discriminated against as a matter of law. That motion was denied. Sardis and Chick-For-Me then provided the Court with two different, special jury instructions regarding the interpretation of the ADA. Consistent with its denial of the motion for judgment as a matter of law, this Court accepted the Chick-for-Me's special jury instruction, which read:

> Reassignment of a disabled employee who is not the most qualified applicant to a vacant position in contravention of an employer's "most qualified" hiring policy is presumptively unreasonable. To overcome this presumption, the disabled employee must show that it was unreasonable for the employer not to make an exception to its "most qualified" hiring policy.

The jury was given this instruction, along with a number of other, jointly submitted instructions.

The jury returned a verdict for Chick-For-Me. After the verdict, Sardis renewed her motion for judgment as a matter of law under Rule 50(b) and moved for a new trial under Rule 59, arguing that the strike of Juror 8 was unconstitutional.

III. Discussion

A. Motion for Judgment as a Matter of Law

Rule 50 empowers a court to grant a motion for a judgment as a matter of law if it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [nonmoving party]." Fed. R. Civ. P. 50(a).

The ADA requires that an employer make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" unless that accommodation imposes an "undue hardship" on the employer. 42 U.S.C. §§ 12112(b)(5)

(2012). Accommodations "may include . . . reassignment to a vacant position." *Id.* § 12111(9)(B). However, the guidelines of the Equal Employment Opportunity Commission, which is the agency tasked with enforcing the ADA, indicate that reassignment should be considered an accommodation of "last resort"; it should be used only when there are no other, effective accommodations available that will allow the individual to perform the essential functions of his or her current job or when such accommodations would pose an undue hardship on the employer. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (2013). Further, for reassignment to be appropriate, the vacant position must be one of roughly equal status and pay. *See id*.

In this case, the parties agree that: (1) Sardis was "qualified" for the vacant position as a Data Analyst; and (2) there were no effective accommodations available to her in her Checker position. However, the parties disagree as to whether the ADA requires an employer to give a disabled employee preference over a more-qualified applicant in contravention of an employer's "best-qualified" policy. Sardis argues that under the ADA, she should have been automatically reassigned to the Analyst position without having to compete with Mr. DeCamp. Not surprisingly, Chick-For-Me argues the opposite—that Chick-For-Me was not required to give Sardis the Analyst position on a

noncompetitive basis because Chick-For-Me's "best-qualified" policy falls under the same category as the seniority policy in *US Airways, Inc. v. Barnett*, 535 U.S. 391, 395-96 (2002). Chick-For-Me further argues that contravening its best-qualified hiring policy would be presumptively unreasonable, and that this situation should be analyzed under what has been called the "special circumstances" test. We agree.

1. The Circuit Split

Although this is an issue of first impression in this circuit, other circuits disagree as to whether the ADA requires mandatory reassignment of a disabled employee to a vacant position over other, more-qualified applicants. The Tenth and D.C. circuits have held that reassignment is mandatory. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-65 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1300-01 (D.C. Cir. 1998). These courts rely heavily on statutory interpretation arguments, reasoning, for example, that the dictionary definition of the word "assign" in the statute means "to appoint (one) to a post or duty" and that competing for a position is not the same as being assigned to one. *Aka*, 156 F.3d at 1302; *see also Smith*, 180 F.3d at 1164. These courts also defer to the EEOC's interpretive guidelines, which mandate reassignment without competition. *Aka*, 156 F.3d at 1301; *Smith*, 180 F.3d at 1166.

The Eighth Circuit, by contrast, has held that an employer may refuse to reassign a less-qualified, disabled employee if that reassignment would violate a legitimate, nondiscriminatory selection rule. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007). In *Huber*, the employer had a best-qualified policy and did not place a disabled employee in a position she wanted, but rather reassigned her to a different, vacant position that paid less. *Id.* at 481. The court reasoned that the employer's actions did not violate the ADA because it is not an affirmative-action statute. As stated in *Huber*, "an employer is not required to provide a disabled employee with an accommodation that is ideal from the employee's perspective, only an accommodation that is reasonable." *Id.* at 483.

Five other circuits have also held that the ADA does not automatically mandate preferential treatment for disabled employees. *See Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384-85 (2d Cir. 1996); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

2. EEOC Position

Although the EEOC guidelines state that an "employee does not have to be the best-qualified individual for the position in

order to obtain [the new position] as a reassignment" and that "[r]eassignment means that the employee gets the vacant position if s/he is qualified for it," Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (2013)," the Court is not bound by these guidelines. These guidelines are not entitled to substantial deference because the language of the ADA is unambiguous. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) (declining to follow EEOC's position as to whether mitigating measures should be taken into account when determining individual's disability under the ADA); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council,* Inc., 467 U.S. 837 (1984).

