

Legal Briefings

Prepared by:
*Barry C. Taylor*¹



Reassignment as a Reasonable Accommodation Under the Americans with Disabilities Act

Introduction

An exemplary, highly productive, long-time employee has a stroke. After some time on medical leave, the employee is able to return to work. However, she is unable to perform some of the essential functions of her job in the same manner as before. Several reasonable accommodations are attempted to allow her to do the job she was performing so well before the stroke. Unfortunately, everyone agrees that the accommodations have not been effective. The employer reluctantly comes to the conclusion that it must terminate the employee. If the employer terminates the employee, has it met its obligations under the ADA? The answer is “No” if the employer terminates the employee without examining the ADA reasonable accommodations of reassignment to a vacant position for which the employee is qualified.

Overview of Reassignment as a Reasonable Accommodation

In 1990, Congress enacted the Americans with Disabilities Act (“ADA”) with an intent to “assure equality of opportunity” to individuals with disabilities.² Congress found that discrimination against individuals with disabilities persists in many areas, including employment.³ These individuals have been relegated to “lesser” jobs and other opportunities.⁴



REASSIGNMENT AS A REASONABLE ACCOMMODATION

To combat this discrimination, Title I of the ADA specifically bars employers from discriminating against an individual with a disability because of that disability.⁵ The ADA goes beyond other civil rights laws by placing certain affirmative obligations on employers. One obligation is that employers make a “reasonable accommodation” for an applicant or employee who has a disability, unless an accommodation would impose an “undue hardship” on the employer.⁶

ADA regulations, promulgated by the Equal Employment Opportunity Commission (EEOC), define a reasonable accommodation as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.” 29 C.F.R. app. § 1630.2(o). The ADA provides a non-exhaustive list of reasonable accommodations, which includes modifying equipment and facilities; restructuring a job; modifying work schedules; modifying examinations, training materials or policies; providing readers or interpreters; and reassigning the employee to a vacant position.⁷

The EEOC takes the position that when an employee is unable to perform the essential functions of his or her current position, either with or without an accommodation, the employer must consider reassignment as a reasonable accommodation. Under these circumstances, if a vacant position is available for which the employee is qualified, with or without a reasonable accommodation, the employer must reassign the employee unless reassignment would be an undue

hardship. Reassigning an employee to a vacant position is different than merely allowing an employee to interview for a vacant position, an opportunity available to any member of the general public.⁸ EEOC’s guidelines are persuasive but not controlling legal authority and courts and parties may refer to them for guidance in interpreting the ADA.⁹ As will be discussed in this Legal Brief, courts have not been particularly deferential to the EEOC’s guidance relating to the reassignment. A few rogue decisions have gone so far as to suggest that employers are not required to even consider reassignment as a reasonable accommodation even though reassignment is specifically referenced in the statutory language.¹⁰ However, the overwhelming majority of courts hold that the ADA requires employers to consider reassignment as a reasonable accommodation, though the courts often differ in interpreting the scope of the obligation.

Except where otherwise noted, this Legal Brief assumes that reassignment is a reasonable accommodation mandated by the ADA. It will review the positions of the EEOC and the courts on various issues relating to the reassignment accommodation.

Employee Qualifications for Reassignment

In order to qualify for the protections of the ADA, an individual must be a “qualified individual with a disability,” which is “an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual

holds or desires.”¹¹ Some employers have used this definition to argue that employees who are no longer able to perform in their current positions are not “qualified” under the ADA, and thus need not be considered for a reassignment, but at least one court has rejected this argument.¹²

A handful of courts have accepted this argument in some situations. For example, in *Schmidt v. Methodist Hospital of Indiana, Inc.*¹³, a new employee requested reassignment when he found himself unable to do his job because he was hard of hearing. The employer instead offered additional training. The court held that the employer was not required to reassign the employee. Citing a pre-ADA Supreme Court decision, the court stated that “[e]mployers cannot deny an employee alternative employment opportunities reasonably available under the employer’s existing policies, but they are not required to find another job for an employee who is not qualified for the job he or she was doing.”

Likewise, in *Dorsey v. City of Chicago*,¹⁴ an employee became unable to do her job after she became disabled. After attempts at accommodation failed, the employer reassigned her to another position. The court held that the employer was not obligated to perform the reassignment under the ADA because she “was not qualified to perform the essential functions of” her original position.¹⁵

The prevailing view, however, is that reassignment is available for an employee who is qualified for the position he or she would hold after reassignment.¹⁶

According to the EEOC, an individual is qualified for the new position if he or she “(1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.”¹⁷ Courts do agree that the reasonable accommodation is only available to current employees and not job applicants or former employees.¹⁸

Training for a Reassigned Employee

Because reassignment is only available to an employee who is qualified for the new position, the employer is generally not obligated to provide training to help the employee become qualified beyond the training that it normally provides to other individuals who assume that position.¹⁹ However, additional training may be required under the ADA for disability-related reasons such as for an employee with a cognitive disability.

