

## Ruling clarifies position-transfer obligations for employers



David C.  
Henderson



Susan K.  
Tvrdy

In *U.S. Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc.*, the 11th U.S. Circuit Court of Appeals last December held that an employer's "reasonable accommodation" obligations under federal law do not automatically require transferring a disabled employee to a vacant position, particularly when the employer has a "best-qualified applicant policy" and a better qualified candidate has applied.

Instead, according to *St. Joseph's*, a plaintiff must show that special circumstances exist that warrant a finding that reassignment is required under the particular facts of the case.

The *St. Joseph's* ruling should be of interest to local employers even though it arrives from a different federal circuit, because it was a significant defeat for the Equal Employment Opportunity Commission. *St. Joseph's* rejects outright a view that the EEOC has advanced for more than 14 years through the following question and answer in its Enforcement Guidance:

*Does reassignment [as a reasonable accommodation] mean that the employee is permitted to compete for a vacant position?*

No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.

*St. Joseph's* also will be of interest in jurisdictions outside the 11th Circuit because of its explanation of why the EEOC has been incorrect when it tried to argue that other courts of appeals have upheld its position on this point.

Further, *St. Joseph's* not only foreshadows how local courts probably would rule on this federal law issue, but also is consistent with how courts can be expected to rule on the analogous issue under Massachusetts' Fair Employment Practices Act.

David C. Henderson is a partner in the litigation department at Nutter in Boston. He concentrates his practice in civil litigation and corporate general counsel advice, with a focus on employment and labor law and general business and commercial matters. Susan K. Tvrdy is an associate in Nutter's litigation department, where she focuses her practice on complex commercial, employment and labor litigation.

The plaintiff in *St. Joseph's* was a nurse assigned to the hospital's psychiatric ward. Her disability was a back problem requiring the use of a walking cane. The hospital determined, however, that, under the Americans with Disabilities Act, the cane was not a reasonable accommodation in the psychiatric ward because of the risk that it could be taken by a patient and used as a weapon.

The hospital, therefore, tried to accommodate the nurse in some other way. In particular, it gave the nurse 30 days to apply for vacant positions on the hospital's job board.

The problem, however, was that, under the hospital's "best-qualified applicant" policy, the hospital always chose other, better-qualified internal applicants for the vacant positions. The parties thus could not agree on a resolution. And ultimately, the EEOC sued on the nurse's behalf, arguing, *inter alia*, that the ADA required that she be given a *noncompetitive* reassignment to

the opposite: that reassignment will be reasonable in some circumstances but not in others."

Another basis of its ruling, according to the court, was that "well-settled ADA precedent" in the 11th Circuit already held that "employers are only required to provide alternative employment opportunities reasonably available under the employer's existing policies."

Further, according to the court, the framework explained by the U.S. Supreme Court in *U.S. Airways, Inc. v. Barnett* informs a rejection of the EEOC's argument, because in somewhat analogous circumstances, *Barnett* shows that "ordinarily" the ADA does not require an employer to assign a disabled employee to a particular position when another employee is entitled to that position under an established seniority system. Rather, according to *Barnett*, the disabled plaintiff has to present evidence of *special circumstances* that make reasonable an exception to

Moreover, while the 1st Circuit has not yet faced directly the question presented to the other courts, it has ruled that an employer is not obligated to violate a collective bargaining agreement in order to accommodate a disabled employee's transfer, and in doing so, it emphasized that "[c]ourts that recognize a duty to reassign also recognize the limitation on that duty: an employer is not required to violate the provisions of a collective bargaining agreement or the rights of other employees in seeking such reassignment."

*St. Joseph's* also comports with how courts could be expected to rule on the analogous state law issue under the Massachusetts FEPA. According to the Supreme Judicial Court, the FEPA is "less generous than the ADA" when it comes to requests for transfers.

That, in part, is because the ADA defines a "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires" and the ADA explicitly lists transfer as a possible accommodation.

But the FEPA refers to a "qualified handicapped person" as someone "capable of performing the essential functions of the position involved with reasonable accommodation," and it does not reference the possibility of a transfer or potential position.

The U.S. District Court in Massachusetts thus highlighted those differences in the two statutes 10 years ago to show that, under the FEPA and in the circumstances of the case then at hand, a Massachusetts employer did not have to reassign an employee to a vacant position in order to accommodate the employee's disability.

Also suggesting that, from this perspective, the FEPA should be construed more narrowly than the EEOC's view of the ADA is the fact that the state non-discrimination enforcement agency, the Massachusetts Commission Against Discrimination, has expressed its related views less aggressively than the EEOC.

The MCAD's Persons with Disabilities in the Workplace Guidelines show that, contrary to the position taken by the EEOC, an employer is not automatically required to transfer a disabled employee to a vacant position. Instead, the guidelines state more flexibly that "[f]ailure to reassign an individual to a vacant position for which s/he is qualified may be evidence of discriminatory animus."

Also, according to the guidelines, "reassignment or transfer to a vacant position" is only one among many "[t]ypes of accommodation that may, depending upon the circumstances, be considered reasonable."

Indeed, according to the MCAD guidelines, transfer is "usually only a reasonable accommodation where it involves a change in work site or locations within the same job category." NEIH

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one of the vacant positions.

The EEOC lost on that issue in the District Court, when the court refused to instruct the jury that the ADA automatically mandated a reassignment without competition.

Likewise, the 11th Circuit rejected the EEOC's argument on appeal. It found, in essence, that the ADA requires "equal employment opportunities" for the disabled and cannot be a vehicle for turning "nondiscrimination against the disabled" into "discrimination against the nondisabled."

In reaching its decision, the *St. Joseph's* court began by explaining the following point of statutory construction:

"The ADA provides that, subject to exceptions irrelevant here, an employer must reasonably accommodate a disabled employee. 42 U.S.C. § 12112(a), (b)(5)(A). But it does not say how an employer must do that. It offers a non-exhaustive list of accommodations that 'may' be reasonable, and one item on the list is 'reassignment to a vacant position.' See *id.* § 12111(9)(B) ('The term "reasonable accommodation" may include ... reassignment to vacant position.') (emphasis added). The ADA does not say or imply that reassignment is always reasonable. To the contrary, the use of the word 'may' implies just

the seniority rule.

Accordingly, a disabled plaintiff facing a "best-qualified applicant" policy should be treated similarly. Automatic reassignment would not be reasonable generally (or as the Supreme Court said in *Barnett*, "in the run of cases") for the following reason:

"As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients."

*St. Joseph's* also explains that the views of courts in the 11th Circuit are in accord with those of the 8th and 5th Circuits, both of which already had held that the ADA does not automatically require that a disabled employee be transferred to a vacant position.

That confluence of views thus suggests how a federal district or appellate court here could be expected to rule, if presented with the same issue.