3. "Special Circumstances" Test

Instead, this Court believes that the most applicable precedent is found in the 2002 Supreme Court case *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). In *Barnett*, the Court established a two-part test for determining whether an accommodation under the ADA is reasonable and therefore mandatory. 535 U.S. at 402-03, 405. The first step involves determining whether an accommodation is "reasonable on its face" or "ordinarily or in the run of the cases." *Id.* at 402-03. The plaintiff has the burden of proving the first element. *Id.* If the plaintiff meets that burden, the burden shifts to the defendant to show that the accommodation would place an undue

hardship on it. *Id.* at 396. If the plaintiff cannot show that an accommodation would ordinarily be reasonable, then the second step requires the plaintiff to produce evidence that "special circumstances" exist requiring the accommodation nevertheless. *Id.* at 405. In *Barnett*, a disabled employee demanded that he be given a vacant position over another, more senior worker even though doing so would violate the employer's longstanding seniority policy. *Id.* The Court held that employers do not have to modify seniority policies to accommodate a disabled employee so long as the seniority policy contains no exceptions and has been consistently applied (i.e. there are no "special circumstances"). *Id.* at 404. It reasoned that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id.*

In this case, Chick-For-Me's "best qualified" hiring policy was uniformly applied and invokes the same kinds of concerns as seniority policies. Similar to the employees in *Barnett* who relied on the seniority system and expected uniform treatment, Chick-For-Me's employees expected its "best-qualified" hiring policy to be consistently and uniformly applied.

For the reasons outlined above, the Court holds that reassignment of a disabled employee who is not the most-qualified applicant to a vacant position in contravention of a

"most-qualified" hiring policy is presumptively unreasonable. This presumption can be overcome only if the disabled employee produces evidence indicating the existence of special circumstance justifying an exception to the "most-qualified" hiring policy, which did not occur in this case. Based on the foregoing, the Court hereby denies the plaintiff's motion for judgment as a matter of law.

B. Motion for New Trial

A court may grant a motion for a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). When a court concludes that a violation has occurred under *Batson*, the case "*must* be remanded for a new trial." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 489 (9th Cir. 2014) (emphasis added).

1. Sexual Orientation as a Basis for a *Batson* Challenge

Assuming for the sake of argument that Chick-for-Me's challenge of Juror 8 was based on her sexual orientation, this Court does not believe that fact brings this case under *Batson*.

The right to trial by an impartial jury in civil cases is guaranteed by the United States Constitution. U.S. Const. amends. VI, VII. Parties are entitled to a limited number of peremptory strikes to help guarantee that the composition of the jury is impartial. 28 U.S.C. § 1870. Although peremptory

challenges generally may be used to strike a juror from the venire for any reason without explanation, this privilege is subject to the constraints of the Equal Protection Clause. *Batson*, 476 U.S. at 89. Under *Batson*, peremptory strikes based on a juror's race, ethnicity, or gender are prohibited. *Id.* at 86 (holding that peremptory strikes against potential jurors based on race or ethnicity violate the Equal Protection Clause); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to peremptory strikes based on the potential jurors' gender). A finding of intentional discrimination against prospective jurors based on race or gender requires reversal. *Batson*, 476 U.S. at 100.

However, counsel generally may use their peremptory strikes to remove "any group or class of individuals normally subject only to 'rational basis' review." *J.E.B.*, 511 U.S. at 143. This makes sense because the purpose of a peremptory challenge is to select an impartial trier of fact, without bias for or against either litigant. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

Courts have consistently refused to apply *Batson* to classes of people that are only subject to rational basis review. *See, e.g., United States v. Watson*, 483 F.3d 828, 833 (D.C. Cir. 2007) (refusing to apply *Batson* protections to peremptory strikes based on disability); *Weber v. Strippit, Inc.*, 186 F.3d

907, 911 (8th Cir. 1999) (refusing to apply *Batson* protection to peremptory strikes based on age); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (refusing to apply *Batson* protection to peremptory strikes based on obesity).

Thus, the question becomes whether classifications based on sexual orientation should be subject to a higher level of scrutiny or simply subject to rational basis review, like the other groups discussed above. The answer is found in the Supreme Court's cases, which have generally applied a rational basis review to classifications based on sexual orientation. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (using a rational basis standard of scrutiny to hold unconstitutional a law criminalizing homosexual sodomy); *Romer v. Evans*, 517 U.S. 620 (using a rational basis standard of scrutiny to hold unconstitutional an amendment to the Colorado State Constitution that discriminated based on sexual orientation).

This Court is aware that the slightly higher version of rational basis review applied in *Lawrence* (i.e. rational basis "with teeth"), as well as the Court's silence on standard of scrutiny in recent pro-gay-rights cases, including *United States v. Windsor*, 133 S. Ct. 2675 (2013), has led many courts to disagree as to whether a higher level of scrutiny should apply to classifications based on sexual orientation. *Compare Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804

(11th Cir. 2004) (interpreting *Lawrence* as applying rational-basis to classification based on sexual orientation), *with Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (interpreting *Lawrence* as applying intermediate scrutiny and enumerating three factors for interpreting the level of scrutiny applied in Supreme Court cases) *and SmithKline*, 740 F.3d 471 (interpreting *Windsor* as applying heightened scrutiny to classifications based on sexual orientation).

This Court agrees with the courts that have concluded that classifications based on sexual orientation do not need to be subject to a heightened standard of scrutiny, and are therefore not subject to the test announced in *Batson*. Given that Juror 8 was a health and wellness coach who disliked fast food, Chick-for-Me clearly had a rational basis for striking Juror 8 from the panel, and was therefore legally entitled to use a preemptory challenge to remove Juror 8 from the jury.

2. Application of *Batson* Test

Moreover, even if *Batson* were to apply to classifications based on sexual orientation, the strike at issue in this case would still be permissible. A strike challenged under *Batson* undergoes a three-part analysis. *SmithKline*, 740 F.3d at 476. First, the challenging party must show a prima facie case of purposeful discrimination; second, the striking party must offer a nondiscriminatory reason for the strike; and third, the Court

must then decide whether the challenging party demonstrated intentional discrimination based on the record. *Id.*

To establish a prima facie case of discrimination, the challenging party must demonstrate that (1) the juror is a member of a cognizable group, (2) a peremptory strike was used to remove the juror, and (3) the "totality of the circumstances raises an inference that the strike was motivated" by the characteristic that makes the juror part of the group. *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009). The challenging party has a burden of production at the prima facie stage, but that burden is "not an onerous one." *SmithKline*, 740 F.3d at 476 (internal quotations omitted).

Sardis met her burden of establishing a prima facie case of discrimination. First, the record provides sufficient evidence that Juror 8 was a member of a cognizable group because her responses supported a reasonable inference that she is homosexual. Second, Chick-for-Me used a peremptory strike against Juror 8. Third, given Chick-for-Me's owner's history of anti-gay politics, it would be reasonable to infer that Chick-for-Me's strike could have been motivated by Juror 8's perceived sexual orientation.

However, Chick-for-Me also stated a nondiscriminatory basis for challenging Juror 8: Juror 8's strong anti-fast-food beliefs. Chick-for-Me's concern that Juror 8 had an anti-fast-

food bias was reasonable given Juror 8's occupation and lifestyle. Sardis's challenge therefore fails on the third prong of this test: she failed to prove intentional discrimination by Chick-for-Me. Although it was reasonable to infer from the facts that Chick-For-Me might have wanted to strike Juror 8 because she was probably homosexual, it was at equally, if not more, reasonable to infer that defense counsel honestly challenged Juror 8 because she was likely to be biased against his client because Chick-For-Me owns and operates numerous fast-food restaurants. Based on the totality of the record, Sardis failed to demonstrate intentional discrimination. Therefore, even if *Batson* did apply to challenges based on sexual orientation–and it does not–the record did not support Sardis's *Batson* objection.

IV. Conclusion

Plaintiff's motions are DENIED.

Dated: 03/3/2014

Amy Hulbert
AMY HULBERT
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 14-1234

Decided July 27, 2015

AMANDA SARDIS,

Plaintiff-Appellant,

v.

CHICK-FOR-ME, INC.,

Defendant-Appellee.

APPEAL from the judgment of the United States District Court for the District of Gould. Before Farless, McFall, and DiPietro. Opinion by DiPietro, M. Reversed.

I. INTRODUCTION

Plaintiff-Appellant Amanda Sardis appeals the district court's denial of her motion under Rule 50(b) of the Federal Rules of Civil Procedure for judgment as a matter of law and her motion under Rule 59 of the Federal Rules of Civil Procedure for a new trial. In her motion for judgment as a matter of law, Sardis argued that she was legally entitled under the Americans with Disabilities Act (ADA) to be reassigned to a vacant "Data Analyst" position after she was no longer able to perform her

duties as a "Spot Checker" working for Defendant-Respondent Chick-for-Me because the reassignment was reasonable and did not impose an undue burden on Chick-for-Me. We agree. Deciding an issue of first impression in this circuit, we hold that Chick-for-Me was required to reassign Sardis to the vacant Analyst position and that Chick-for-Me violated the ADA by failing to do so. We therefore reverse the district court's order denying Sardis's motion for judgment as a matter of law.

