

MAY 10, 2012

HEADS UP - MANDATORY TRANSFER TO VACANT POSITION AS ADA ACCOMMODATION - MAYBE...

Under the ADA an employer is obligated to find a "reasonable accommodation," if possible, for a qualified individual with a disability, which would allow that individual to perform the essential functions of his or her job or to otherwise remain employed by the employer. Such an accommodation can take various forms, including reassignment of the disabled employee to a vacant position. For some time there has been a debate as to whether that means that the disabled employee must be given the vacant position if there are better qualified employees to fill that vacancy. The EEOC has maintained for a long time that the disabled employee should get the vacant position, if the employee is qualified - even if not the most or best qualified employee for the position.

WHO GETS TO FILL THE VACANCY?

For twelve years, the law in the Seventh Circuit, which covers Indiana, Illinois, and Wisconsin, has been clear ever since the court said in the case of *EEOC v. Humiston-Keeling, Inc.*, "the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." But that may now change. In March of this year, in *EEOC v. United Airlines, Inc.*, a three-judge panel on the Seventh Circuit questioned this interpretation of the ADA. While the Court reluctantly followed its earlier decision, it invited the EEOC to petition the Court for a rehearing before all eleven Seventh Circuit judges. In doing so it suggested that it is "likely" that the "EEOC's interpretation may in fact be a more supportable interpretation of the ADA." According to the EEOC, an employer's policy of hiring the *most* qualified candidate for a position would not shield it from liability under the ADA. Instead, the employer would be *required* to transfer a *minimally* qualified disabled employee to a vacant provision as a reasonable accommodation *unless* the employer could establish that doing so would result in an undue hardship.

HEADS UP FOR EMPLOYERS

For now, in those situations where a disabled employee seeks assignment to a vacant position as a reasonable accommodation - and when there are multiple qualified candidates - the employer should carefully look at all the facts and circumstances, determine if the disabled employee is qualified and then determine if the law has changed to *require* the assignment of that employee to the vacancy ahead of more qualified applicants.

Briefing with respect to the rehearing is ongoing and no date for oral argument has been set. We will continue to monitor this matter and provide further updates as necessary. Regardless of how the Seventh Circuit rules on the rehearing of this matter, this issue is likely heading for the Supreme Court. Stay tuned.

If you have questions regarding this topic, please contact Craig Williams at 317.977.1457 or cwilliams@hallrender.com Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney