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DO WE HAVE TO GIVE PREFERENCE TO A DISABLED EMPLOYEE WHEN THERE IS A VACANT POSITION?

The answer to that question now is YES, so long as that person is "qualified" for the job and the transfer isn't an "undue hardship."

A SIGNIFICANT CHANGE OF COURSE ON COMPETITION FOR VACANT POSITIONS AS AN ADA ACCOMMODATION

Reversing twelve years of decisions that allowed an employer to pick the *best* applicant for a vacancy over a disabled employee seeking reasonable accommodation, the Seventh Circuit changed course and sided with the EEOC in a decision handed down on September 7, 2012.

For twelve years employers were reassured by the language that this court used in stating that "*the ADA is not a mandatory preference act but only a nondiscrimination statute*." In other words, disabled employees could be forced to compete against other qualified applicants for a vacant position. With this new decision of the Seventh Circuit, which covers Indiana, Illinois and Wisconsin, disabled employees seeking an accommodation won't have to compete with other employees for a vacant position. Instead, employers will have to be aware of a two-step process to fill a vacancy when a disabled employee is in the running. According to the court the first step is to determine if mandatory reassignment to a vacant position would ordinarily be reasonable in most cases. The court said that generally this is an easy hurdle. The second step, assuming that the reassignment would be reasonable, is to determine if there are any particular facts that would create an "undue hardship" for the employer and therefore make the reassignment unreasonable. This is where it will be tricky for employers.

THE SUPREME COURT OPENS THE DOOR ON PREFERENCES

This reversal of course was based on a decision by the U.S. Supreme Court in 2002 (*U.S. Airways v. Barnett*) that essentially allowed a seniority system to trump the ADA when it comes to filling a vacancy. Although the Supreme Court recognized that overriding a seniority system would be unreasonable in most cases, it also said, "… preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." It is upon this phrase that the Seventh Circuit hangs its hat. The court said that while employers may prefer to hire the best qualified applicant, it's a violation of the ADA nevertheless. According to the court, seniority systems are not the same as "best qualified" systems because seniority systems provide contract rights and involve administrative burdens if a seniority system were to be bypassed to accommodate an employee with less seniority.

SOME INTERESTING QUESTIONS REMAIN

It's already challenging for employers to know what to do in finding a "reasonable" accommodation. Imprecise words in the statute and in court decisions change with the facts of each situation. While this new case charts a new course under the ADA, there are still many questions that will vex employers and employees alike.

- What are the "minimal qualifications" for the vacant job?
- Who gets the benefit of the doubt in determining those qualifications?
- Is necessary extra training for the transferred disabled employee an "undue hardship?"
- Will the transferred disabled employee need an accommodation to perform in the vacant position?
- What if two minimally qualified disabled employees are seeking the same vacant position - who gets the job?
- What if one employee had been "promised" the job when it became vacant in the future but now the disabled employee seeks it?
- What if a disabled employee is previously given an accommodation but then a vacancy occurs that better accommodates the disability?

WHAT DOES THIS MEAN FOR EMPLOYERS?

First, employers need to understand that from now on there will be a preference for disabled employees when a vacant position is available as a reasonable accommodation. As long as the disabled employee is at least minimally qualified for the open job, the ADA requires that the disabled employee must be assigned to the vacant position even though another employee may be judged by the employer to be the better

applicant. The only exceptions to this rule would be if there is a contractual seniority system in place or if it can be shown by the employer that to grant a preference would be an "undue hardship" on the employer. Proving undue hardship under the ADA is exceedingly difficult. Mere inconvenience, minimal cost or co-worker dissatisfaction with the accommodation is generally not seen as an undue hardship. Given this important new decision employers should consider:

- Reviewing existing policies and practices for filling vacant positions during the accommodation process;
- Reviewing job descriptions to more accurately describe the "qualifications" needed for the job;
- Looking for other reasonable accommodations that might exist besides a transfer to vacant positions;
- Engaging in the "good faith interactive process" with the disabled employee to find a reasonable accommodation;
- Documenting your decision making process along the way to support any argument that either the disabled employee was either not "qualified" or that to grant a preference would be an undue hardship; and
- Educating your managers and supervisors about the new preference to be given to disabled employees when filling vacancies as a reasonable accommodation.

If there are any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.