In her motion for a new trial, Sardis argued that during jury selection, a juror was removed on the basis of her sexual orientation, which violated the Equal Protection Clause.[1] She argues that her challenge under *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) for discriminatory use of a peremptory strike should have been granted, warranting a new trial. We agree. We hereby hold that the district court improperly applied rational basis review to Sardis's *Batson* challenge and that, under the correct standard of scrutiny, the record shows that a *Batson* violation occurred in this case, and the district court erred in denying Sardis's motion for a new trial.

[1] Although appellate courts generally should not reach constitutional issues when a case can be resolved on nonconstitutional grounds, courts may reach the merits of a constitutional issue when a case raises a constitutional question of public importance and the lower courts, public officers, and the public are in need of guidance. *See Bigelow v. Virginia, 421 U.S. 809 (1975).* Because the constitutional issue raised by Sardis (whether *Batson* applies to preemptory challenges based on a juror's sexual orientation) is an issue of public importance, an issue of first impression in this circuit, and the subject of a circuit split, this Court believes it is important for it to address the merits of that question as an alternative grounds for reversing the district court in this case.

This matter is remanded to the district court for proceedings consistent with this opinion.

II. FACTUAL AND PROCEDURAL SUMMARY

Chick-For-Me is a fast-food company with over 5,000 employees and 80 restaurants. Employees from its headquarters' office, located in the City of Gould, handle all of the chain's operations, including monitoring every store, collecting and analyzing customer data, advertising and marketing. In addition to Chick-for-Me being known for its unhealthy food, its owner has donated millions of dollars to anti-gay conservative groups and vocally supported anti-gay policies. As a result, in the eyes of the public, there is a strong connection between the name "Chick-for-Me" and anti-gay politics.

Sardis is a 35-year-old woman from Gould. Although she has a four-year degree in Business Economics, she does not have any graduate degrees. Before she became disabled, Sardis held a part-time position at Chick-For-Me as a Spot Checker I for eight years, working an average of thirty hours per week. In that position, Sardis drove to all the Chick-For-Me locations in a 200-mile radius of Gould to make sure the stores were meeting Chick-For-Me's standards of cleanliness, service, and food quality. The position involved a great deal of walking.

Approximately six and a half years into her time at Chick-For-Me, Sardis developed Fibromyalgia, a condition that results

in intense, chronic pain, which made it impossible for her to stand or sit for longer than twenty minutes. Her doctor told her to find a new job because her disability made it impossible for her to continue working as a Spot Checker.

The corporate headquarters of Chick-For-Me had one vacant, full-time position that Sardis was qualified for: Data Analyst I ("Analyst"). There are only three Analyst positions in Chick-For-Me and, although the Analysts do not go through a formal training process, they generally train one another. The posting for the Analyst position said that a four-year degree (or the equivalent work experience) was required and a higher graduate degree in a relevant field was highly recommended. The Analyst position is generally equivalent to the Checker position in that they are both entry-level, require a four-year degree, and pay roughly the same amount ($25 per hour).

Sardis applied for the Analyst position but another worker, Cody DeCamp, was chosen. According to Chick-For-Me, DeCamp was chosen because he had a Masters in Statistics and had been working full-time at Chick-For-Me as an Assistant Analyst for two years. Sardis and DeCamp both had consistent "above average" reviews from their supervisors.

Chick-For-Me has a "best qualified" hiring policy. This policy is articulated in their employee handbook, which states that the company will hire the best qualified applicant for

every position, and the best applicant is determined by: (1) the length of time at the company (if applicable); (2) the level of education; (3) the applicant's interview; (4) whether the employee is currently part-time or full-time (if applicable); (5) the applicant's reviews (if applicable) and (6) the applicant's resume.

After being denied the Analyst position, Sardis was offered an Administrative Assistant position, which was also full-time and paid $19 per hour. Sardis was irate because the position she was given involved an hourly pay cut. The full-time positions within Chick-For-Me provided benefits, but the part-time positions do not.

In February, 2013, Sardis filed a complaint in the United States District Court for the District of Gould, alleging that Chick-For-Me discriminated against her by not reassigning her to the vacant Analyst position as required by the ADA. The case was set for jury trial in January 2014. The parties stipulated that Sardis was a "qualified individual with a disability," and that there were no effective accommodations that would have enabled Sardis to keep her original position.

During jury selection, the court and counsel questioned potential jurors about their personal background and qualifications. Sardis's arguments on appeal focus on the answers given by two of the potential jurors, Juror 5 and Juror

8. When the Court asked them about their employment, Juror 8 stated that she was a health and wellness coach, and Juror 5 stated that he was a personal trainer. It was also revealed that Juror 8 was married, and she referred to her partner with the female pronoun "she." Another question revealed that Juror 8 volunteered as a yoga instructor at a local "LGBT" youth center. Juror 8 was the only juror whose answers implied that she was homosexual.