A few cases illustrate this point. In *Warren v. Volusia County*,²⁰ a corrections officer injured on the job requested that the county retrain her in another position. The court held that the county was not required under the ADA to retrain her in another position because “retraining is not a reasonable accommodation.” Likewise, in *Williams v. United Insurance Co. of America*,²¹ a door-to-door insurance salesperson terminated after a leg injury argued that her employer should have trained her to become a sales manager. The court held that the employer was not required to provide her with training to qualify her for

a new position if the training was not available to other employees for that position. The court reasoned that the ADA does not require the employer to “reconfigure the disabled worker.”

Reassignment and the Interactive Process

The ADA’s regulations provide guidance to employers on how to structure the process of finding a reasonable accommodation for a qualified employee. Under the regulations, the employer may be required to initiate an “informal, interactive process” with the employee to identify potential reasonable accommodations.²² The interactive process usually begins when an employee tells the employer that he or she has a disability and needs an accommodation, and ends either when an accommodation is offered or when it is determined that an accommodation is not available.²³ Although it is typically the employee who initiates the interactive process, the EEOC takes the position that an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.²⁴ In any event, the employer and the employee both have responsibilities in the interactive process. This Section will review court decisions that have addressed these responsibilities in the reassignment context. It will also discuss different

theories of employer liability under the interactive process.

Employee’s Responsibilities

As mentioned, the employee has responsibilities in the interactive process. Although courts attribute varying degrees of responsibility to the employee, they seem to agree that the employee must inform the employer that he or she has a disability and needs a reasonable accommodation. The employer must then engage in the interactive process to determine whether the employee’s requested accommodation will be given, whether a different yet effective accommodation will be provided, or whether the employee will not be accommodated. The employer may request additional medical and other information as part of this process. During the interactive process, if the employer determines that the employee cannot be accommodated in his or her present position, the employer must consider reassignment.²⁵

Some courts require an employee to request a reassignment (rather than simply an accommodation) in order to trigger an employer’s reassignment duties but this is generally not required.²⁶ A reassignment request may simply be a request to stay with the company. In *Smith v. Midland Brake, Inc.*,²⁷ an employee may have triggered his employer’s reassignment obligation by telling his employer of his disability and expressing a desire to return to work. The court held that an employee desiring a reassignment must request one, but need not use “magic words” in doing so. It is enough that the employee “convey[s] to the employer a desire to remain with the company despite his or

REASSIGNMENT AS A REASONABLE ACCOMMODATION

her disability and limitations.” However, the court in *Warren v. Volusia County*,²⁸ reached a different result. The court held that the employer’s knowledge of the plaintiff’s disability and her “desire to return to work” was insufficient to trigger her right to an accommodation.

Some courts go even further by holding that an employee desiring reassignment must request or apply for a specific position. In *Burch v. City of Nacogdoches*,²⁹ a former employee with a disability had told his employer that he did not want to retire and that he would “work in any capacity” for the employer. The court held that the employer was not required to reassign the employee because the employee never asked for a transfer to a “specific light-duty job” or “impl[ied] that he wanted one.” Similarly, the Sixth Circuit held that employees may not recover in failure to reassign claims “unless they propose, or apply for, particular alternative positions for which they are qualified.”³⁰

Despite these cases, once an employer’s reassignment responsibilities have been triggered, the employee and the employer should work together to identify positions for reassignment. Although, as will be discussed below, the employer generally must identify vacant positions that the employee is qualified for, the employee must provide input to identify which positions he or she is capable of performing in.³¹ The rationale for this is that the employee is in the best position to know what type of work is possible given his or her disability. An employee may also be required to provide documentation regarding the employee’s ability to work.³²

Employer’s Responsibilities

The employer also bears some responsibilities as part of the interactive process. Courts have held that it is the employer’s responsibility to identify potential positions to which the employee may be reassigned. For example, the Seventh Circuit held that the employer must “identify the full range of alternative positions for which the individual” may be qualified.³³ This means that the employer must look for positions for which the employee is qualified and may not exclude an entire class of positions from its search criteria.³⁴

The employer is primarily responsible for identifying vacant positions because the employer “is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.”³⁵ Moreover, the employer is in the best position to know which positions or departments may be able to accommodate the employee’s disability. To illustrate, in *Wojciechowski v. William Beaumont Hospital*,³⁶ the court held that a hospital might have violated the ADA when it failed to help the plaintiff, a nurse, identify vacant positions to which she could be reassigned. The hospital argued that the plaintiff knew how to find positions because Human Resources had trained her on the computer system. Questioning the hospital’s argument, the court stated that the plaintiff “did not possess the knowledge of the positions that could accommodate her specific restrictions.” She could not, for example, know the pace of different units of the hospital or whether different units could accommodate her disability.

