Outside Counsel

By John A. Beranbaum

Reasonably Accommodating ADA Reassignments

At last count, since 1999 there have been more than 30 decisions from federal appellate courts, and one pending U.S. Supreme Court case, concerning the issue of an employer's duty under the Americans with Disabilities Act to reasonably accommodate a qualified disabled employee by providing "reassignment to a vacant position."[1] This article discusses the parameters of the duty of reassignment and explores some of the issues that make this obligation so controversial.

Reassignment is the workplace accommodation of "last resort."[2] An employer first must try to accommodate a disabled employee within his or her current job, and only if those efforts have failed should it consider a transfer to another position.[3] In order for reassignment to be deemed reasonable, the following requirements must be met: 1) the disabled employee must be qualified for the new position; 2) if available, the new position should be equivalent in compensation and benefits to the disabled employee's current job; and 3) the new position must be vacant.

An employee is considered qualified for the new position if he or she (a) satisfies the requisite skill, experience, education, and other job related requirements of the position; and (b) can perform the essential functions of the new position, with or without reasonable accommodation.[4] The U.S. Court of Appeals for the Second Circuit decision in *Stone v. City of Mt. Vernon*[5] illustrates what is meant by "qualified" in the context of reassignment.

Mr. Stone, a firefighter, became partially paralyzed in an off-duty accident and sought reassignment to the fire department's administrative bureau. The department refused the transfer on grounds that its administrative staff needed to perform fire-suppression duties in emergencies.

The Second Circuit ruled that the department violated the ADA. The court noted that the administrative staff had

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never been called on to fight a fire, and thus, fire-suppression activities could not be considered "essential," but at most, "marginal," to the desk job. Because Mr. Stone could perform the job's essential functions, he was "qualified" for the position.

Stone demonstrates the potentially wide-ranging scope of reassignment as a reasonable accommodation. The fire department, in effect, was required to make a double accommodation: first, it had to transfer the paralyzed firefighter, and second, it needed to restructure his new job to eliminate some of its marginal job duties. By the same token, an employer is not obligated to modify the essential functions of a new job in order to meet the needs of a disabled employee seeking reassignment.[6] Had the fire department shown that its administrative staff actually put out fires, it would not have been obliged to reassign Mr. Stone or to exempt him from those duties.

Equivalent Position

Wherever feasible, an employer must place a qualified disabled employee requesting reassignment in a position that is equivalent in pay and other relevant factors, such as benefits and geographical location, to his or her current position. An employer violates its duty of reasonable accommodation where a position comparable to the employee's current placement is available, but it reassigns him or her to a position with inferior pay and benefits.[7]

In *Norville v. Staten Island Hospital*, a nurse took a one year leave of absence from a hospital because of a spinal injury. At the end of the year, she wanted to return to her nursing job, but be relieved of heavy lifting. The hospital offered her either a part-time job at the facility where she had been working or a full-time job at another facility. With a transfer to the other facility, Norville would have forfeited her seniority rights.

Meanwhile, another vacancy arose for a full-time nursing position at the first facility, but the employer passed her over for that job in favor of another employee. When Ms. Norville refused to return to work in either of the two positions offered her, she was fired. The jury returned a verdict for the employer and judgment was entered against the plaintiff.

The Second Circuit reversed, holding that the district court should have instructed the jury that the employer's offer of an inferior position could not be considered a reasonable accommodation when a position comparable to the former job was available. Thus, where the employer has, in fact, offered a disabled employee reassignment as a reasonable accommodation, the employee may nonetheless prevail on her discrimination claim if she can show that 1) the position offered was inferior to his or her former job, and 2) a comparable position, for which he or she was qualified, was available.

Under the regulations implementing the ADA, if no equivalent position is available, the employer must reassign the employee to a vacant lower level position for which the employee is qualified. If the employer reassigns the employee to a lower level position, it does not have to maintain the former salary, but can pay a lower salary commensurate with the inferior position.[8] Finally, an employer does not have to promote a disabled employee unable to perform the essential functions of the current job[9] or re-train a disabled employee to meet the qualifications of an entirely different position.[10]

Vacant Position

For a reassignment to be obligatory, the new position must be "vacant," which is construed as meaning the position is immediately available or will become available "in the fairly immediate future."[11] An employer is not required to create a vacancy for a disabled employee by bumping an employee from an existing job or establishing a new position.[12] However, it is an open question whether a "vacancy" exists if a position is not currently occupied, but another employee would be entitled to the job pursuant to the employer's internal seniority system.

Every circuit court that has considered the issue has held that the ADA does not require an employer to reassign a disabled employee to a vacant position if to do so would conflict with the seniority rights of other employees under a collective bargaining agreement. These courts point out that collectively bargained seniority rights are accorded a heightened status in the law, and in enacting the ADA, Congress did not show that it intended to alter this special status.[13]

Circuit courts, however, are divided on whether an employer's unilaterally imposed — as opposed to collectively bargained — seniority system defeats the right of reassignment.[14] The issue is now before the Supreme Court in *Barnett v. US Airways*.

Mr. Barnett worked for 10 years as a customer services agent for US Airways and its predecessors. Barnett injured his back, and after a period on disability leave, he used the company's internal policies to transfer into the mail room. The transfer effectively accommodated his disability. Two years later, the company opened up for bid the mail room position, and another employee, with greater seniority, advised US Airways that he intended to bump Mr. Barnett from the position pursuant to the company's internal seniority policy. Mr. Barnett requested, pursuant to his right of reasonable accommodation, that US Airways make an exception to its seniority policy and allow him to remain in the mail room. US Air denied the request citing its seniority policy, and in the lawsuit that followed, the company prevailed on summary judgment.