Each party's counsel was given the opportunity to ask additional questions. Chick-For-Me's counsel asked Juror 8 one follow-up question about whether she had ever eaten at one of Chick-For-Me's restaurants. She answered negatively, stating that she did not eat fast food. Juror 5 was asked the same question and admitted to eating at Chick-for-Me on occasion.

When it came time for peremptory challenges, Chick-For-Me's counsel asked the Court to strike Juror 8. He did not ask the Court to strike Juror 5. Sardis's counsel immediately raised a *Batson* objection, arguing that Chick-For-Me was using a peremptory strike to eliminate the only openly homosexual juror on the panel, in violation of the Equal Protection Clause. Chick-For-Me's counsel responded that the reason for his challenge was that, as a health and wellness coach, Juror 8 could not be impartial in a case involving a fast-food company. The Court allowed the strike, finding that Chick-for-Me had

asserted a reasonable nondiscriminatory reason for its challenge. The Court further stated that it did not believe that *Batson* applies to sexual orientation.

After Chick-For-Me's case was completed but before the jury was instructed, Sardis moved for Judgment as a Matter of Law under Rule 50(a), arguing that her reassignment was mandatory under the ADA. The court denied Sardis's motion, holding that the ADA does not require automatic reassignment.

The Court then heard arguments concerning jury instructions. Sardis and Chick-For-Me each provided the court with different instructions regarding the proper interpretation of the ADA. The judge accepted and used Chick-For-Me's instruction, which read:

> Reassignment of a disabled employee who is not the most qualified applicant to a vacant position in contravention of an employer's "most qualified" hiring policy is presumptively unreasonable. To overcome this presumption, the disabled employee must show that it was unreasonable for the employer not to make an exception to its "most qualified" hiring policy.

Sardis's jury instruction, which the Court rejected, read:

> If an employee has become unable to perform his or her current job duties due to a disability, and the employer has a vacant position with approximately equal pay and

status for which the employee is qualified, the employer must reassign the employee to that vacant position.

The jury was instructed, deliberated, and returned a verdict in favor of Chick-For-Me. Sardis then renewed her motion for Judgment as a Matter of Law under Rule 50(b) of the Federal Rules of Civil Procedure and also moved under Rule 59 for a New Trial. She argued that the jury instruction on the ADA issue was legally incorrect, and that the defense had challenged Juror 8 based on her sexual orientation in violation of the Equal Protection Clause. The district court denied both motions.

III. DISCUSSION

A. Standard of Review

A district court's denial of a motion for judgment as a matter of law under Rule 50(b) is reviewed de novo. *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000.

Because of the factual nature of most *Batson* challenges, a district court's rulings regarding a *Batson* challenge are usually reviewed only for clear error. *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009). However, because the issue here is whether district court applied the wrong level of scrutiny, the standard of review is also de novo. *Id.*

B. The District Court Erred in Denying Sardis's Motion for Judgment as a Matter of Law Under Rule 50(b).

The ADA was enacted to address the pervasive isolation and discrimination that disabled Americans experience every day of their lives. Americans with Disabilities Act of 1990 Statement by the President of the United States, 1990 U.S.C.C.A.N. 601, 601-02 (1990 WL 285753). It requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee" unless that accommodation imposes an "undue hardship" on the employer. 42 U.S.C. §§ 12112(b)(5) (2012). Such accommodations "may include . . . reassignment to a vacant position." *Id.* § 12111(9)(B).

While best-qualified hiring policies, like the one in this case, may generally be seen as fair, disabled individuals face an unusual amount of systemic discrimination. At times, the only way to fairly address that discrimination is to require "affirmative conduct to promote entry of disabled people into the workforce." *US Airways v. Barnett*, 535 U.S. 391, 401 (2002). The question in this case is whether mandatory reassignment of a qualified disabled employee into a vacant position without requiring the disabled employee to compete with other applicants, even if the employer normally has a "best-qualified" hiring policy, is a fair and reasonable way to

affirmatively promote entry of disabled people into the workforce. This Court believes that it is.

