A Timely Analysis of Legal Developments

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Seventh Circuit Reverses Itself on Reassignments as a Reasonable Accommodation Under the ADA (or "Humiston-Keeling: An Appreciation")

By Peter Petesch

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for qualified employees with disabilities, and lists several examples of possible accommodations, including "reassignment to a vacant position."[1] Over the years, courts and employers have struggled with the extent of this obligation when an employee with a disability seeks reassignment to a vacant, lateral position – but other, more qualified employees in the workforce seek the vacant position as well.

In a stunning reversal of over 10 years of precedent, the Seventh Circuit retreated from its frequently cited position on the lengths to which an employer must go – and whether preferences must be given – in order to accommodate an employee with a disability in connection with a job reassignment under the ADA. The practical effect of the Seventh Circuit's recent decision in *EEOC v. United Airlines, Inc.*[2] is that employers will need to consider far more carefully any reassignment request by an employee with a disability so long as that employee is minimally qualified for the position, and may face a dilemma when confronted with the competing rights and aspirations of other employees.

Reversal of *EEOC v. Humiston-Keeling*

Humiston-Keeling's Opinion on "Affirmative Action with a Vengeance"

In its recent decision, the Seventh Circuit overruled its prior 2000 decision in *EEOC v. Humiston-Keeling*.[3] In doing so, the Seventh Circuit contends that Humiston-Keeling was at odds with the Supreme Court's 2002 decision in *US Airways v. Barnett* (in which the Supreme Court held that a non-contractual but consistently followed seniority policy ordinarily takes precedence over the reasonable accommodation requirement).[4] In *Humiston-Keeling*, the Seventh Circuit described

1 42 U.S.C. § 12111(9)(B).

2 EEOC v. United Airlines, Inc., No. 11-1774 (7th Cir. Sept. 7, 2012).

3 EEOC v. Humiston-Keeling, 227 F.3d 1024 (7th Cir. 2000).

4 US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

the ADA as an anti-discrimination law, not an affirmative action mandate. The case involved an employee with "tennis elbow" whose lifting restrictions rendered her unable to perform her warehouse job. She sought a lateral, vacant clerical position – but the employer filled the vacant clerical positions with other individuals who were indisputably better qualified, following its policy of selecting the best applicant rather the first minimally qualified applicant. The EEOC claimed that the employer's refusal to reassign the employee to an equivalent vacant clerical position that she could perform violated the ADA. Specifically, the EEOC argued that a reassignment or transfer request by an employee with a disability takes primacy, and must be granted if the individual with a disability is only minimally qualified for the desired position – unless the employer can prove "undue hardship." Otherwise, argued the EEOC, the ADA's express mention of reassignment to a vacant position as a possible accommodation rings hollow. The court disagreed with this premise, pointedly commenting that "[t]he fact that the disability isn't what makes the disabled person unable to perform the [clerical] job as well as the person who got it is, in the Commission's view, irrelevant."

The Seventh Circuit's opinion in *Humiston-Keeling* rejected the EEOC's approach of bestowing favored status upon individuals with disabilities, noting that the approach was "affirmative action with a vengeance" and created a "hierarchy of protections for groups deemed entitled to protection against discrimination." The court held that passing over the more qualified person transformed the ADA from a nondiscrimination statute on par with Title VII into a mandatory preference law not justified by the statute. Still, the court acknowledged that the duty to consider reassignment to a vacant position as an accommodation is not illusory, because "[w]ithout the reassignment provision in the statute, an employer might plausibly claim that 'reasonable accommodation' refers to efforts to enable a disabled worker to do the job for which he was hired, or for which he is applying, rather than to offer him another job." But, the court cautioned, reassignment is not always "mandatory," and the accommodation obligation "is not the same thing as requiring the employer to give [an employee with a disability] the job even if another worker would be twice as good at it" unless the employer can prove that doing so imposes an "undue hardship."

The court fully acknowledged that making reasonable accommodations often requires added expense for the employer to enable persons with disabilities to compete in the workplace – "[b]ut there is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group."