REASSIGNMENT AS A REASONABLE ACCOMMODATION

The Tenth Circuit has discussed a more flexible approach in which the employer's interactive process obligations may depend on its size. In *Smith v. Midland Brake, Inc.*,³⁷ the court stated that "in a small company an employee might be reasonably expected to know what other jobs are available for which he or she would be qualified to perform," but a larger employer would likely need to identify vacant positions for the employee. The Sixth Circuit has similarly stated that an employer need not reiterate options that are "self-evident."³⁸

In any event, an employer will want to be able to demonstrate that it made a good faith effort to reassign an employee by conducting a thorough job search. In *Malabara v. Chicago Tribune Co.*³⁹, the court held that the employer had fulfilled its obligations under the ADA by spending "significant time and effort" and conducting a "conscientious and thorough intra-company search" to find the plaintiff a position, even though the search was fruitless. In contrast, in *Gilbert v. Nicholson*,⁴⁰ the court found evidence of a breakdown in the interactive process where human resources initially failed to conduct job searches ordered for the plaintiff. The department eventually did order a job search for her, but it did so using the wrong information. Similarly, in *Shapiro v. Lakewood*,⁴¹ the employer may have been liable for a breakdown in the interactive process where, pursuant to company policy, it simply advised the employee to look at the job board and apply for a position. And in *Bultemeyer v. Fort Wayne Community Schools*,⁴² the court held that an employee's statement regarding the stress of the new position

was a reasonable accommodation request triggering a duty on the part of the employer to engage in the interactive process.

Employer's Liability for Failure to Engage in the Interactive Process

Most courts hold that an employer is liable for a breakdown in the interactive process only where the employee could have been accommodated if the employer had acted in good faith.⁴³ The court in *Willis v. Conopco, Inc.*, explained: "[w]here a plaintiff cannot demonstrate an existing 'reasonable accommodation,' the employer's lack of investigation into reasonable accommodation is unimportant . . . The ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made."⁴⁴ This means that in a failure-to-reassign case, plaintiff may recover only if it can be shown that there were vacant positions available that he or she was qualified to perform. However, as noted above, the employer must assist the employee in identifying appropriate positions. And a few courts suggest that an employer may be liable for failure to engage in the interactive process even if accommodations were not available.⁴⁵ Moreover, some courts have found that an employer's failure to engage in the interactive process after an accommodation request has been made can result in an actionable claim for retaliation.⁴⁶

Reassignment vs. Other Accommodations

According to the EEOC, reassignment is the “accommodation of last resort,” meaning that an employer should first consider accommodations that would keep the employee in his or her current position. Reassignment is only required after a determination that “(1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.”⁴⁷ Of course, if the employer and the employee agree that reassignment is the preferred accommodation, then reassignment is appropriate.

Courts have generally followed the EEOC’s position on this issue. For example, in *Skerski v. Time Warner Cable Co.*,⁴⁸ a cable installer technician who was unable to climb requested an accommodation that would permit him to continue in the installer position. His employer refused his request and instead offered to reassign him to a warehouse position. In reversing summary judgment for the employer, the court held that if the requested accommodation were reasonable, then a reassignment “did not satisfy the requirements of the ADA.” In *Vollmert v. Wisconsin Department of Transportation*,⁴⁹ an employee with dyslexia and learning disabilities requested additional training after her employer acquired a new computer system. Although the employer did provide some additional training, it ultimately forcibly reassigned her to a

position that did not allow for promotions. The court held that the forced reassignment was not a reasonable accommodation if the employee desired to be accommodated in her current position. The court stated that, “reassignment generally should be utilized as a method of accommodation only if a person could not fulfill the requirements of her current position with accommodation.” To comply with the ADA, the employer needed to accommodate the employee in her current position before requiring reassignment.

It follows that an employer may also deny a reassignment request where the employee can be accommodated in his or her current position. In *Schmidt v. Methodist Hospital of Indiana*,⁵⁰ a nurse who was hard of hearing requested a transfer to another department of the hospital. The hospital denied the transfer, but offered additional training to allow the nurse to remain in his current position. The court held that the hospital satisfied its obligation under the ADA, even though the accommodation offered was not what the nurse requested.

Reassignment to a Position that is “Equivalent”

The EEOC requires, and courts agree, that when reassignment is appropriate, employees must be reassigned to an “equivalent position, in terms of pay, status, etc.” if one is available.⁵¹ Reassignment may not be used to force employees with disabilities into undesirable positions.

REASSIGNMENT AS A REASONABLE ACCOMMODATION

In determining whether a new position is equivalent to the old one, courts may look to several factors, including salary, benefits, status, and opportunities for advancement. In *Norville v. Staten Island University Hospital*,⁵² the court held that an employer may be liable for failure to accommodate an employee where it had only offered her positions that would have reduced her salary and benefits or her seniority despite evidence that a comparable position was available.

In *Karbusicky v. City of Park Ridge*,⁵³ a police officer was reassigned to a community service officer position when his hearing loss was putting other officers at risk. The court held that the reassignment was a reasonable accommodation because it provided the same salary and benefits as the police officer position, even though it did not allow the officer to carry a gun or arrest people. In a similar case, reassignment was deemed unreasonable as it resulted in less opportunity for advancement. The court in *Cripe v. City of San Jose*,⁵⁴ held that a city's policy of reassigning disabled police officers to "undesirable jobs" involving "degrading conditions" that did not involve opportunities for promotion likely violates the ADA, even though the positions receive the same salary and benefits as those held by other officers.

