THE NATIONAL
LAW JOURNAL
NLPIP CO. WWW.NLJ.COM MONDAY, APRIL 1, 2002

EMPLOYMENT LAW

Analyzing the ADA

By Michael Starr

FROM ITS INCEPTION, the Americans With Disabilities Act (ADA) has been different from other federal anti-discrimination statutes. Only the ADA explicitly requires an employer to accommodate reasonably individuals in the protected group, and only the ADA limits its employment protection to those individuals who are "qualified." These two features of the ADA come prominently into play for one form of reasonable accommodation, called "reassignment to a vacant position."

This past December, the Supreme Court heard argument in *Barnett v. U.S. Airways Inc.*, 228 F.3d 1105 (9th Cir. 2000) (en banc). The court will decide whether an employer must contravene its established seniority policies to accommodate reasonably a disabled employee by reassigning the employee to a different job. This, though, is just one of the nettlesome problems that arise from reassignment. In broader perspective, the court's decision may provide some important clues as to whether the ADA is best understood as, in essence, a non-discrimination statute, or an "affirmative action" one.

Reassignment of a worker as an accommodation

Under the ADA, prohibited discrimination includes as one of its core elements "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."

In general, an accommodation is 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. Increasingly, employees who, due to disability, are no longer able to perform their current jobs, are seeking reassignment to different jobs as a reasonable accommodation to their disability.

At first blush this is anomalous, since the ADA requires employers to accommodate only a "qualified" individual with a disability, and that is defined as one who (with or without reasonable accommodation) can perform the essential functions of the job. If, however, an individual is, due to a disability, no longer qualified for the position he or she currently holds, is there any requirement for reasonable accommodation at all, and, if so, does it require the employer to reassign that individual to a different job, even if doing so adversely affects the employer's business or work environment?

For a time, this was a disputed question. Now, though, the federal appellate courts almost uniformly hold that an employer is required to reassign a disabled employee no longer qualified for his or her position if that employee is qualified for other positions that the employer has available. See, e.g., *Gaul v. Lucent Tech. Inc.*, 134 F.3d 780, 786 (3d Cir. 1998); *Dalton v. Subaru-Isuzu Automotive Inc.*, 141 F.3d 667, 668 (7th Cir. 1998). In coming to this conclusion, courts often cite the ADA's statutory language, which defines a "qualified" disabled individual as one who can perform the job he or she "holds or *desires*" (emphasis added). Moreover, courts say, the express statutory provision— "reassign to a vacant position" as a form of reasonable accommodation— must apply to something and that must be, it is said, individuals who cannot perform their current jobs, though the obvious distinction between temporary and permanent incapacities seems not to have been addressed.

The more controversial question has been whether an employer must give preferences to a disabled employee in reassignment and, specifically, whether an employer must reassign that employee in contravention of an existing, nondiscriminatory employment policy such as seniority.

When the seniority or other policy that stands in the way of reassignment is derived from an existing labor contract, the courts are uniform in holding that such an accommodation is not "reasonable" and thus not required by the ADA. See, e.g., *Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000); *Feliciano v. State of Rhode Island*, 160 F.3d 780 (1st Cir. 1998).

When, however, the seniority policy is part of the employer's established practices, but not required by a union contract, the courts are divided. This is exactly the question that the Supreme Court is poised to answer in *Barnett*.

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In 'Barnett,' bag handler requested reassignment

In *Barnett*, the plaintiff was a former baggage handler who suffered from severe back problems. He requested reassignment to a vacant, less strenuous mailroom job that he was physically able to do. Initially, the company granted his request, but then another employee with greater seniority sought the mailroom job, and the plaintiff, still unable to return to luggage handling, was discharged. The 9th Circuit allowed the plaintiff's claim to proceed, concluding that employers may have to compromise their existing seniority policies when attempting to reassign a qualified disabled employee as a reasonable accommodation. The court relied, in large part, on the EEOC's position that the "ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability....And, if an employer has a policy prohibiting transfers, it would have to modify that policy...unless it could show undue hardship." EEOC Enforcement Guidance, EEOC Compliance Manual at 5454.

The 5th Circuit, among others, has held otherwise. In *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), one of the earliest reassignment cases, the plaintiff, an insulin-dependent diabetic, was a part-time bus driver who was no longer qualified under Department of Transportation regulations. He sought reassignment to several vacant positions but, as a part-timer, was not eligible for those positions, which the employer reserved for its full-time employees.

The court held that the ADA did not require Daugherty's reassignment, reasoning that this would give him a preference other part-time employees did not have. The ADA, the court said, merely "prohibits employment discrimination against qualified individuals with disabilities, no more and no less."

A second, perhaps more controversial issue is whether an employer must always reassign a disabled worker who is at least minimally qualified for the position sought, even if a more qualified nondisabled applicant is seeking that same job. In *Smith v. Midland Brake*, 180 F.3d 1154 (10th Cir. 1999), the plaintiff developed muscular injuries as a result of coming into contact with various chemicals in his job as a brake assembler, and this made it impossible for him to continue in that position. Noting that the statutory language separately prohibits discrimination against disabled persons applying for available jobs, the court ruled that reassignment must require something more than just allowing the disabled employee to compete for vacant positions on equal footing with nondisabled employees, or else it would be redundant. Accordingly, the reasonable accommodation of reassignment implies, the court said, the right to reassignment (if minimally qualified), and allowing the employer to award the position, instead, to a better qualified nondisabled employee was a "judicial gloss unwarranted by the ADA's statutory language."

The Barnett case may provide important clues on whether the ADA is best understood as a law against discrimination.

A 7th Circuit ruling goes in the opposite direction

The directly opposite approach was taken by the 7th Circuit in *EEOC v. Humiston-Keeling Inc.*, 227 F.3d 1024 (7th Cir. 2000). There, the plaintiff, a warehouse worker, could not perform her current job due to what was essentially "tennis" elbow. She applied and was qualified for several vacant clerical positions, but in each case was turned down in favor of a more qualified candidate.

The court held that an employer with a bona fide policy favoring the most qualified candidate has an absolute right to deny reassignment to a disabled candidate in favor of another, more qualified individual. As Chief Judge Richard Posner argued, there was a difference between "requiring employers to clear away obstacles to hiring the best applicant for a job...and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group." Posner referred to the latter as "affirmative action with a vengeance."

The 7th Circuit position has support in the legislative history. The House committee report on the ADA states that "[t]he employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability." To emphasize its point, it gave the following example: "[S]uppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute. The employer is permitted to choose the applicant with the higher typing speed if typing speed is necessary for successful performance on the job." H.R. Rep. No. 101-485, pt. 2, at 56. Significantly, the EEOC acknowledged this same principle in the explanatory section to its initial ADA regulations, issued in 1992.

If a preference for less-qualified job applicants is not required by the ADA and if the worker who, due to disability, is "qualified" only with respect to the alternative job the worker "desires" to have, then one may ask whether the accommodation of reassignment remains "reasonable" in the face of more qualified candidates. Perhaps, the ADA embodies a social policy of preferences in reassignment for current employees with disabilities, but not for new applicants, but it has yet to be articulated why. This may well be a watershed issue of what kind of statute the ADA really is.