

Seventh Circuit: ADA Gives Disabled Employees Priority For Vacant Positions

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A recent **Seventh Circuit** decision may require employers to select minimally qualified employees over far more qualified employees when filling vacant positions. In ***EEOC v. United Airlines, Inc.***, 2012 WL 3871503 (7th Cir. 2012), the Court held last month that, absent undue hardship, the **Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (“ADA”)**, requires an employer to transfer a disabled employee to a vacant position ahead of more qualified non-disabled employees.

This case involved guidelines that United Airlines issued in 2003 for accommodating “employees who, because of disability, can no longer do the essential functions of their current jobs even with reasonable accommodation.” Under the guidelines, these disabled employees were eligible for placement in a vacant position and even received priority over otherwise equally qualified co-workers, but did not receive an open position over a genuinely superior candidate. The **Equal Employment Opportunity Commission (“EEOC”)** filed a lawsuit against United Airlines, which filed a Motion to Dismiss. The district court granted the motion, holding that a “competitive transfer policy does not violate the ADA.”

The EEOC appealed and the Seventh Circuit reversed. The Seventh Circuit acknowledged that, according to its own precedent, employers were not required “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." The Court concluded, however, that this precedent conflicted with the Supreme Court's more recent decision in ***U.S. Airways, Inc. v. Barnett***, 535 U.S. 391 (2002).

In *Barnett*, the Supreme Court considered whether a disabled cargo handler who could no longer perform his job was entitled to a mailroom position ahead of a more senior employee who was otherwise entitled to the job pursuant to a seniority system. The *Barnett* Court noted that "preferences will sometimes prove necessary to achieve the [ADA's] basic equal opportunity goal" and articulated a "two-step, case-specific" analysis. First, the plaintiff/employee must show that an accommodation "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." After the plaintiff/employee satisfies the first step, the burden shifts to the defendant/employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." The *Barnett* Court concluded that, although a transfer to the mailroom may have constituted a reasonable accommodation, violating the seniority system was unreasonable. According to the Seventh Circuit, however, the *Barnett* Court "was not creating a *per se* exception for seniority systems."

Relying on *Barnett*, the Seventh Circuit remanded the *United Airlines* case and directed the district court to apply the Supreme Court's analysis. The Seventh Circuit observed that the Tenth and the District of Columbia Circuits have previously reached similar results. The Court gave little weight to a contrary Eighth Circuit decision that relied on the Seventh Circuit's now-overruled precedent.

Practical Advice for Employers

Employers should have policies and procedures in place to address transfer requests by employees whose disabilities prevent them from performing their jobs. Within the Seventh Circuit (Wisconsin, Illinois and Indiana), employers should plan to give these employees priority for open positions and must understand that the Seventh Circuit will rarely accept an "undue hardship" excuse for denying the transfer.

Even outside of the Seventh Circuit, employers should be mindful of the *United Airlines* decision. Not only have the Tenth and District of Columbia Circuits reached similar rulings, but the Seventh Circuit's interpretation of the Supreme Court's *Barnett* decision will likely influence the decisions of courts that have not yet addressed this issue. Moreover, the EEOC clearly takes the position that anything less than mandatory reassignment violates the ADA.

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