Split Circuits: To Reassign or Not to Reassign

By Howard S. Lavin and Elizabeth E. DiMichele

Under the Americans with Disabilities Act of 1990 (the ADA), is an employer mandated to reassign a qualified disabled employee to a vacant position, contrary to the employer’s own implemented policy of hiring the best candidate for the position? The circuit courts are split on this question, with the Tenth and the DC Circuits requiring mandatory reassignment of a disabled employee and the Eighth and the Seventh Circuits allowing for an exception to the employer’s reassignment duty if the employer has an actual policy and practice of hiring the most qualified candidate for open positions.

The Eighth Circuit held in Huber v. Wal-Mart Stores, Inc., that “the ADA does not require Wal-Mart to turn away a superior applicant for the … position in order to give the position to [the disabled employee].” Similarly, the Seventh Circuit held in EEOC v. Humiston-Keeling, Inc., that an employer is not required to “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.”

In conflict with Huber and Humiston-Keeling, are the decisions of the Tenth Circuit in Smith v. Midland Brake, Inc. and the DC Circuit in Aka v. Washington Hosp. Ctr. In those cases, the circuit courts held that the word “reassign” must mean more than allowing an employee to apply for a job with everyone else, as to hold otherwise would render “reassignment,” as a reasonable accommodation, a nullity.

Although the US Supreme Court granted certiorari in Huber, the case was dismissed because the parties settled outside of court. Consequently, the divide between the circuit courts remains.

Background

The issue underlying this circuit split is the scope of an employer’s reassignment duty under the ADA when considered in tandem with its own hiring policies. An employer violates the ADA when, among other things, it fails to make “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."6 Section 12111(9)(B) of the ADA defines “reasonable accommodation” as, among other things, “reassignment to a vacant position.” Over the years, an employer’s duty under the ADA to reassign a disabled employee has been further delineated by caselaw.

For example, in *U.S. Airways, Inc. v. Barnett*, the Supreme Court held that an employer’s entrenched seniority system trumps the reassignment claim of a disabled employee unless the employee can show special circumstances “that make ‘reasonable’ a seniority rule exception in the particular case.”7 In so holding, the Court noted that entrenched seniority systems, whether or not in the collective bargaining context, provide important employee benefits including, but not limited to, workforce expectations of fair treatment and job security.8

Although *Barnett* addressed the validity of entrenched seniority systems in an ADA reassignment claim, it left an open question: whether an employer’s policy of hiring the best qualified candidate for a vacant position would similarly trump the employer’s duty to reassign a disabled employee. With the Tenth and DC Circuits ruling in favor of mandatory reassignment and the Seventh Circuit in favor of the employer policy, a decision by the Supreme Court in *Huber* would have brought clarity to the long-debated interpretation of the ADA’s reassignment provision.

**The Eighth Circuit’s Huber Decision**

In *Huber v. Wal-Mart Stores, Inc.*, Pam Huber (Huber) filed claims of discrimination under the ADA against her employer, Wal-Mart Stores, Inc. (Wal-Mart).9 Huber, during her employment with Wal-Mart, sustained a permanent injury to her right arm and hand making it impossible for her to perform her job as an order filler. Huber sought a reasonable accommodation by way of reassignment to a vacant “router” position. Wal-Mart, pursuant to its stated policy of hiring the best qualified applicant, insisted that Huber apply and compete for the position with other applicants. Subsequently, Wal-Mart gave the job to a non-disabled applicant and Huber was eventually reassigned to a lower-paying maintenance position. Huber argued that Wal-Mart should have automatically reassigned her to the router position and that its aforementioned policy was not applicable in the face of the ADA’s reasonable accommodation mandate. The district court granted summary judgment to Huber and Wal-Mart appealed.

On appeal, the Eighth Circuit discussed the circuit split and agreed with the Seventh Circuit’s decision in *EEOC v. Humiston-Keeling, Inc.* The Eighth Circuit held that an employer is not required “to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate.”10 To insist on mandatory reassignment, the court reasoned, effectively would make the ADA a mandatory preference statute and create an unreasonable imposition on employers.11 The court found Wal-Mart’s eventual reassignment of Huber to the lower-paid maintenance position an appropriate accommodation, on the grounds that an employer is not required to provide an ideal or preferred accommodation, merely a reasonable one.12

**The Tenth Circuit’s Midland Brake Decision**

In *Smith v. Midland Brake, Inc.*, the Tenth Circuit considered the scope of the employer’s obligation to offer an employee a reassignment job.13 Robert Smith (Smith), an employee of Midland Brake, Inc. (Midland Brake), became disabled as a result of on-the-job injuries and eventually was fired due to Midland Brake’s admitted inability to accommodate his disability in the department in which he had been employed.14 The district court granted Midland Brake summary judgment on all claims and Smith appealed to the Tenth Circuit, which affirmed the
grant of summary judgment. Smith, in turn, petitioned the Tenth Circuit for *en banc* review of the panel decision and limited review was granted. The *en banc* Tenth Circuit considered, among other things, the proper interpretation of the ADA’s reasonable accommodation requirement with respect to an employer’s obligation to reassign a disabled employee to a vacant position and reversed the grant of summary judgment to Midland Brake on Smith’s ADA claim arising out of Midland Brake’s failure to reassign him.

The Tenth Circuit, *en banc*, rejected a narrow definition of “reassignment” that would permit an employer to deny a qualified, disabled employee reassignment if there were a more qualified applicant for the position, reasoning that such a reading would invalidate the reassignment language in the ADA. Instead, the court held that “reassignment” must mean more than the basic opportunity to apply for a job like anyone else.