Courts universally hold that when an equivalent position is not available, an employer is not required to promote an employee in order to effectuate a reassignment.⁵⁵ However, a transfer to a higher-graded position is not always a "promotion" in the reassignment arena. For example, in *Office of the Architect of*

the Capitol v. Office of Compliance,⁵⁶ the court held that reassigning an employee to a position with a higher pay grade would not amount to a promotion because the employer had been "arbitrary and fluid" in classifying that position and frequently transferred employees to different graded positions without changing their salaries. In another case, *Sacco v. Secretary of Veterans' Affairs*,⁵⁷ an employee requested to be reassigned to a higher-graded position that she had previously held. The court, noting that there was no authority stating that a promotion could never be a reasonable accommodation, held that the accommodation could be reasonable. The court suggested that the employer at least had a duty to explore the possibility of providing the transfer without a salary increase.

Moving in the other direction on the career ladder, although a promotion might not be required under the ADA, reassignment to a lower level position may be required if no equivalent position is available.⁵⁸ The EEOC and courts seem to agree that when an employee is reassigned to a lower-level position, the employer does not have to maintain the employee's original salary and benefits unless it does so for non-disabled employees.⁵⁹

Reassignment to a Position that is "Vacant"

Reassignment is only required when there is a "vacant" position available.⁶⁰ The EEOC has explained that "[v]acant" means that the position is available when the employee asks for reasonable accommodation, or that the employer

REASSIGNMENT AS A REASONABLE ACCOMMODATION

knows that it will become available within a reasonable amount of time.”⁶¹ Although the EEOC Enforcement Guidance does not define what constitutes a reasonable amount of time, the examples indicate that four weeks is a reasonable amount of time, but six months is beyond a reasonable amount of time.

In cases where a position opens up shortly after an employee with a disability is terminated, the court will look at whether the employer subjectively anticipated the opening. In *Bristol v. Board of County Commissioners of the County of Clear Creek*,⁶² an employee apparently requested an accommodation prior to his termination in May, and a position he was qualified for came open in October or November. The court held that the position was not vacant for the purposes of reassignment because the employer had no subjective knowledge that the position would open up. The court did not, however, disagree with the district court’s finding that the job had opened within the “fairly immediate future,” even though it had been several months since the requested accommodation. In a case with similar facts, the court granted summary judgment for the employer stating “employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future.”⁶³ However, in *Dark v. Curry County*,⁶⁴ the court, without discussing whether the employer knew of upcoming openings, reversed summary judgment for the employer because positions became available after the plaintiff’s termination.

One court held that an unfilled position is

vacant only when the employer intends to fill it. In *Ozowski v. Henderson*,⁶⁵ the court held that a mail clerk position was not “vacant” where there was an informal hold on hiring for the position due to the anticipated installation of a new computer system, which could alter job requirements.

The EEOC and the courts agree that an employer is not required to bump another employee from his position to create a vacancy.⁶⁶ However, if an employer has a policy that permits a more senior employee to bump a less senior employee, the less-senior employee’s position may be considered vacant for purposes of a reassignment inquiry.⁶⁷

There is also universal agreement that ADA does not require an employer to create a new position or to make a temporary position permanent to accommodate an employee. For example, in *Graves v. Finch Pruyn & Co.*,⁶⁸ an employee who was given a temporary position while he prepared for disability retirement alleged that the employer should have accommodated him by making the position permanent. The court held that the ADA did not require the employer to create the temporary position or to make it permanent.

In at least one case, a court held that the ADA does not require employers to ask for volunteers to relinquish their positions to create a vacancy for an employee with a disability. In *Thomsen v. Romeis*,⁶⁹ an employee argued that his employer should have invited other employees to change positions in order to accommodate him. The court rejected this argument, noting

REASSIGNMENT AS A REASONABLE ACCOMMODATION

that employers are not required to bump other employees to effect a reassignment. However, a district court suggested that employers might need to entertain the offers of other employees to switch jobs to accommodate an employee with a disability. In *Emrick v. Libbey-Owens-Ford Co.*,⁷⁰ the plaintiff's evidence that at least one other employee volunteered to give his position to the plaintiff was sufficient to overcome the employer's summary judgment motion. The court held that "another employee's offer to voluntarily relinquish their position and accept reassignment, thus enabling the disabled employee to have the newly vacated position, may be a valid means of attempting a reasonable accommodation." The court cautioned, however, the proposed reassignment must still be reasonable.

Organizational and Geographical Scope of an Employer's Reassignment Obligation

Another question is how widely the employer must look within its organization for a vacant position. The EEOC's position is that the employer is obligated to look for vacancies beyond the employee's "office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area."⁷¹ This obligation is not limited by an employer's non-transfer policies because such policies must be reasonably modified under the ADA. For a discussion of how employer policies

impact the reassignment obligation, see the Section below titled "Whether Employers Must Modify Nondiscriminatory Transfer and Assignment Policies in Reassigning an Employee."

The Seventh Circuit has agreed with the EEOC in holding that an employer is obligated to look beyond the employee's department in seeking positions for reassignment.⁷² Similarly, a district court held that the city of Denver's policy of barring transfers between departments violated the ADA where the City did not produce evidence of an undue burden.⁷³

The issue of whether an employer must look for vacant positions beyond the employee's geographical area has apparently not been litigated, but one case seems to suggest that the employer need not conduct a geographically expansive search. In *Reisiger v. Gober*,⁷⁴ the court granted the employer's motion for summary judgment where the employee did not identify "any vacant positions within her department, her Agency, or her geographic location for which she is otherwise qualified, and to which the defendant could reassign her."