Although this is an issue of first impression in this circuit, the Supreme Court has established a two-part test for determining whether accommodations under the ADA are reasonable and therefore mandatory; under that test, a court must: 1) determine whether the particular accommodation is "reasonable on its face" or "ordinarily or in the run of the cases" and if it is, then determine whether the accommodation would place an undue hardship on the employer; and 2) if an accommodation is not reasonable, then determine whether there are "special circumstances" indicating that the accommodation should be required nonetheless. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 402-03, 405 (2002). In *Barnett*, a disabled employee demanded that he be given a vacant position over another, more senior worker even though doing so would violate the employer's longstanding seniority policy. *Id.* The Court held that employers do not have to modify seniority policies to accommodate a disabled employee so long as the seniority policy has been consistently applied. *Id.* at 404. It reasoned that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id.*

Unfortunately, the circuits disagree as to how *Barnett's* test applies to cases involving mandatory reassignment of a disabled employee to a vacant position when such reassignment conflicts with employers' other kinds of policies. The Eighth Circuit is the only circuit that has specifically held that best-qualified employment policies trump reassignment under the ADA. *See Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 483 (8th Cir. 2007). Other circuits have, however, suggested that the *Huber* outcome would be favored but have not expressly reached that holding. *See Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004); *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001); *Terrell v. USAir*, 132 F.3d 621, 627 (11th Cir. 1998); *Wernick v. Fed. Reserve Bank of N.Y.*, 91 F.3d 379, 384-85 (2d Cir. 1996); *Daugherty v. City of El Paso*, 56 F.3d 695, 700 (5th Cir. 1995).

On the other hand, before *Barnett* was decided, the Tenth and D.C. circuits both held that reassignment is mandatory. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164-65 (10th Cir. 1999) (en banc); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1300-01 (D.C. Cir. 1998). These courts rely heavily on statutory interpretation arguments, reasoning, for example, that the dictionary definition of the word "assign" in the statute means "to appoint (one) to a post or duty" and that competing for a position is not the same as being assigned to one. *Aka*, 156

F.3d at 1302; *Smith*, 180 F.3d at 1164. They also relied heavily to the EEOC's interpretive guidelines, which also mandate reassignment without competition. *Aka*, 156 F.3d at 1301; *Smith*, 180 F.3d at 1166.

In 2012, the Seventh Circuit found a middle ground between these two positions when it applied *Barnett's* two-part test and concluded that deviation from a best-qualified hiring policy does not always represent an undue hardship for the employer. *EEOC v. United Airlines Inc.*, 693 F.3d 760, 764 (7th Cir. 2012). Thus, although the Seventh Circuit did not hold that reassignment is mandatory per se, it did imply that mandatory reassignment would "ordinarily" be reasonable under *Barnett*.

This court agrees with the reasoning in *Smith, Aka,* and *United Airlines Inc.,* and believes that mandatory reassignment is reasonable even if it conflicts with an employer's "best-qualified" hiring policy, like the one in this case. This decision finds support from a number of sources. First, the ADA's plain language supports a strong presumption in favor of mandatory reassignment because it requires employers to make "reasonable accommodations" for all disabled employees and defines "reasonable accommodation" to include "reassignment to a vacant position." 42 U.S.C. §§ 12111(9), 12112(b)(5). The ADA also separately prohibits discrimination against a job applicant applying for a vacant position. *Id.* at § 12112(a). To avoid

redundancy, the reassignment language must mean more than simply requiring employers to consider disabled applicants on an equal basis with all other applicants. *Smith v. Midland Brake*, 180 F.3d 1154, 1164-65 (10th Cir. 1999). This is consistent with basic principles of statutory interpretation, including the "mere surplusage" rule, which states courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

Second, the EEOC, the government agency that was created to administer and enforce employment discrimination laws, *see* 42 U.S.C. 12116 (1994), has spoken on this topic and should be afforded significant deference, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76 (2002)(holding that an EEOC guideline interpreting a provision of the ADA that allows employers to use qualification standards that tend to screen out individuals with disabilities deserves Chevron deference). The EEOC guidelines state, "the employee does not have to be the best qualified individual for the position in order to obtain [the new position] as a reassignment," and that "[r]eassignment means that the employee gets the vacant position if s/he is qualified for it." Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (2013). Because

these Guidelines do not directly contradict the statutory language of the ADA, they should be afforded substantial deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, even if a court finds that another interpretation is reasonable, or even better than the agency's interpretation, it must defer to the agency's reasonable interpretation. 467 U.S. at 844.

Third, the ADA's legislative history states that the ADA was passed so that those with disabilities could remain in "the economic and social mainstream of American life." See S. REP. NO. 101-116, at 20 (1989) (discussing central purpose of ADA). Mandatory reassignment supports this legislative intent.

Finally, this decision is consistent with the Supreme Court's holding in *Barnett* because, while seniority and best-qualified policies may superficially seem to involve similar concerns about providing employees with uniform and consistent treatment, they actually involve very different consistency and fairness concerns. While seniority policies can be objectively applied by counting how long someone has been employed, "best-qualified" policies involve a much more subjective determination, which vastly increases the danger of discrimination against disabled members of the workforce when reassigning employees. Thus, although reassignment does not

trump a seniority system, it should trump a mere "best-qualified" hiring policy.