Referencing the EEOC’s Interpretative Guidance regarding reassignment, the court held that if the disabled employee is qualified for the vacant position, the employer must reassign the employee. The court noted that the right to reassignment is not absolute and listed certain limitations: the position must be vacant and the position is not vacant if other employees have a “legitimate contractual or seniority right” to it; granting a promotion is not necessary; the employee must be qualified, though the employee does not have to be the best qualified applicant; and the reassignment must be reasonable and not pose an undue hardship. The court stated that certain policies of an employer “might have to be subordinated to an employer’s reassignment obligation under the ADA because to do otherwise would essentially vitiate the employer’s express statutory obligation to employ reassignment as a form of reasonable accommodation.”

In *Duvall v. Georgia-Pacific Consumer Products, L.P.*, the Tenth Circuit reaffirmed its decision in *Midland Brake*, holding that an employer’s statutory duty to reassign disabled employees to vacant positions is mandatory and that “the employer must do more than consider the disabled employee alongside other applicants; the employer must offer the employee the vacant position.” The *Duvall* court nevertheless affirmed the grant of summary judgment to the employer that failed to transfer the disabled employee to positions held by temporary employees on the grounds that they were not “vacant” within the meaning of the ADA’s reassignment duty. The Tenth Circuit held that for such purposes, a position is “vacant” when it “would have been available for similarly situated nondisabled employees to apply for and obtain.”

**Other Circuits’ Decisions**

In *EEOC v. Humiston-Keeling, Inc.*, an employee brought a claim against her employer under the ADA, alleging that by not reassigning her to a vacant clerical position, the employer failed to provide a reasonable accommodation for her disability. The employer had a “bona fide policy, consistently implemented, of giving the best job to the best applicant rather than to the first qualified one.” The Seventh Circuit found that “requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of [a statutorily protected group] … is affirmative action with a vengeance.” Accordingly, the court held that the ADA does not require reassignment of a disabled employee if there is a better applicant, provided that the employer has a legitimate policy of hiring the best, and not simply the first, applicant for the position.

In *Aka v. Washington Hosp. Ctr.*, the DC Circuit, *en banc*, held that an employee who is allowed to compete for a job has not been “reassigned” because any position the employee attains has been attained under the employee’s own power and therefore, the
word “reassign” must mean more than allowing a
disabled employee to compete for a vacant position
with other applicants.26 Subsequently, in Alston v.
Washington Metro. Area Transit Auth., the DC District
court, noting that the holding of Aka has been
disputed by other circuit courts, clarified Aka’s
holding. The Alston court stated that the ADA
reassignment provision imposes an affirmative duty
on an employer to find a position for the employee
who becomes disabled. Therefore, even an
employer’s long-held policy of hiring only the best
qualified candidate for a position cannot trump the
duty to reassign a disabled employee to a vacant
position for which he or she has met the minimum
qualifications.27

Looking Ahead

The Huber case demonstrates the current tension
between an employer’s right to create and adhere to
non-discriminatory hiring policies and the employee’s
rights to reasonable accommodation under the ADA.
Given the continuing, conflicting decisions of the
circuit courts over the scope of an employer’s
reassignment duty under the ADA, it is likely that this
question will come again before the Supreme Court.

The impact of such a ruling would be substantial
and would provide employers a greater degree of
certainty when faced with a request to reassign an
employee with a disability to a position for which he
or she is not the most qualified applicant. If the
Court were to hold that an employer’s policy trumps
the duty to reassign, as have the Seventh and Eighth
Circuits, the employer, particularly if it has adopted a
“Best Candidate Hire” policy, would be able to hire
the most qualified applicant with a reasonable degree
of comfort. Of course, the employer’s determination
of which candidate was most qualified would still be
open to challenge.

If the Court were to accept the Tenth and DC
Circuits’ interpretation, employers would be
obligated to transfer a disabled employee to a vacant
position for which he or she was qualified regardless
of whether there were more qualified applicants.
Employers would lose some ability to control their
hiring decisions and disputes would shift to whether a
disabled employee who was denied a transfer met the
minimum qualifications for the new position.

Regardless of how the Court ruled in a Huber-like
case, any decision would settle a much debated area
of employment law and clarify the scope of an
employer’s duty under the ADA to reassign a disabled
employee.

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Howard S. Lavin is a partner and Elizabeth E.
DiMichele is a special counsel in the Employment
Law Practice Group of Stroock & Stroock & Lavan
LLP, concentrating in employment law counseling
and litigation. The authors, who gratefully
acknowledge the assistance of Joanna S. Smith, an
associate in the firm’s Employment Law Practice
Group, in the preparation of this column, can be
reached at hlavin@stroock.com and
edimichele@stroock.com, respectively.

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1. 42 U.S.C.S. § 12101 et seq.
2. 486 F.3d 480, 484 (8th Cir. 2007).
3. 227 F.3d 1024, 1029 (7th Cir. 2000).
4. 180 F.3d 1154 (10th Cir. 1999).
5. 156 F.3d 1284 (D.C. Cir. 1998).
8. Id. at 1524.
9. 486 F.3d 480.
10. Id. at 483.
11. Id. (quoting EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028 (7th Cir. 2000)).
12. Id. at 484.
13. 180 F.3d 1154 at 1159.
14. Id. at 1160.
15. Midland, 180 F.3d at 1164.
16. Id. at 166–167.
17. Id. at 1170.
18. Id. at 1176.
19. 607 F.3d 1255 (10th Cir. 2010).
20. Id. at 1260.
21. Id. at 1264.
22. 277 F.3d 1024 (7th Cir. 2000).
23. Id. at 1027.
24. Id at 1029.
25. 156 F.3d 1284, 1302 (D.C. Cir. 1998).
26. Id. at 1304.