Whether Employers Must Modify Seniority Policies in Reassigning an Employee

A qualified employee with a disability may seek reassignment to a position that a more senior employee is otherwise entitled to under a seniority system. Do seniority rights trump the right to

REASSIGNMENT AS A REASONABLE ACCOMMODATION

reassignment under the ADA? The Supreme Court has held that the answer is yes as long as the seniority policy contains no exceptions and is consistently applied in all situations. In *U.S. Airways, Inc. v. Barnett*,⁷⁵ the Court held that a reassignment that violates an employer's seniority rules is presumptively unreasonable. The Court emphasized the advantages of seniority systems in fulfilling the important benefits of "creating, and fulfilling, employee expectations of fair, uniform treatment." The presumption applies in cases of collectively bargained for seniority agreements as well as seniority policies "unilaterally imposed" by the employer. However, the employee with a disability may overcome the presumption with evidence of "special circumstances" that the proposed reassignment is reasonable. Special circumstances are those that alter the "important expectations" created by a seniority system. For example, the employee could show that the employer has "retained the right to change the seniority system unilaterally" and "exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure . . . will not likely make a difference." The employee could also show that the policy contains exceptions such that one more exception "is unlikely to matter." The EEOC has incorporated the *Barnett* holding into its Enforcement Guidance.⁷⁶

Depending on the fact situations involved, lower courts have reached differing conclusions about when a seniority provision trumps reassignment. For example, in *Adams v. Potter*,⁷⁷ a postal

worker who had injured his back and was unable to perform the heavy lifting requirement of his mail handler job requested reassignment to a light-duty position or a make-up clerk position. The court held that these accommodations were not reasonable because they would require that the Postal Service violate its collective bargaining agreement with the National Mail Handlers Union. Likewise, in *Equal Employment Opportunity Commission v. Sara Lee, Inc.*,⁷⁸ the court held that the company was not required to modify its seniority policy in order to prevent the plaintiff, an employee with a disability, from getting bumped by a more senior employee.

The Tenth Circuit has held that only a direct violation of a seniority system is unreasonable; a reassignment that carries with it a potential violation may be permissible. In *Dilley v. Supervalu, Inc.*,⁷⁹ a truck driver who had a lifting restriction requested a reassignment to a route that did not require heavy lifting. The employer argued that the reassignment would violate its seniority system because a more senior employee could later bid for the new position. The Court rejected the employer's argument, stating that there was only a "potential violation of the seniority system." As the employee had the requisite seniority for the requested position, and the employer could remove him later if a more senior employee requested the position, reassignment should have been available.

In analyzing whether "special circumstances" would justify an exception to an employer's seniority policy, the Sixth Circuit chose to look only at exceptions

made to the policy after its most recent modification. In *Medrano v. City of San Antonio*,⁸⁰ a part-time parking attendant with cerebral palsy was given a first-shift assignment to accommodate his need to use alternative transportation, even though the attendant did not have the requisite seniority for the first-shift assignment. Later the employer eliminated the part-time position and modified its seniority system. When the attendant applied for the full-time position and requested the same first-shift accommodation, the employer rejected his application and terminated his employment because the accommodation conflicted with the seniority system. The attendant argued that “special circumstances” required that the seniority system should give way to his desired accommodation. In analyzing the seniority system, the court declined to look at the entire history of the system, but rather looked at the modified system that was in place when the attendant was terminated. Because there was no evidence of an exception made to the seniority system after the part-time position was eliminated, the court held that there were no special circumstances to warrant an exception in the attendant’s case.

Another way of viewing the conflict between seniority policies and reassignment is the requisite “vacant” position for reassignment simply does not exist because the employer fills position automatically with the person with the greatest seniority.⁸¹

Whether Employers Must Modify Nondiscriminatory Transfer and Assignment Policies in Reassigning an Employee

Is an employer required to modify or make exceptions to nondiscriminatory transfer and assignment policies in order to reassign an employee under the ADA? For example, some employers have policies that prohibit transfers between certain departments or require that employees apply for transfers. Do such policies violate the ADA? The EEOC takes the position that if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability,⁸² unless it could show undue hardship. However, some courts have held that the ADA does not require employers to modify nondiscriminatory transfer and assignment policies.⁸³

Many courts reason that requiring an employer to abandon nondiscriminatory transfer policies to effectuate a reassignment constitutes affirmative action and discrimination against non-disabled employees and is therefore not required by the ADA. In *Daugherty v. City of El Paso*,⁸⁴ a part-time bus driver who developed diabetes was denied reassignment pursuant to a city charter that gave priority in transfers to full-time employees over part-time employees. The court held that the city did not violate the ADA, reasoning that the ADA does not require “affirmative action in favor of

REASSIGNMENT AS A REASONABLE ACCOMMODATION

of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.” The Seventh Circuit reached a similar holding in *Dalton v. Subaru-Isuzu Automotive, Inc.*,⁸⁵ but cautioned that a strict “no transfer” policy may violate the ADA. In another case, *Emrick v. Libbey-Owens-Ford Co.*,⁸⁶ the court held that an employer was not required to modify its policy prohibiting transfers between facilities to reassign a disabled employee.

