

## EMPLOYMENT LAW DEVELOPMENTS

## SUPREME COURT OFFERS NO SIMPLE ANSWER TO QUESTION WHETHER UNDER THE ADA AN ACCOMMODATION THAT VIOLATES AN EMPLOYER'S SENIORITY SYSTEM IS "UNREASONABLE"

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Over the course of the decade since the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101 *et seq.*, was enacted, employers have come to understand very well that they cannot discriminate against an individual with a disability who, with "reasonable accommodation," can perform a job's essential functions. A requested accommodation is not "reasonable," however, if it would impose an "undue hardship" on the operation of the employer's business. It is the employer's burden to prove "undue hardship."

Many employers with a collectively bargained seniority system in place believe that "undue hardship" is proven, once they establish that a proposed accommodation would necessarily violate the company's seniority system. In the Sixth Circuit, collectively bargained seniority has trumped the need for reasonable accommodation, at least in cases brought under the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*<sup>1</sup> *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985). Since *Jasany*, this rule has been

<sup>1</sup>The ADA and the Rehabilitation Act are similar and the same standards govern both. The main distinction is that the Rehabilitation Act applies only to entities that receive federal financial assistance.

applied in at least two unpublished decisions to cases brought under the ADA. In *Shiplett v. National Railroad Passenger Corporation* ("Amtrak"), 182 F.3d 918 (6th Cir. 1999), the court cited *Jasany* for the proposition that the ADA does not require an employer to restructure the company to create a position for an employee "in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement." See also *Boback v. General Motors Corp.*, 107 F.3d 870 (6th Cir. 1997). No published decision in the Sixth Circuit, however, has squarely addressed the issue of accommodation vs. seniority rights in the context of the ADA.

On April 29, 2002, the United States Supreme Court decided an ADA handicap discrimination case and attempted to resolve the conflict that may arise when a disabled employee requests an accommodation which conflicts with the employer's seniority system. *U.S. Airways, Inc., v. Barnett*, 535 U.S. \_\_\_\_ (2002). Eschewing a *per se* rule that the seniority system always prevails, the Supreme Court, in a 5-4 decision, held that, "in the run of cases," the employer's seniority system trumps the interests of a disabled

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employee who seeks “accommodation” by assignment to a position to which nondisabled employees have superior bidding rights under the employer’s seniority system. While the Court held that “ordinarily” the employer needs to show only the existence of a seniority system to demonstrate that the requested accommodation is not “reasonable,” the Court clearly left the door ajar for the employee to defeat a motion for summary judgment by showing that, in his particular case, “special circumstances” render an exception to the seniority rules, “reasonable.”

The facts of the case in *Barnett* were fairly straightforward. Barnett was employed as a cargo handler for US Airways. When he injured his back, he invoked his seniority rights under the company’s seniority system to transfer to a less physically demanding job in the mailroom. Two years later he learned that other employees intended to bid for his mailroom position. He asked US Airways to make an exception and accommodate his disability by protecting his position from bidding. US Airways considered his request for several months and finally decided not to make an exception.

Barnett sued, claiming that his request to keep his mailroom position was a “reasonable accommodation” and that US Airways discriminated against him by refusing to make an exception to its’ seniority system.

The lower court granted US Airways’ motion for summary judgment, stating that the uncontroverted evidence showed that the airline’s seniority system had been in place for “decades” and governed over 14,000 US Airways agents. The lower court also observed that seniority policies such as the one at issue were common to the airline industry. The court stated: “Given this context, it seems clear that the [airline’s] employees were justified in relying upon the policy. As such, any significant alteration of that policy would result in undue hardship to both the company and its nondisabled employees.”

Barnett appealed and the Ninth Circuit Court of Appeals reversed. US Airways then appealed to the Supreme Court and asked the Court to decide whether the ADA requires an employer to reassign a disabled employee to a position, as a “reasonable accommodation,” even though another employee is entitled to hold the position under the employer’s *bona fide* and established seniority system.

The Supreme Court carved a middle road between the parties’ conflicting positions. The Court first rejected US Airways’ argument that a seniority system always prevails, and that the ADA does not require an employer to afford a disabled employee *preferential* treatment. The Court pointed out that, by definition, an “accommodation” entails making an exception to the employer’s disability-neutral work rules. The Court noted that the ADA specifically states that the term “reasonable accommodation” may mean reassignment to a vacant position, as well as job restructuring, part-time or modified work schedules, or acquisition or modification of equipment or devices, all of which are *preferential*.

The Court also rejected Barnett’s claim that in determining whether the requested accommodation is “reasonable” or not, the court should only consider whether it is “effective,” i.e., whether it meets the employee’s needs, and nothing more.

Instead, the Court found that when an accommodation requested by a disabled employee would violate the rules of a seniority system (whether collectively bargained or employer imposed), such an accommodation “ordinarily” will not be viewed as reasonable—“unless there is more.” This means that the employee may present evidence of “special circumstances” that make what would “ordinarily” be considered an unreasonable exception to the seniority rule, “reasonable” in that particular case.

Such “special circumstances” include a showing that the employer, having retained the right to

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change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference.

Under *Barnett*, to obtain summary judgment, it will ordinarily be sufficient for the employer to show that the accommodation which the disabled

employee seeks would violate the rules of a seniority system. Yet, while extolling the benefits of seniority systems to employee-management relations (i.e., fostering employee reliance on fair, uniform treatment), and denying any intention to undermine seniority systems, the Court's invitation to employees to demonstrate "special circumstances" nevertheless will have the practical effect of making summary judgment in such cases more difficult.

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## DYKEMA BRIEFS...VICTORIES

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Patrick Hickey and Rosemary Schikora recently won summary judgment in favor of Eastern Michigan University in two consolidated cases in federal court (Battani, J., Eastern District of Michigan), where plaintiffs alleged sexual and racial harassment and constitutional violations, arising out of a study abroad trip to South Africa sponsored by EMU. Six of the female participants alleged that they had been sexually harassed by the male students and discriminated against on the basis of their race during the trip abroad. They sued the university and the professor who directed the trip. Two of the male students who were accused of sexual harassment also sued the university, claiming that the disciplinary action taken against them as a result of their conduct on the trip constituted gender discrimination under Title IX and violated their constitutional rights to due process, freedom of speech, and the right to bear arms. The court granted EMU's motion for summary judgment and dismissed all of the male students' claims, and taxed costs against them in the amount of almost \$5,000. The court also granted summary judgment in favor of EMU and dismissed the female students' §1981 race claim, and their claim of sexual harassment under Elliott Larsen, and denied their request to amend their complaint to add a claim under Title VI of the Civil Rights Act. The only remaining claim, which is subject to a pending motion to dismiss, is the female students' claim for sexual harassment under Title IX.

## Mark Your Calendars!

*Thursday, October 10, 2002*

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Employment Law Developments Issues Affecting Employers

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