

HR Weekly Podcast
August 26, 2015

Today is Wednesday, August 26, 2015. Welcome to the HR Weekly Podcast from the Division of State Human Resources. This week's podcast is about employers reassigning employees with disabilities covered by the Americans with Disabilities Act, or ADA, to vacant positions as a reasonable accommodation.

If an employee is no longer able to perform his or her essential job functions due to a disability, does an employer have to reassign the disabled employee to a vacant position for which he or she is qualified even if other employees are better-qualified for the position? According to a final decision by Seventh Circuit Court of Appeals, the answer is yes!

United Airlines (United) required workers with disabilities, who could not perform the essential function of their jobs to compete, as part of United's competitive transfer policy, for vacant positions for which they were qualified and could perform the essential functions of the job. As a result, if a disabled employee was not selected for the transfer, they were not able to continue their employment with the airline. In 2009, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against United charging that the airline's competitive transfer policy violated the ADA. While the case was originally filed in the U.S. District Court for the Northern District of California – San Francisco, United moved for a change of venue to the Northern District of Illinois. United requested the change in venue since that district had an earlier precedent which held that a competitive transfer policy, similar to United's policy, did not violate the ADA. As a result of this precedent, the lower court dismissed the EEOC's case in 2011. The Seventh Circuit Court of Appeals reviewed the case and overturned the lower court's decision and found that, "the ADA does indeed mandate that an employer assign employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinary and reasonable and would not present any undue hardship on the employer." In 2013, United petitioned the U.S. Supreme Court to review the case; however, the Supreme Court denied United's request. The U.S. Supreme Court's denial meant that the Seventh Circuit's decision stood and the EEOC could pursue its case that United illegally denied the reassignment of disabled employees.

Subsequently, United agreed to settle the federal disability lawsuit filed by the EEOC. The consent decree settling the suit required United to pay \$1,000,000 to a small class of United's former employees with disabilities, revise its ADA reassignment policy, train employees with supervisory or human resources duties about the revised policies, and provide a report to the EEOC about employees who were denied a position as part of the ADA reassignment process. EEOC's Regional Attorney, William Tamayo, said, "If a disability prevents an employee from returning to work in his or her current position, an employer must consider reassignment. As the Seventh Circuit's decision highlights, requiring an employee to compete for the position falls

short of the ADA's requirements. Employers should take note: When all other accommodations fail, consider whether your employee can fill a vacant position for which he or she is qualified."

Employers should be aware that the mere existence of a consistently applied policy of hiring the most qualified candidate may not defeat a disabled employee's request for a reassignment to a vacant position for which he or she is qualified. Although in most jurisdictions there is currently no definitive ruling on the issue, a "reading of the tea leaves" strongly suggests that, an employer who cannot demonstrate a significant hardship if it were to grant a disabled employee's request to fill a vacant position, runs a considerable risk that it will not fare well in any ensuing litigation.

Thank you.