Employees must comply with reasonable company policies and requirements regarding reassignment. This includes an employer’s requirement that an employee to apply for a transfer. In *Burns v. Coca-Cola Enterprises, Inc.*,⁸⁷ an employee was unable to recover on a failure to reassign claim where he did not comply with the company’s policy that required him to apply for a transfer. The court noted that the policy was “not the equivalent of a no-transfer policy,” but was a legitimate, nondiscriminatory policy. A Seventh Circuit case reached a somewhat different result. In *Gile v. United Airlines, Inc.*,⁸⁸ the court stated that “[a]lthough the ADA does not require the employer to abandon its legitimate policies regarding job qualifications and entitlements to company transfers,” the employer could not refuse to reassign an employee to a day shift just because she did not fulfill the “technical requirement” of casting a bid for a day shift while she was on medical leave.

In some situations, courts have held that certain nondiscriminatory transfer policies must give way to a disabled employee seeking reassignment. In *Davoll v.*

Webb,⁸⁹ three police officers who became disabled were forced to retire due to the city’s policy prohibiting disabled officers from transferring to other city positions. The court affirmed a jury verdict for the plaintiffs. Notwithstanding the city’s contrary policy, the court stated that the employer should have considered the officers for reassignment since they could not otherwise be accommodated. Moreover, the court affirmed the district court’s prohibition of the use of the term “affirmative action” at trial, reasoning that “affirmative action” should not be conflated with the definition of discrimination in the ADA.

Similarly, in *Ransom v. Arizona Board of Regents*,⁹⁰ the court held that an employer’s policy that “all employees, including those with disabilities, must compete for job reassignments” violates the ADA as a matter of law. The court rejected the argument that the ADA only requires that employees with disabilities be given the same reassignment opportunities as non-disabled employees, noting that the ADA requires “something more” on the part of the employer. Here, because the employer could not demonstrate that modifying its policy would be an undue hardship, the employee prevailed.

The Third Circuit seems to have taken a middle approach by extending application of the *Barnett* holding (discussed in the previous Section) to all disability-neutral employer policies—not just seniority policies. In *Shapiro v. Lakewood*,⁹¹ an employer refused to transfer an employee who had become disabled because the employee did not follow the company’s

transfer procedure, which required the employee to find a position on a job board and apply for it. Reversing summary judgment for the employer, the court held that the *Barnett* approach should be followed in reassignment cases where the “reassignment is claimed to violate a disability-neutral rule of the employer.” Under this approach, the plaintiff must first show that the desired accommodation is “reasonable in the run of cases.” Then the burden shifts to the defendant to show undue hardship. But if the plaintiff cannot show that the accommodation is reasonable in the run of cases, he still has the opportunity to show “special circumstances” that make the accommodation reasonable in his own case.

Requiring Employees to Compete for a New Position

Can an employer require an employee with a disability seeking the reassignment under the ADA to compete with other employees for a vacant position? In other words, should an employee with a disability be reassigned to a vacant position over a more qualified candidate? The EEOC’s position is that employers must not require an employee to compete for a position. “Reassignment means that the employee gets the vacant position if s/he is qualified for it.” Otherwise, reasons the EEOC, “reassignment would be of little value and would not be implemented as Congress intended.”⁹²

The Tenth Circuit, and perhaps the D.C.

Circuit, agree with the EEOC. In *Smith v. Midland Brake, Inc.*,⁹³ the Tenth Circuit held that the reassignment obligation means “something more than merely allowing a disabled person to compete equally with the rest of the world for a vacant position.” Where reassignment is appropriate, “the disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment.” In so holding, the court relied on the statutory text, legislative history, and EEOC guidance, noting that “the statute does not require that the employee be the ‘best qualified’ employee for the vacant position.”⁹⁴

Similarly, in *Aka v. Washington Hospital Center*,⁹⁵ the D.C. Circuit stated that the reassignment duty means “more than allowing an employee to apply for a job on the same basis as anyone else.” The court reasoned that “the core word ‘assign’ implies some active effort on the part of the employer.” Moreover, a contrary interpretation would make the statute’s reference to reassignment redundant since the ADA already prohibits discrimination against job applicants on the basis of disability. However, the court did not define the extent of the employer’s reassignment obligation.

The leading case to the contrary is *Equal Employment Opportunity Commission v. Humiston-Keeling, Inc.*⁹⁶ In that case, a warehouse employee with tennis elbow applied for some office positions with the company, but was turned down in favor of more qualified applicants. The Seventh Circuit rejected the EEOC’s position as “affirmative action with a vengeance,” and

REASSIGNMENT AS A REASONABLE ACCOMMODATION

held that the employer was not required to reassign the disabled employee over more qualified applicants. The court relied on its cases holding that an employer is not required to abandon legitimate and non-discriminatory policies in reassigning an employee. In this case, the employer had a “legitimate and nondiscriminatory” policy of hiring the best applicant. The court stated that the reassignment obligation still requires the employer to “consider the feasibility” of reassigning the disabled employee, and “if the reassignment is feasible and does not require the employer to turn away a superior applicant, the reassignment is mandatory.”