The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, reversed, holding that the fact that a disabled employee's reassignment request requires modification of the employer's seniority system is not, by itself, dispositive. The court explained that

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"[a] per se bar conflicts with the basic premise of the ADA, which grounds accommodation in the individualized needs of the disabled employee and the specific burden which such accommodation places on an employer."[15] The Ninth Circuit ruled that in determining whether an undue hardship exists, the presence of a potentially conflictual seniority system is but one factor a court should consider.

The court suggested that in order for an employer to prove that a reassignment would so disrupt its seniority system as to constitute an undue hardship, it would need to produce evidence of the number of ADA claimants at the company, their seniority and need to be accommodated by exceptions to the seniority rules.[16]

In deciding *Barnett*, the Supreme Court will have the opportunity to give guidance to lower courts on the related question of whether a disabled employee seeking reassignment may get preference over non disabled employees, an issue on which the courts are divided. The U.S. Court of Appeals for the Seventh Circuit has held that "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided that 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."[17]

The Seventh Circuit reasoned that to allow a less qualified disabled employee to transfer to a position for which there is a better qualified non-disabled employee would impermissibly "convert a non-discrimination statute into a mandatory preference statute"[18] and conflict with the ADA's non-discriminatory aims.

In contrast, the U.S. Court of Appeals for the Tenth Circuit has ruled that an employer must transfer a qualified disabled employee to a vacant position, even if there is better qualified candidate, unless the reassignment would impose an "undue hardship."[19] It is submitted that the Tenth Circuit's construction is truer to the ADA's plain language because the statute makes "undue hardship" the only relevant exception to an employer's duty of reasonable accommodation. The Seventh Circuit, by subordinating the duty of reassignment to an employer's "consistent and honest policy to hire the best applicant for the particular job," effectively has created an exception to the reasonable accommodation mandate not grounded in the language of the statute or implementing regulations.

The Seventh Circuit's extrastatutory exception eviscerates the ADA's duty of reassignment. Under the "better candidate" exception, the employer is obligated to do little more than treat a disabled employee's request for reassignment in a non-discriminatory manner.

However, the ADA already proscribes discrimination, so, under the court's construction, the ADA's duty of reassignment becomes superfluous. ing priority in reassignments to disabled employees will transform the ADA into a "mandatory preference statute" is overblown. The job preference at issue is limited to reassignments; nothing in the statute gives disabled employees priority in hiring, promotions and firing decisions.

Further, the scope of the duty of reassignment is already quite small. As noted, reassignment may be considered only if the disabled employee cannot be accommodated in his or her current job; the disabled employee must be "qualified"; bumping is prohibited; and reassignment is not required if it poses an "undue hardship."[20]

The Seventh Circuit reasoned that the "better candidate" exception comports with the ADA's goal of ensuring non-discrimination in the workplace. However, the court overlooked the ADA's other equally compelling statutory objectives — promoting economic self-sufficiency of disabled employees, retaining qualified disabled employees in the workforce and preventing their unemployment and dependency.[21]

Conclusion

Reassignment, as the accommodation of last resort, often represents a disabled employee's sole remaining way to continue to work and to avoid unemployment, and, perhaps, permanent removal from the workforce. A full-fledged right of reassignment, with a limited job preference for qualified disabled employees, advances the ADA's laudable objective of economic self-sufficiency for the disabled, admittedly at a price — but a manageably small one — to employers and non-disabled employees.

(1) 42 U.S.C. 1211·1(9)(B) (identifying "reassignment to a vacant position" as a reasonable accommodation).
(2) *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1019 (8th Cir. 2000).
(3) *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998) (en banc); 29 C.F.R. app. §1630.2(o).
(4) Aka, 156 F.3d at 1301.
(5) 118 F.3d 92 (2d Cir. 1997).
(6) See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 (10th Cir. 1999) (en banc).
(7) See *Norville v. Staten Island Hosp.*, 196 F.3d 89, 99 (2d Cir. 1999) (citing 29 C.F.R. pt. 1630 app. 1630.2(o)(2)(ii)).
(8) 29 C.F.R. pt. 1630 app. 1630.2(o).
(9) See *Cravens*, 214 F.3d at 1019 (8th Cir. 2000); 29 C.F.R. pt. 1630, app. §1630.2(o).
(10) See *Mitchell v. Washingtonville Central Sch. Dist.*, 190 F.3d 1; 9 (2d Cir. 1999).
(11) *Smith*, 180 F.3d at 1175.
(12) See *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249 (11th Cir. 2001); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 27 (1st Cir. 2001).
(13) See *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1306-1307 (11th Cir.) (collecting cases), cert. denied, 121 S. Ct. 304 (2000).
(14) Compare *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 354 (4th Cir. 2001) (collecting cases) with *Barnett v. US Airways, Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc), cert. granted, 121 S.Ct. 1600 (2001).
(15) *Barnett*, 228 F.3d at 1120.
(16) Id. at 1120.
(17) *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1029 (7th Cir. 2000).
(18) Id. at 1028 (internal citations and quotations omitted).
(19) *Smith*, 180 F.3d at 1167-68; *Davoll v. Webb*, 194 F.3d 1116, 1131-32 (10th Cir. 1999).
(20) See *Aka*, 156 F.3d at 1305.
(21) 42 U.S.C. §12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals"); see also Senate Comm. On Labor and Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. (1989) at 9 (finding that "[i]ndividuals with disabilities experience staggering levels of unemployment and poverty").