The Contrary Holding in EEOC v. United Airlines

In *EEOC v. United Airlines*, the EEOC challenged the airline's policy under which employees with disabilities requiring a reassignment receive priority consideration for the vacant position, a guaranteed interview, and selection for the position so long as the employee with a disability is equally qualified. Relying on *Humiston-Keeling*, the district court sided with United.

On appeal, the Seventh Circuit revisited its *Humiston-Keeling* decision. This time, the Seventh Circuit sided with the EEOC, and abandoned its holding from *Humiston-Keeling*. The court took a revisionist view of *Humiston-Keeling*, wrongly characterizing it as merely holding that employers are not required to appoint employees unable to perform their current positions due to a disability to a vacant position for which they are qualified. The court in *United Airlines* held that "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." It noted that the Supreme Court's decision in *US Airways v. Barnett* did not impose "categorical exceptions" to the reasonable accommodation obligation, and still kept open the possibility that an accommodation providing a "preference" could be "reasonable on its face, *i.e.*, ordinarily or in the run of cases."

Examples of such "preferences" that were noted and approved by the Supreme Court in *Barnett* were breaks, flexibility in making office assignments to enable an individual with a disability to work on the ground floor, modified schedules, and additional equipment or devices. The Seventh Circuit reasoned that *Barnett* stands for the proposition that the requirement to provide reasonable accommodation cannot be overcome by rigid adherence to all disability-neutral rules, relying on the Supreme Court's directive that reasonable accommodations "will sometimes require affirmative conduct to promote entry of disabled people into the workforce." Yet, the Supreme Court in *Barnett* also cautioned that reasonable accommodations "do not, however, demand action beyond the realm of the reasonable."[5]

Expanding upon the basic concept that the ADA warrants different treatment of an employee with a disability, the court in *EEOC v. United Airlines* observed that the ruling in *Humiston-Keeling* is incompatible because it takes a decidedly "anti-preference interpretation of the ADA."

5 The Court in *Barnett* also rejected the argument that "reasonable" only means "effective."

Moreover, the Seventh Circuit seemed to narrow *Barnett's* application to cases that involve a seniority system (though the Supreme Court did not narrow its decision in this manner)[6] because it contrasted the quasi-property right associated with seniority from simply being the best qualified individual for a vacant position.

Finally, the *United Airlines* court also interpreted decisions from two other circuits (D.C. and the Tenth Circuit) as embracing the EEOC's view of a requirement to make reassignments so long as an employee is qualified, absent an undue hardship.[7]

Is Rejection of Stark Preferences in Accommodations Truly at Odds with the Supreme Court?

The plain language in *Humiston-Keeling*, despite its stark characterization in *United Airlines*, does not flatly reject the concept of reassignments as a reasonable accommodation, or even create a per se rule that vacant positions must always go the most qualified individual. Likewise, the decision did not eschew the obvious and non-controversial principle that making accommodations entails taking affirmative measures and incurring additional expense (not provided to employees without disabilities) to enable individuals with disabilities to compete equally. Finally, *Humiston-Keeling* can be read as consistent with the Supreme Court's ruling in *Barnett*.[8] That is, the Supreme Court's majority opinion in *Barnett* certainly did not list or require disregarding employees' relative qualifications for a vacant position as an example of a reasonable accommodation.

If an employer never diverted from a policy of selecting the most qualified individual for a vacant position, a court following *Humiston-Keeling* and *Barnett* could conclude that a preferential transfer to a decidedly less-qualified employee with a disability is ordinarily facially unreasonable – much like ignoring a consistently-followed seniority system was not facially reasonable (without the burden shifting to the employer to prove undue hardship) in *Barnett*. By the same token, *Barnett* leaves open the possibility for a preferential reassignment to be facially reasonable in instances when the employer has made past exceptions to its policy – a principle not inconsistent with *Humiston-Keeling* (which was grounded on the finding that the employer always chose the most qualified individual). Thus, notwithstanding the Seventh Circuit's new ruling, it is our opinion that *Barnett* does not compel casting aside the holding in *Humiston-Keeling*.

A Hierarchy of Protected Classes?