This Court hereby holds that, in the ordinary case involving a best-qualified hiring policy, an employer must reassign a disabled but qualified employee into a vacant position, even if doing so contravene a best-qualified hiring policy. Accordingly, in this case, the jury should have been instructed that the law required reassignment so long as it would not cause an undue hardship on the employer, and the district court erred in denying Sardis's Rule 50(b) motion.

C. The District Court Incorrectly Applied a Rational Basis Review Standard to a *Batson* Challenge for Discrimination Based on Sexual Orientation

During jury selection, Sardis challenged the peremptory strike of a potential juror under *Batson v. Kentucky*, 476 U.S. 79 (1986), on the grounds that the juror's answers to voir dire questioning revealed that she was homosexual and that Defendant Chick-for-Me was discriminating against her based on her sexual orientation. The district court overruled Sardis's objection, finding both that there was insufficient evidence of intentional discrimination, and that even if there had been intentional discrimination, classifications based on sexual orientation are not subject to heightened scrutiny or the test announced in *Batson*. This Court disagrees with both of those findings.

1. The Record Shows that Chick-for-Me's Preemptory Challenge Was Intentionally Discriminatory

No citizen may be excluded from jury service for an unconstitutional reason. *Batson*, 476 U.S. at 87; *see also* 28 U.S.C. § 1862. Both the rights of potential jurors to serve and the rights of defendants to an impartial jury are implicated in the jury selection process. *Batson,* 479 U.S. at 91. Therefore, the use of a peremptory challenge to remove a juror is subject to the constraints of the Equal Protection Clause. *Id.* at 89.

When a *Batson* objection is raised, the party making the objection must first establish prima facie case of discrimination; if a prima facie case is shown, then the party seeking to strike the juror must offer a nondiscriminatory basis for the strike. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 476 (9th Cir. 2014). Finally, the trial court must decide, based on the record, whether the challenging party has shown that the challenge was intentionally discriminatory. *Id.*

The first two requirements of this test are easily met in this case. Sardis established a prima facie case of purposeful discrimination because it can reasonably be inferred from the fact that Juror 8 said that her spouse was a "she" that Juror 8 was homosexual. Given Chick-for-Me's owner's well-known anti-gay advocacy, it is also reasonable to infer that Chick-for-Me

struck Juror 8 from the jury because she was homosexual. Further, although Chick-for-Me offered a possible nondiscriminatory explanation for the strike—namely that Juror 8 might be biased against fast-food restaurants because of her professional background—Chick-for-Me's justification is inconsistent with other facts in the record. Specifically, the fact that Chick-for-Me did not strike Juror 5, who had a very similar professional background and therefore the same potential for bias, undermines the credibility of Chick-for-Me's excuse for its strike. The only significant difference between Juror 5 and Juror 8's answers to questions during void dire was Juror's 8's answers that exposed her likely homosexuality. Given Chick-for-Me's owner's undisputed history of anti-gay rhetoric, it is obvious why defense counsel would want to exclude a homosexual juror. Thus, the record shows that the strike was almost certainly intentionally discriminatory, making the next question whether that strike was unconstitutional.

2. The District Court Erred in Determining that Classifications Based on Sexual Orientation are Not Subject to *Batson*

It is well-established that striking a juror based on race or gender is unconstitutional, and that these categories face a heightened level of scrutiny. *Batson*, 476 U.S. at 89; *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). However, it is also true that "any group or class of individuals subject to

rational basis review" may be removed by use of a peremptory strike. *Id.* at 143. Therefore, to answer whether the preemptory strike in this case was unconstitutional, the Court must determine whether classifications based on sexual orientation should be subject to rational basis or a higher level of scrutiny.

Despite having issued a growing number of high-profile decisions concerning the rights of homosexuals, the Supreme Court has yet to articulate a clear standard for reviewing classifications based on sexual orientation. *See* e.g., *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003). This has resulted in confusion among the lower courts; while some courts have continued to apply a rational basis level of scrutiny, *see, e.g., Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), others have interpreted these cases as requiring a heightened level of scrutiny for classifications based on sexual orientation, *see, e.g., SmithKline Beecham Corp. v. Abbot Laboratories*, 740 F.3d 471 (9th Cir. 2014); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008). For example, in *Witt*, the Ninth Circuit determined that the Supreme Court had implicitly applied heightened scrutiny in *Lawrence* when it held that a law criminalizing homosexual sodomy violated the Due Process clause.

527 F.3d at 816. More recently, the Ninth Circuit found that the Supreme Court had also applied a heightened level of scrutiny in *Windsor* when it invalidated the federal Defense of Marriage Act on Equal Protection grounds. *SmithKline,* 740 F.3d at 480-81.

