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Expert Analysis

7Th Circuit Reverses Course; Reassignment May Be 'Reasonable Accommodation' Under ADA

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An employer is faced with the following situation: A disabled employee is unable to perform the essential functions of her job even with a reasonable accommodation. However, the employer has a position available for which the disabled employee is qualified. Must the employer automatically appoint the disabled employee to this vacant position? Or, can the employer consider many applicants for the vacancy on a competitive basis?

The 7th U.S. Circuit Court of Appeals recently joined the 10th and D.C. circuits in determining that an employer *must,* under most circumstances, reassign the disabled employee to the vacant position in order to comply with the Americans with Disabilities Act,[1] even if she is not the most qualified candidate.

In *Equal Employment Opportunity Com-mission v. United Airlines*,[2] the 7th Circuit held that the ADA mandates that an employer reassign an employee unable to perform his or her current job because of a disability to a vacant position for which he or she is qualified, if such an accommodation would be ordinarily reasonable and would not present an undue hardship to the employer. In so holding, the 7th Circuit overturned its prior ruling in *EEOC v. Humiston-Keeling Inc.*,[3] explaining that the U.S. Supreme Court's decision in *US Airways v. Barnett*[4] demanded this reversal.

In *Humiston-Keeling*, the plaintiff worked in a pharmaceutical warehouse, and her job duties included carrying products from a shelf to a conveyor belt. A work accident led to acute lateral epicondylitis, commonly known as "tennis elbow," meaning she had limited use of her right arm. Because of this injury (which the court accepted as a disability), the plaintiff could no longer perform the essential functions of her job. Her employer had several open clerical positions, but plaintiff lost out to better-qualified candidates each time she applied, and she was ultimately terminated.

The 7th Circuit found that the employer's policy to hire the best applicant meant reassignment was not a reasonable accommodation under the ADA. "[T]he ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to

hire the best applicant for the particular job in question rather than the first qualified applicant."[5]

Less than two years after the *Humiston-Keeling* decision, the Supreme Court decided *Barnett*, where the court evaluated reassignment as a "reasonable accommodation" under the ADA where the reassignment would violate a seniority system.

The court laid out a two-step, case-specific approach to address this conflict. First, the employee must show that the accommodation (reassignment to a different position) "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases."[6] Second, if the accommodation seems reasonable on its face, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship under the particular circumstances of the case.

While a reassignment that would violate an established seniority system is not "reasonable on its face," a reassignment that would violate a company policy to hire the best candidate is, the 7th Circuit said.

But, if the accommodation is not shown to be of a type that is reasonable in the run of cases, the employee can still prevail if he or she shows that special circumstances call for a finding that the accommodation is reasonable in his or her particular situation.[7]

For the plaintiff in *Barnett*, his request for assignment to a position as a mailroom worker, rather than as a cargo handler, was not "reasonable in the run of cases" because it would have violated an established seniority system imposed by US Airways.[8]

The court did note, however, that it was not creating a blanket ADA "reasonable accommodation" exception for seniority systems, because a plaintiff "remains free to show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts."[9] The court explicitly stated that "preferences will sometimes prove necessary to achieve the act's basic equal-opportunity goal."[10]

In *EEOC v. United Airlines* the 7th Circuit applied *Barnett* to United Airlines' "reasonable accommodation guidelines," which listed transfer to an equivalent or lower-level vacant position as a possible reasonable accommodation, but made clear that while the employee needing accommodation would be granted priority, the application process would remain competitive.[11]

The 7th Circuit found that an employer's policy to hire the best candidate was very different from an established seniority system (as in *Barnett*), because the former did not involve "property rights" or comparable administrative concerns.[12] So while a reassignment that would violate an established seniority system is not "reasonable on its face,"[13] a reassignment that would violate a company policy to hire the best candidate for vacant positions is, on its face, a reasonable accommodation.

Therefore, the 7th Circuit remanded to the trial court, strongly suggesting that United Airlines' policy of reassigning employees seeking transfer on a competitive basis is contrary to the ADA's reasonable-accommodation requirement.[14]

EXAMINING THE CIRCUIT SPLIT

The 7th Circuit in *EEOC v. United Airlines* joined the 10th and D.C. circuits in adopting the "mandatory preference" view of reassignment as a reasonable accommodation.

In *Smith v. Midland Brake*[15] the 10th Circuit considered *en banc* whether an employee can be a "qualified individual with a disability" when that employee is unable to perform the essential functions of his or her present job, regardless of the level of

accommodation offered, but could perform the essential functions of other available jobs within the company with or without a reasonable accommodation.

The 10th Circuit considered the language of the ADA, which defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual *holds or desires*."[16]

The *Smith* court determined that an "opportunity to compete" approach would do violence to the text of the ADA, rendering the words "or desires" superfluous. Further, reassignment (*not* consideration for reassignment) is one of the types of reasonable accommodation specifically mentioned in the ADA.[17] Therefore, the court reasoned, "the reassignment obligation must mean something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position" and that "something more" is the disabled employee's right in fact to reassignment, rather than simply to consideration with other applicants.[18]

The D.C. Circuit reached a similar con-clusion in *Aka v. Washington Hospital Center*[19] by finding that simply allowing a disabled employee to compete for a vacant position does not honor the "reasonable accommodation" language of the ADA.

The D.C. Circuit made statutory inter-pretation findings similar to the 10th Circuit, finding that "reassign" must mean more than "allowing an employee to apply for a job on the same basis as anyone else."[20] Such a limited reading, the court reasoned, would render the statute's reassignment language redundant, since the ADA already prohibits discrimination in job application procedures.[21]

The D.C. Circuit ultimately remanded this issue to the trial court to determine whether an applicable collective bargaining agreement permitted the employer to reassign the plaintiff to the vacant position without following the CBA's provisions on posting vacancies and seniority.