EEOC v. United Airlines resurrects many of the questions and fears posited by the *Humiston-Keeling* opinion and its commentators (including this author in the Society for Human Resource Management's *amicus* brief in *Barnett*):

- Is there now a hierarchy of protected classes?
- What *are* the rights of a more qualified employee who is also seeking reassignment to the vacant, lateral position, when that employee belongs to one or more other protected classes?
- In the statute, the ADA's reasonable accommodation obligation extends to the *employer*, and clearly mandates some cost and disruption; but to what extent does the reasonable accommodation obligation also entail treading on the material expectations of other *employees*? Should this distinction temper what is "reasonable" in a reassignment situation in which other employees also seek the vacant position?
- How does the employer confront competing requests for reassignment to a vacant position by more than one qualified employee with a disability? Must selection be based on merit or relative need?
- How does the employer explain its filling of the vacancy to the disappointed and more qualified employee also vying for the position, especially when the less qualified or unproven employee filling the vacancy does not have an obvious disability (as is often the case)? According to the EEOC, the ADA's confidentiality requirements bar the employer from divulging to the disappointed employee that the successful transferee has a disability and/or is receiving a reasonable accommodation.[9]

6 Indeed, the Supreme Court's majority decision in *Barnett* noted that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." The same could be said of a consistent policy of selecting the most qualified individual for a vacant position.

7 See *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999); *Aka v. Washington Hospital Center,* 156 F.3d 1284 (D.C. Cir. 1998).

8 See *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002).

9 See EEOC Reasonable Accommodation Guidance (Question 41) ("[a]n employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability.").

- Will making a reasonable accommodation provide a conclusive defense against a *prima facie* discrimination or retaliation claim by the more qualified employee who also seeks the more desirable vacant position? Or will employers face a Hobson's Choice over competing employee bias claims?
- Is rejection of *Humiston-Keeling* at odds with other Supreme Court ADA precedent outside of the employment context, such as *PGA Tour, Inc. v. Martin*, which underscores the principle of competing on an equal basis, but not with an advantage over other competitors? Or does the Seventh Circuit's rejection of *Humiston-Keeling* now reward mediocrity, as the EEOC seems to be urging?
- If the decision holds, will courts and the EEOC provide the employer community with more predictable and tangible guidance on how and under what circumstances the employer can bear its burden of showing that reassigning a far less qualified employee to a vacant position imposes an amorphous "undue hardship"?
- Although the ruling applies to lateral transfers and not promotions, isn't the relative desirability of a vacant position often in the eye of the beholder? In applying the standard in *EEOC v. United Airlines*, will courts also need to evaluate whether the vacant position is truly lateral, versus an upgrade?
- The accommodation process often involves trial and error. If a less-qualified individual with a disability assigned to the vacant position later fails to meet expectations, what are the employer's further obligations toward that employee?

Practical Considerations for Employers in the Crossfire

Amendments to the ADA mean that far more individuals will enjoy protection under the law, and far more individuals will be entitled to reasonable accommodations. Litigation and daily implementation of the ADA now involves more intense focus on the core anti-discrimination and reasonable accommodation requirements. Even with the *United Airlines* decision, there is still a conflict among courts surrounding whether reassigning a less qualified individual to a vacant position as an accommodation meets the ADA's threshold "reasonableness" requirement. The Seventh Circuit's recent decision, if embraced by more courts of appeal and if its principles are ultimately upheld by the Supreme Court, will thrust employers between a proverbial "rock and a hard place" when confronted with accommodation scenarios involving reassignments to vacant lateral positions, pitting the expectations of a minimally qualified employee with a disability and the aspirations of a more qualified employee (who may also have a disability or belong to other protected classes under Title VII or other laws) vying for the same position. Time-tested practices of selecting the objectively superior candidate (which rewards achievement and enhances the efficiency of the overall business) will no longer necessarily be the safest employer option.

Peter Petesch is a Shareholder in Littler Mendelson's Washington, D.C. office and co-author of *Disability Discrimination in the Workplace* (2d ed. BNA 2011). If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Petesch at ppetesch@littler.com.