

Assignment to Vacant Position Under the ADA

The circumstances under which the Americans with Disabilities Act (ADA) requires that a disabled employee be assigned to a vacant position has been a source of continuing litigation. In that regard, the ADA first provides that an employer may not "discriminate against a qualified individual with a disability." 42 U. S. C. § 12112(a). Second, it provides that a "qualified" individual includes "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of" the relevant employment position. § 12111(8). Third, the ADA provides that "discrimination" includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." § 12112(b)(5)(A). Fourth, it provides that the term "'reasonable accommodation' may include . . . reassignment to a vacant position." § 12111(9)(B).

For years in the Seventh Circuit, it was settled that an employer was not required to reassign a disabled employee to a vacant position for which there was a better candidate, provided that the employer had a "consistent and honest policy" of hiring the best candidate for the job. That decision stood until the Seventh Circuit reversed its earlier position late last year in *EEOC v. United Airlines, Inc.*, No. 11-1774 (7th Cir. Sept. 7, 2012).

This reversal was somewhat belatedly found to be required based upon the U.S. Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). In that decision, the Supreme Court determined that the ADA requires the employee to show that an accommodation is reasonable on its face, which then shifts the burden to the employer to demonstrate case-specific undue hardship. The result is that reassignment of a disabled but qualified employee to a vacant position is mandatory in the absence of the employer showing an undue hardship. Accordingly, the Seventh Circuit adopted the position 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."

The U.S. Supreme Court recently refused to review the Seventh Circuit's most recent ruling on this matter. Federal courts in Alabama are not bound to follow the Seventh Circuit position. However, it may be viewed as persuasive and, in view of the Supreme Court's choosing not to review the case, may well be adopted by the Eleventh Circuit which controls district courts in Alabama.