The Eighth Circuit recently adopted the Seventh Circuit’s position. In *Huber v. Wal-Mart Stores, Inc.*,⁹⁷ an employee with a hand injury was turned down for an equivalent router position in favor of the most qualified applicant. Instead, the employer reassigned her to a janitorial position that resulted in a more than 50% wage decrease. The court rejected the employee’s argument that the ADA

required the employer to automatically reassign her to the router position “without requiring her to compete” for it. The court, relying on *Humiston-Keeling*, held that “the ADA is not an affirmative action statute” and does not require an employer violate its nondiscriminatory policy of hiring the most qualified applicant. The law on this issue is uncertain in the other Circuits. The Second Circuit has declined to decide this issue in a case where the argument had not been raised before the district court.⁹⁸

Conclusion

As this Legal Brief demonstrates, the ADA’s reassignment provision has generated a fair amount of litigation including a U.S. Supreme Court decision. While courts differ on a number of key issues, it is usually advisable to follow EEOC guidance in most situations. Employers should educate themselves on the law in their Circuit and train their employees accordingly to protect the rights of employees with disabilities and ensure compliance with the ADA.

Notes:

1. This legal brief was written by Barry C. Taylor, Legal Advocacy Director with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). Equip for Equality is providing this information under a subcontract with the DBTAC: Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability Rehabilitation and Research Award No. H133A060097. Mr. Taylor would like to thank Equip for Equality Senior Attorney Alan Goldstein and Angie Dickson Marston for their assistance with this brief.
2. See 42 U.S.C. § 12101(a)(8).
3. *Id.* § 12101(a)(4)
4. *Id.* § 12101(a)(5)
5. *Id.* § 12112(a)
6. *Id.* § 12112(b)(5)(A)
7. 42 U.S.C. § 12111(9)

REASSIGNMENT AS A REASONABLE ACCOMMODATION

Notes (continued):

8. See Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act, Notice No. 915.002 (2002), available at www.eeoc.gov/policy/docs/accommodation.html [EEOC, Enforcement Guidance]; The ADA: Your Responsibilities as an Employer, www.eeoc.gov/facts/ada17.html
9. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)
10. 42 U.S.C. § 12111(9), See, e.g., *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Schmidt v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 342 (7th Cir. 1996)
11. 42 U.S.C. § 12111(8)
12. See *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996); See also EEOC, Enforcement Guidance, *supra*
13. 89 F.3d 342 (7th Cir. 1996)
14. 255 WL 1340811 (N.D. Ill. June 6, 2005)
15. *Id.*; See also *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995)
16. See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999) (listing cases)
17. EEOC, Enforcement Guidance, *supra*.
18. See e.g., EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o) ("Reassignment is not available to applicants."); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1164 (10th Cir. 1999); *Crano v. Graphic Packaging Corp.*, No. 02-1166, 2003 U.S. App. LEXIS 11286 (10th Cir. June 5, 2003), where an employee was denied a reassignment request after being on an extended medical leave for more than one year thus losing his status as a current employee.
19. See EEOC, Enforcement Guidance, *supra*
20. 188 F.App'x 859 (11th Cir. 2006)
21. 253 F.3d 280 (7th Cir. 2001)
22. 49 C.F.R. § 1630.2(o)(3) (2006)
23. For detailed information and illustrations on the interactive process, see EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.9.
24. EEOC, Enforcement Guidance, *supra*
25. See, e.g., *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998); see also *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vac'd on other grounds*, 535 U.S. 391 (2000) (stating that an employer's recognition of a need to accommodate an employee may trigger the interactive process obligation.)
26. See *Thompson v. E.I. Dupont Denemours and Co.*, 70 F.App'x 332 (6th Cir. 2003); *Hines v. Chrysler Corp.*, No. 99-12801, 2000 U.S. App. LEXIS 11338 (10th Cir. May 19, 2000); and *Nicholson v. The Boeing Company*, No. 98-3058, 1999 U.S. App. LEXIS 3404 (10th Cir. May 4, 1999).
27. 180 F.3d 1154 (10th Cir. 1999)
28. 188 F.App'x 859 (11th Cir. 2006)
29. 174 F.3d 615 (5th Cir. 1999)
30. *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000)
31. See *Mengine v. Runyon*, 114 F.3d 415 (3d Cir. 1997) (Rehabilitation Act case); and EEOC, Enforcement Guidance, *supra*
32. *Bundy v. Chaves County Bd. of Comm'rs*, 215 F.App'x 759, 762 (10th Cir. 2007)
33. *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667 (7th Cir. 1998); see also *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894 (8th Cir. 2006); *Mengine*, 114 F.3d 415
34. See *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685 (7th Cir. 1998)
35. EEOC, Enforcement Guidance, *supra*
36. 2007 WL 3500634 (E.D. Mich. Dec. 6, 2006)
37. 180 F.3d 1154 (10th Cir. 1999)
38. *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996).

