

## SEVENTH CIRCUIT REVERSES COURSE ON EMPLOYER'S ADA REASONABLE ACCOMMODATION OBLIGATIONS

In *EEOC v. United Airlines*, the Court of Appeals for the Seventh Circuit held that an employer, as part of its reasonable accommodation obligations under the Americans with Disabilities Act ("ADA"), must reassign a disabled employee to an open and available position regardless of whether there might be a better or more qualified applicant for that job position. The Seventh Circuit's holding is a direct reversal of its previous decision on the same issue twelve years earlier when it held that an employer who has an open and available position is not required to provide a disabled employee seeking reassignment to that open and available position preferential consideration when there are better qualified applicants for the position provided the employer has a consistent policy to hire the best applicant for the particular job in question, rather than the first qualified applicant.

In a decision issued twelve years ago by then Chief Judge Richard Posner, the Seventh Circuit took the position that the ADA is not a mandatory preference act and that the ADA only requires an employer to consider the feasibility of reassignment. The Seventh Circuit also previously held that it was not Congress' intent when it passed the ADA that a reasonable accommodation should be used to provide a disabled employee an advantage or preference over non-disabled employees. Rather, it was Congress' intent to provide disabled employees a level playing field with non-disabled employees relative to job opportunities. In that case, the Seventh Circuit held that a "policy of giving the job to the best applicant is legitimate and nondiscriminatory."

In its *United Airlines* decision, the Seventh Circuit reversed its anti-preference interpretation of the ADA based upon a re-examination of the U.S. Supreme Court's decision in *Barnett v. U.S. Air, Inc.* where the U.S. Supreme Court arguably rejected that interpretation of the ADA noting that such an argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." The Seventh Circuit interpreted this language from the *Barnett* decision to mean that an employer is mandated under the ADA to reassign a disabled employee to a vacant position absent a showing of an undue hardship, regardless of whether there might be better qualified candidates for the position.

An argument can be made that the Seventh Circuit interpreted the U.S. Supreme Court's "preference" requirement in *Barnett* too broadly. That is, the ADA does in fact provide a preference to disabled employees – that preference is in the form of a reasonable accommodation as a means of leveling the "playing field" between disabled and non-disabled employees. However, the ADA does not expressly provide that employees with disabilities should be given "bonus points" relative to other qualified applicants or candidates when competing for the same position. As Judge Posner astutely questioned: Should the ADA provide preferential consideration to a 29-year-old white male with tennis elbow in providing that employee preferential treatment in reassignment to a vacant position over a 62-year-old black woman with no disability who also happens to be the more qualified and better applicant for the job? Under such a scenario, the ADA creates a hierarchy of protections against discrimination, placing an employee with a disability ahead of members of other groups also deserving protections, such as racial minorities. In our opinion, the U.S. Supreme Court in *Barnett* did not intend to signal such preferential treatment to employees with disabilities, but, rather, was addressing those preferences that may be necessary to level the "playing field" in the workplace for such employees. The question becomes how far does the duty of reasonable accommodation extend when it affects the legitimate expectations of other qualified applicants or employees. This was an important question that the Seventh Circuit did not address in its *United Airlines* decision and, perhaps, may be a question the U.S. Supreme may wish to address.

In *Huber v. Wal-Mart Stores, Inc.*, a case that followed the *Barnett* decision, the U.S. Supreme Court had the opportunity to address the issue of whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position as a reasonable accommodation, although the disabled employee is not the most qualified applicant for the position. Unfortunately, this case was settled by the parties before the U.S. Supreme Court could rule on the case. A decision in the *Wal-Mart* case would have answered this important question regarding an employer's obligation to reassign a disabled employee who can no longer fulfill the responsibilities of his or her original job position when there are other better qualified applicants.

Despite the Seventh Circuit's reliance on the *Barnett* decision, it is less than clear whether the U.S. Supreme Court intended for the application of a best-qualified applicant policy to be a per se violation of the ADA when a disabled employee seeks reassignment as a form of a reasonable accommodation, especially when that reassignment is to the detriment of better qualified applicants or candidates. Neither the ADA nor the corresponding regulations express that reassignment to a vacant position is mandatory when it is to the exclusion of other qualified applicants or that an employer has to provide a disabled employee preferential treatment. In fact, the ADA stops short of requiring that any particular group be afforded a competitive advantage over all others when it comes to hiring or other job placements decisions. Although the U.S. Supreme Court recently rejected the opportunity to

review the Seventh Circuit's decision in *United Airlines*, it will hopefully be an issue that the Court will address in the near future when given the opportunity.