This Court agrees with the Ninth Circuit. By looking at what the Supreme Court has actually done in each of these cases, it is easy to see that it is actually applying a heightened level of scrutiny to classifications based on sexual orientation. "Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action." *SmithKline*, 740 F.3d at 582. Yet, the most recent Supreme Court decisions concerning classifications based on sexual orientation all examined the inequality that resulted from each challenged action and applied principles normally reserved for heightened scrutiny. For example, in *Lawrence,* the Supreme Court looked to whether there was a "legitimate state interest" to justify criminalizing homosexual sodomy, *Lawrence*, 539 U.S. at 578, a requirement normally reserved for heightened scrutiny, *SmithKline*, 740 F.3d at 582. Likewise, in *Windsor,* the Court analyzed the "essence" of DOMA, finding discrimination as its core purpose, rather than accepting "some conceivable rational purpose" for its enactment. *Windsor*, 133 S. Ct. at 2681. Most recently, in *Obergefell*, the Court reasoned that laws preventing

same-sex couples from marrying “are in essence unequal” and “abridge central precepts of equality.” 135 S. Ct. at 2590.While none of these cases directly state which level of scrutiny is being applied, all applied reasoning normally used with a higher level of scrutiny than rational basis.

The need to apply a heightened standard is further supported by the fact that peremptory strikes involve fundamental constitutional rights: the defendant’s right to trial by an impartial jury and every individual’s right to serve on a jury. U.S. Const. amend. VI; *Batson*, 476 U.S. at 79. Fundamental rights are usually subject to heightened scrutiny because of their nature. *See Lofton*, 377 F.3d at 1309. Courts regularly apply heightened scrutiny to protect other fundamental rights, such as freedom of speech or the right to marry. *See Obergefell,* 135 S. Ct. at 2608. The fundamental right to serve on a jury and to face an unbiased jury should be no different.

Based on the foregoing authorities, this Court finds that heightened scrutiny should apply to classifications based on sexual orientation, particularly in the context of jury service. The final question then becomes whether that means that *Batson* applies.

While it is clear that groups subject to rational basis review may be removed from the jury through the use of a preemptory challenge, it is unclear whether the fact that

actions affecting a particular class of people are subject to heightened scrutiny "is sufficient to warrant *Batson*'s protection or merely necessary." *SmithKline*, 740 F.3d at 484. A look at the groups that *Batson* has historically protected, including classifications based on race, ethnicity, and gender, gives insight into the intended scope of *Batson*. Both racial minorities and women faced a history of exclusion from jury service, both in law and in practice. *Miller-el v. Dretke*, 545 U.S. 231, 236 (2005)("[T]he strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries"); *J.E.B.*, 511 U.S. at 131 ("[U]ntil the 20th century, women were completely excluded from jury service"). Therefore allowing jurors to be stricken from a jury based on their race or gender "harms the litigants, the community, and individual jurors because it reinforces stereotypes and creates an appearance that the judicial system condones the exclusion of an entire class of individuals." *SmithKline*, 740 F.3d at 484, citing *J.E.B.*, 511 U.S. at 140 (internal quotations omitted).

There are similar compelling reasons for extending *Batson* to classifications based on sexual orientation. While the invisible nature of sexual orientation means homosexuals have not been openly excluded from juries, they have been "systematically excluded from the most important institutions of

self-governance." *SmithKline*, 740 F.3d at 484-85. Even now, gays and lesbians frequently face ill-treatment in the judicial system, even when protections are in place to prevent discrimination. Todd Brower, *Twelve Angry-and Sometimes Alienated-Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 678-79 (2011). Allowing intentional discrimination against homosexuals through the use of peremptory strikes also perpetuates negative stereotypes and continues the "deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals." *SmithKline*, 740 F.3d at 485. Therefore, the only reasonable conclusion is that *Batson* applies to challenges based on sexual orientation.

In this case, as discussed above, the record shows that Chick-for-Me intentionally discriminated against Juror 8 based on her sexual orientation in violation of Juror 8's Equal Protection right, and the district court erred therefore when it denied Sardis's motion for a new trial.

III. CONCLUSION

The judgment of the district court is hereby REVERSED and the matter is REMANDED for proceedings consistent with this opinion.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

No. 15-465

CHICK-FOR-ME, INC.,

Petitioner,

v.

AMANDA SARDIS,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented:

1. Does the Americans with Disabilities Act require an employer to automatically reassign a disabled employee to a vacant position of approximately equal pay and status in contravention of that company's "best-qualified" hiring policy?

2. Did the District Court err in holding that the use of a peremptory challenge to remove a prospective juror on the basis of that juror's perceived sexual orientation did not violate the Equal Protection Clause?