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Seventh Circuit Reverses Course On Reassignment Accommodation

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In arguably its most significant decision under the Americans with Disabilities Act (ADA) in years, the Seventh Circuit, in *EEOC v. United Airlines, Inc.*, reversed its own previous holdings regarding the viability of competitive transfer policies for disabled employees.

For over a decade, employers in the Seventh Circuit have been able to rely on *EEOC v. Humiston-Keeling,* 227 F.3d 1024 (7th Cir. 2000), to adopt perfectly valid policies allowing for disabled employees who can no longer perform the essential functions of their current jobs to be considered for reassignment on a competitive basis. In other words, if a more qualified candidate sought the same position as the disabled candidate, the employer could select the best-qualified candidate without running afoul of the ADA. No longer, says the Seventh Circuit.

The circuit court held that under the Supreme Court precedent of *U.S. Airways, Inc. v. Barnett,* 535 U.S. 391 (2002) (requiring an employee to show that an accommodation is reasonable on its face, which then shifts the burden to the employers to demonstrate case-specific undue hardship), reassignment of a disabled but qualified employee to a vacant position is mandatory in the absence of an undue hardship. Despite reaffirming its best-qualified candidate rule even after *Barnett* was decided (reasoning that that ADA does not require preferential treatment and that violating facially-neutral employment policies creates an undue hardship), the Seventh Circuit decided last week that it had been wrong all along: the "ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer."

The importance of this new automatic reassignment interpretation cannot be overstated. Indeed, questions about an employer's reassignment obligations are among the most frequently received inquiries by attorneys under the ADA. United Airlines, whose policy in question provided for *preferential* treatment of disabled employees, although not for *automatic* reassignment for those who were qualified – meaning the company actually went beyond what the Seventh Circuit required it to do before last week – must feel blindsided by the court. Indeed, this Seventh Circuit panel issued an earlier version of an opinion in this case dismissing the lawsuit under *Humiston-Keeling* before vacating that decision and issuing a new opinion.

Obviously, employers in the Seventh Circuit (and likely beyond, as the D.C. and Tenth Circuits provide for automatic reassignment, and the Eighth Circuit relied on *Humiston-Keeling* in deciding that competitive transfer policies were legal) will need to adjust their reassignment policies for disabled employees. In light of this new ruling, it is critical to consult with experienced counsel to navigate what is likely uncharted territory.

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