Notes (continued):

39. 149 F.3d 690 (7th Cir. 1998)
40. 2007 WL 257635 (N.D. Ill. Jan. 23, 2007)
41. 292 F.3d 356 (3d Cir. 2002)
42. 100 F.3d 1281, 1282 (7th Cir. 1996)
43. See, e.g., *Williams v. Phil. Housing Auth. Police Dept.*, 380 F.3d 751 (3d Cir. 2004); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), vac'd on other grounds, 535 U.S. 391 (2000); *Rehling v. City of Chicago*, 207 F.3d 1009 (7th Cir. 2000); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999); *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997)
44. 108 F.3d at 285
45. See, e.g., *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000) ("In order to establish a prima facie case of disability discrimination under the statute, . . . [the plaintiff] could show . . . that he requested and was denied some specific assistance in identifying jobs for which he could qualify."); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999).
46. *Wagers v. Arvinmeritor*, 2007 WL 178618 (S.D. Ind. Jan. 18, 2007)
47. EEOC, Enforcement Guidance, *supra*
48. 257 F.3d 273 (3d Cir. 2001)
49. 197 F.3d 293 (7th Cir. 1999)
50. 89 F.3d 342 (7th Cir. 1996)
51. EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o)
52. 196 F.3d 89 (2d Cir. 1999)
53. 950 F. Supp. 878 (N.D. Ill. 1997)
54. 261 F.3d 877 (9th Cir. 2001)
55. See, e.g., *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444 (6th Cir. 2004); *Emerson v. N. States Power Co.*, 256 F.3d 506 (7th Cir. 2001)
56. 361 F.3d 633 (Fed. Cir. 2004)
57. 2006 WL 2709749 (W.D. Pa. Sept. 20, 2006)
58. See, e.g., *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000); *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000); EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(o); EEOC, Enforcement Guidance, *supra*.
59. See, e.g., *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998); EEOC, Enforcement Guidance, *supra*
60. See 42 U.S.C. § 12111(9)
61. EEOC, Enforcement Guidance, *supra*
62. 281 F.3d 1148 (10th Cir. 2002), vacated in part on reh'g, 312 F.3d 1213 (10th Cir. 2002) (en banc)
63. *Chapple v. Waste Management, Inc.*, No. 05-2583 ADM/JSM, 2007 WL 628361 (D. Minn. Feb. 28, 2007) (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1181 (6th Cir. 1996))
64. 451 F.3d 1078 (9th Cir. 2006)
65. 237 F.3d 827 (7th Cir. 2001)
66. See, e.g., *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995); see also EEOC Enforcement Guidance, *supra*
67. *Thompson v. E.I. Dupont Denemours and Co.*, 70 F.App'x 332, 337 (6th Cir. 2003)
68. 457 F.3d 181 (2d Cir. 2006)
69. 198 F.3d 1022 (7th Cir. 2000), abrogated by *Spiela v. Hull*, 371 F.3d 928 (7th Cir. 2004)
70. 875 F. Supp. 393 (E.D. Tex. 1995)
71. EEOC, Enforcement Guidance, *supra*
72. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 2000)
73. *United States v. City and County of Denver*, 943 F. Supp. 1304 (D. Colo. 1996)
74. 1999 WL 674751 (N.D. Ill. Aug. 23, 1999)
75. 535 U.S. 391 (2002)

Notes (continued):

76. EEOC, Enforcement Guidance, *supra*
77. 193 F.App'x 440 (6th Cir. 2006)
78. 237 F.3d 349 (4th Cir. 2001)
79. 296 F.3d 958 (10th Cir. 2002)
80. 179 F.App'x 897 (5th Cir. 2006)
81. See, e.g., *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391 (2002) (O'Connor, J., concurring); *Willis v. Pacific Maritime Ass'n*, 244 F.3d 675 (9th Cir. 2001); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1047 (7th Cir. 1996)
82. EEOC, Enforcement Guidance, *supra*
83. See, e.g., *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000); and *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995)
84. 56 F.3d 695, *modified*, *Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002)
85. 141 F.3d 677 (7th Cir. 1998)
86. 875 F. Supp. 393 (E.D. Tex. 1995)
87. 222 F.3d 247 (6th Cir. 2000)
88. 213 F.3d 365 (7th Cir. 2000)
89. 194 F.3d 1116 (10th Cir. 1999)
90. 983 F. Supp. 895 (D. Ariz. 1997)
91. 292 F.3d 356 (3d Cir. 2002)
92. EEOC, Enforcement Guidance, *supra*
93. 180 F.3d 1154 (10th Cir. 1999)
94. See also, *Ransom v. Arizona Board of Regents*, 983 F. Supp. 895 (D. Ariz. 1997)
95. 156 F.3d 1284 (D.C. Cir. 1998)
96. 227 F.3d 1024 (7th Cir. 2000)
97. 486 F.3d 480 (8th Cir. 2007)
98. See *Norville v. Staten Island U. Hosp.*, 196 F.3d 89, 99 n.4 (2d Cir. 1999)