VOLUME 75 ◆ NUMBER 3

Employee Benefit Plan Review

Circuit Court Rules Employers Are Not Required to Reassign Employees as an ADA Accommodation

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The U.S. Court of Appeals for the Fourth Circuit upheld a summary judgment award in favor of Lowe's Home Centers LLC ("Lowe's"), holding that it did not violate the Americans with Disabilities Act ("ADA") when a disabled, long-term employee was removed from his senior role and passed over for two similar vacant positions. The court's decision contradicts Guidance from the U.S. Equal Employment Opportunity Commission ("EEOC"), as stated in the agency's *amicus* brief filed on behalf of the employee.

THE AMERICANS WITH DISABILITIES ACT

The ADA states that "no covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . . ."[1] A "qualified individual" is entitled to protection under the ADA if they are able to "perform the essential functions of the employment position" "with or without reasonable accommodation."[2] The ADA requires employers to provide "reasonable accommodations" to "qualified individuals," which may include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position."[3]

ELLEDGE V. LOWE'S

Elledge, a long-term employee of Lowe's, filed suit for violation of the ADA, alleging Lowes (1) forced him out of his position despite being able to perform the essential functions of his job with reasonable accommodations and (2) refused to reassign him to another vacant director-level position. The district court granted summary judgment to Lowe's, and Elledge appealed.

Elledge was a Market Director of Stores for nearly 10 years, overseeing a dozen stores. His job required him to walk the stores and drive to and from the stores. Elledge had knee problems and eventually underwent a series of knee surgeries. His condition led to difficulty traveling to and from the stores he oversaw, and Elledge's doctor restricted his walking and working hours. Lowe's abided by these restrictions and offered Elledge a motorized scooter to assist with store visits – which Elledge declined.

Instead, Elledge arranged for subordinates to drive him to the different locations and did not adhere to the light-work accommodation. When Elledge's restrictions became permanent, Lowe's concluded Elledge could not remain in his current position and discussed other potential career opportunities at Lowe's. Elledge refused the lower paying job presented and applied to two vacant director-level positions

for which Lowe's selected other employees. Elledge accepted a severance package and early retirement.

The EEOC's *Amicus* Brief Argued the District Court Got it Wrong

The EEOC filed an *amicus* brief arguing the district court "misunderstood" and "ignored the plain language of the ADA" in concluding that the competitive hiring policy Lowe's has for the vacant positions "effectively trumps the ADA duty to reassign" a qualified, disabled employee to a vacant equivalent position. Specifically, the EEOC argued that "reassignment" as a potential statutory accommodation does not mean "permission to compete for jobs with other employees."

The Fourth Circuit Holding

The Fourth Circuit upheld the district court's dismissal on summary judgment, rejecting the arguments of both Elledge and the EEOC.

With respect to the removal of Elledge from his original position, the Fourth Circuit found Elledge was, in fact, unable to perform the essential functions of his position even with reasonable accommodations, and thus, not a "qualified individual" under the ADA. In doing so, the Fourth Circuit reasoned that Elledge did not take advantage of the accommodations Lowe's had provided but instead "created certain accommodations, rejected others, and pushed himself beyond the limits of his doctor's orders."

The Fourth Circuit held that "[g]iven the essential functions of his job . . . no reasonable accommodation could, . . ., have sufficed." Importantly, in so doing, the court confirmed (i) that the employer's determination as to what is an essential function merits "considerable deference"; and (ii) that, to the extent there is a variety of accommodation measures available, the employer – exercising "sound judgment" – has the "ultimate discretion" over which of these alternatives to employ.

With respect to the obligation of Lowe's to reassign Elledge as an accommodation under the ADA, the Fourth Circuit rejected the notion that the U.S. Supreme Court case, *U.S. Airways v. Barnett*, required Lowe's to appoint Elledge to one of the vacant positions rather than permit him the opportunity to apply within its competitive process, assuming no other reasonable accommodation. Rather, the Fourth Circuit, citing *Barnett*, stated that the ADA "does not require employers to construct preferential accommodations that maximize workplace opportunities for their disabled employees. It . . . requires . . . that preferential treatment be extended as necessary to provide them with the *same* opportunities as their non-disabled colleagues." And, because Lowe's consistently employed a "best-qualified hiring system," its merit-based approach was "disability neutral" because "[i]t invite[d], reward[ed], and protect[ed] the formation of settled expectations regarding hiring decisions."

Takeaway

The Fourth Circuit's decision sheds light on how far an employer must go in reasonably accommodating a disabled employee and recognizes that while employers must provide adequate reasonable accommodations, it need not change the essential functions of a job or require other employees to share in those tasks. In addition, where there is more than one accommodation that would address the issue, it is the employer who makes the determination as to which will apply. Where, as here, the employee rejects a reasonable accommodation the employer is under no obligation to present or adhere to another – including reassignment. And finally, to the extent "reassignment to a vacant position" is the only accommodation that would address the issue, the disabled employee is entitled to a "disability neutral" equal opportunity similar to that provided to their non-disabled employees.

Notes

1. 42 U.S.C. § 12112(a).
2. 42 U.S.C. § 12111(8).
3. 42 U.S.C. § 12111(9)(B).

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