11th Circuit ADA Update: Reassignment of Qualified-Disabled-Employee To Vacant Position Ordinarily Not "Reasonable" Accommodation Unless Employee Is "Best-Qualified"
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The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* requires employers to reasonably accommodate otherwise qualified individuals with disabilities. Under the ADA, "'reasonable accommodation' may include --... reassignment to a vacant position." 42 U.S.C. §12222(9).

In a decision released on December 7, 2016, *United States EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 2016 U.S. App. LEXIS 21768 (11th Cir. 2016), the Eleventh Circuit Court of Appeals significantly narrowed the duty of an employer in the Eleventh Circuit to reassign an employee to a vacant position as a reasonable accommodation under the ADA. In that case, a nurse who worked on the hospital's psychiatric ward walked with a cane due to back problems and arthritis. After the Hospital barred the use of canes in the ward due to safety concerns, it gave the nurse 30 days to find another position or be subject to termination. Although the nurse applied for at least 3 positions for which she met posted job qualifications, the Court held that the employer did not violate the ADA in refusing to interview or reassign her: "Requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable "in the run of cases." As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. …"In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel."

The Eleventh Circuit's opinion, while consistent with the decision of the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007) seems inconsistent with the holdings of the D.C. Circuit, the Tenth Circuit and the Seventh Circuit Courts of Appeals in, respectively[1]. In *US Airways, Inc. v. Barnett*, U.S. Airways argued that the ADA requires only "'equal' treatment for those with disabilities" and that "[i]nsofar as a requested accommodation violates a disability-neutral workplace rule, such as a seniority rule, it grants the employee with a disability" "preferential treatment" – which it contended the ADA did not require. *Id*. at 535 U.S. 397, 122 S.Ct. 1520-21.

The Supreme Court rejected US Airway's view of the ADA holding that "this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. … By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach." *Id.*

The Supreme Court further held that an employee can meet the burden of showing an accommodation is "reasonable" by "showing that, 'at least on the face of things,' the accommodation will be feasible for the employer," by showing "plausible accommodation," or by showing he seeks "a *method of accommodation* that is reasonable in the run of cases." *Id*. at 535 U.S. 401-402, 122 S.Ct. 1523.

The Court ultimately concluded that absent special circumstances reassignment was not reasonable when it conflicted with an established seniority system, among other things, because "the typical seniority system provides important employee benefits by creating, and fulfilling, employee

[1] Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998), Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999), and EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012). The 2012 Seventh Circuit case, decided en banc, reversed a similar holding in EEOC v. Humiston-Keeling, 227 F.3d 1024 (7th Cir. 2000) relying upon the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002).

expectations of fair, uniform treatment." *Id.* at 535 U.S. 402-406, 122 S.Ct. 1516, 1523-1525.

In holding that, absent special circumstances, "the ADA only requires an employer [to] allow a disabled person to compete equally with the rest of the world for a vacant position," the Eleventh Circuit cites pre-*Barnett* precedent holding that ADA requires only "*equal* employment opportunities," and "that [t]he ADA was never intended to turn nondiscrimination into discrimination" against the non-disabled." *EEOC v. St. Joseph's Hospital,* 2016 U.S. App. LEXIS 21768 at *26-27.

The decision seems at odds not only with the language of *Barnett*, but also with the *en banc* opinion of the Seventh Circuit in *United Airlines, Inc*., 693 F. 3d 760, 764 and n. 3 in which the Court suggested that determining whether "mandatory reassignment is ordinarily, in the run of cases, a reasonable accommodation" should not "cause the district court any great difficulty. This is the very accommodation analyzed in *Barnett.* There, the Supreme Court "assume[d] that normally such a request would be reasonable within the meaning of the statute, were it not for one circumstance, namely, that the assignment would violate the rules of a seniority system."

Accord Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Circuit 1998) ("[T]he word 'reassign' must mean more than allowing an employee to apply for a job on the same basis as anyone else. An employee who on his own initiative applies for an obtains a job elsewhere in the enterprise would not be described as having been "reassigned"; the core word "assign" implies some active effort on the part of the employer. Indeed the ADA's reference to reassignment would be redundant if permission to apply were all it meant; the ADA already prohibits discrimination "against a qualified individual with a disability because of the disability … in … job application procedures.")

Compare Smith v. Midland Brake, Inc., 180 F.3d 1154, 1180 (10th Cir. 1999) ("Although reasonableness is the underlying qualifier on an employer's duty to reassign, there may be cases where, for example, the record is clear that the employee failed to take the necessary steps to initiate or participate in the interactive process or there may be cases where reassignment would be unreasonable as a matter of law, and in those cases summary judgment would be appropriate for the employer. For example, an employer might be entitled to summary judgment if the record established that reassignment would violate a collective bargaining agreement, or would constitute a promotion, or would be to a position to which the employee is not qualified, with or without reasonable accommodation. On the other hand, there may be cases where it is undisputed that the interactive process was adequately initiated by the employee and the facts are undisputed that the employer failed in its burden to offer reassignment as a form of reasonable accommodation. In such a situation, summary judgment might be appropriate for the employee.")

To date the EEOC has not filed a petition for rehearing or rehearing *en banc*. The Agency has until January 23rd to do so.