The 8th Circuit now stands alone as the sole circuit to adopt the "opportunity to compete" viewpoint.

In *Huber v. Wal-Mart Stores*[22] the 8th Circuit held that an employer with an established policy to fill vacant job positions with the most qualified applicant does not violate the ADA when it fails to reassign a qualified disabled employee to a vacant position, when the disabled employee is not the most qualified applicant for the position.[23]

The plaintiff in *Huber* worked as a dry grocery order filler, but she injured her arm and hand, rendering her unable to perform the essential functions of her job. She sought reassignment to a router position, but there was a more qualified candidate for the job, and she did not get the position.

The 8th Circuit determined that the ADA did not require Wal-Mart to set aside its policy to hire the most qualified candidate, reasoning that requiring an employer to reassign a qualified disabled employee to a position in violation of a legitimate nondiscriminatory policy would constitute "affirmative action with a vengeance."[24]

District courts in other circuits have come out both ways on this question; some have found that an employer's policy to hire the best candidate means reassignment is not a reasonable accommodation, and others have found the opposite.[25]

Employers in the 7th, 10th and D.C. circuits must revisit their policies to ensure compliance, as they may now be required to reassign disabled employees to vacant positions, despite a policy to fill open positions competitively.

Because of this clear circuit split, reasonable-accommodation policies that give reassignment preference to disabled employees, while still allowing consideration of other applicants, may be perfectly legal in the 8th Circuit, but generally violative of the ADA in at least the 7th, 10th and D.C. circuits.

PRACTICAL IMPLICATIONS FOR EMPLOYERS

The crucial question that arises from the *Barnett* line of cases is *which* employer policies will overcome the employer's obligation to reassign a disabled employee as a reasonable accommodation under the ADA. Put differently, when will reassignment "seem reasonable on its face,"[26] and when will it not?

It is clear that reassignment generally is not "on its face" a reasonable accommodation where reassignment to the vacant position would violate a company's established seniority system (even one unilaterally imposed by the employer, not collectively bargained for)[27] or a collective bargaining agreement.[28] The same would appear to be true when the reassignment would constitute a promotion.[29]

In these situations, the burden is on the employee to prove that special circumstances warrant such an accommodation.[30] For example, the employee could show that the employer has retained the right to unilaterally alter the seniority system and exercises that right frequently, or that the system already has exceptions, such that reassignment in spite of the seniority system is a reasonable accommodation.[31]

The burden would generally shift to the employer to show undue hardship under the particular circumstances of the transfer where, for example, an employer simply has a blanket "no transfer" policy. [32]

Employers in the 7th, 10th and D.C. circuits must revisit their reasonable-accommodation policies to ensure compliance, as they may now be required, as a general proposition, to automatically reassign disabled employees to vacant positions for which they are qualified as a reasonable accommodation, despite a company policy to fill open positions competitively with the most qualified candidate.

NOTES

1 42 U.S.C. § 12101.
2 693 F.3d 760 (7th Cir. Sept. 7, 2012).
3 227 F.3d 1024 (7th Cir. Sept. 15, 2000).
4 535 U.S. 391 (Apr. 29, 2002).
5 *Humiston-Keeling,* 227 F.3d at 1029.
6 *Barnett,* 535 U.S. at 402.
7 *Shapiro v. Twp. of Lakewood,* 292 F.3d 356, 361 (3d Cir. May 29, 2002) (citing *Barnett,* 535 U.S. at 402).
8 *Barnett*, 535 U.S. at 403.
9 *Id.* at 405.
10 *Id.* at 397.
11 *EEOC v. United Airlines,* 693 F.3d at 761.
12 *Id.* at 764.
13 The first step of the *Barnett* analysis is that the accommodation "seems reasonable on its face." 535 U.S. at 402.
14 *EEOC v. United Airlines,* 693 F.3d at 764.
15 180 F.3d 1154 (10th Cir. June 14, 1999).
16 *Id.* at 1161 (citing 42 U.S.C. § 12111(8) (emphasis added in *Smith*)).
17 *Id.* (citing 42 U.S.C. § 12111(9)).
18 *Id.* at 1165.
19 156 F.3d 1284 (D.C. Cir. Oct. 9, 1998).
20 *Id.* at 1304.
21 *Id.*

[22] 486 F.3d 480 (8th Cir. May 30, 2007).
[23] *Id.* at 481.
[24] *Id.* at 484 (citing *Humiston-Keeling,* 227 F.3d at 1029).
[25] *Compare, e.g., Haynes v. AT&T Mobility,* 2011 WL 532218, at *4 (M.D. Pa. Feb. 8, 2011) (applying *Barnett* to find that "reassignment over another candidate who is more qualified for the job, when the most qualified candidate would normally be entitled to the job under the employer's established hiring practices" is not an accommodation that is reasonable in the run of cases), with *Rowe v. Aroostook Medical Center,* 2010 WL 3283065, at *11 (D. Me. Aug. 17, 2010) (applying *Barnett* to find that a medical center's asserted policy to hire nurses through a competitive application process, without "fully shouldering its burden of proving the existence" of such a policy, did not make reassignment an unreasonable accommodation under the circumstances).
[26] *Barnett*, 535 U.S. at 402.
[27] *Id.* at 403.
[28] *Smith*, 180 F.3d at 1175 (internal citations omitted).
[29] *Id.* at 1176 (internal citations omitted).
[30] *See Barnett,* 535 U.S. at 402.
[31] *Id.* at 405.
[32] *See Smith,* 180 F.3d at 1176 (internal citations omitted).

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