Assigning Meaning to the ADA's Reassignment Accommodation

By Brian East

The Americans with Disabilities Act (ADA) has been described as "a milestone on the path to a more decent, tolerant, progressive society."[1] One of the Act's "most impressive strengths" is its "comprehensive character."[2] As elaborated by the Supreme Court, "[t]o effectuate its sweeping purpose, the ADA forbids discrimination against" individuals with disabilities "in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)."[3]

A key provision of the ADA is its obligation on employers to provide reasonable workplace accommodations. The Act does not define reasonable accommodations. Instead, it gives a non-exhaustive list of examples.[4] One of those examples is reassignment to a vacant position.

The U.S. Equal Employment Opportunity Commission (EEOC)—the agency with rule-writing and enforcement authority over ADA Title I—explains that reassignment is the accommodation "of last resort."[5] This means that accommodating an individual in his or her *current* position is the desired goal, but if that cannot be achieved (or if doing so would pose an undue hardship on the employer), the employer and employee should consider whether there is a vacant position (or one soon to be vacant) for which the employee is qualified to perform, and to which the employee could be reassigned.

But like accommodations generally, reassignment is not defined in the statute or the regulations. There is a fair amount of EEOC guidance and case law fleshing out its parameters, but the courts are somewhat divided on one issue—does reassignment mean actually placing the employee in the vacant position, or does it just mean allowing the employee with a disability to compete for a vacancy?

The EEOC's position is clear: "Employers should reassign the individual to an equivalent position . . . if the individual is qualified, and if the position is vacant within a reasonable amount of time."[6] As the EEOC states, the contrary interpretation "nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation," because "even without the ADA, an employee with a disability may have the right to compete for a vacant position."[7]

The EEOC's position has also been adopted by several courts.[8] Courts have also found that employers adopting a contrary position may demonstrate a failure to engage in the accommodation process in good faith.[9]

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1 PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (quoting Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

2 *PGA Tour, Inc.*, 532 U.S. at 675 (2001) (citing Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh)).

3 *PGA Tour, Inc.*, 532 U.S. at 675 (2001).

4 42 U.S.C. § 12111(9) (2012).

5 U.S. Equal Emp't Opportunity Comm'n, EEOC Notice No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter EEOC Enforcement Guidance].

6 29 C.F.R. pt. 1630 app. at 396 (2012).

7 EEOC Enforcement Guidance, *supra* note 5.

8 *See, e.g.*, EEOC. v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164–66 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc); Reyazuddin v. Montgomery Cty., Md., 7 F. Supp. 3d 526, 550 (D. Md. 2014) ("If the employee can be accommodated by reassignment to a vacant position, the employer must offer the employee the vacant position."), *rev'd in part on other grounds*, 789 F.3d 407 (4th Cir. 2015); Wiechelt v. United Parcel Serv. Inc., No. 03-CV-345A, 2007 WL 2815755, at *2 n.5 (W.D.N.Y. Sept. 24, 2007).

9 *See, e.g.*, Fitzsimmons v. City of Phoenix, No. CV–06–3103–PHX–DGC, 2008 WL 2225764, at *4 (D. Ariz. May 28, 2008) (supervisor testified that it was not her job to find plaintiff a job elsewhere, supporting failure-to-accommodate claim); Johnson v. McGraw-Hill Cos., 451 F. Supp. 2d 681, 708 (W.D. Pa. 2006)

There is contrary authority from the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, holding that reassignment means simply an opportunity to compete for a vacant position.[10] The Supreme Court granted certiorari in *Huber*, but later dismissed the case when it settled before it could be heard.[11] Still, there is reason to question the continued viability of *Huber*, in part because it relied heavily on the earlier Seventh Circuit decision in *EEOC v. Humiston-Keeling, Inc.*,[12] which has since been explicitly overturned by the Seventh Circuit in *EEOC v. United Airlines, Inc*.[13]

Although not squarely on point, the Supreme Court's analysis in *U.S. Airways, Inc. v. Barnett* also seems fundamentally inconsistent with that in *Huber*.[14] As the majority wrote in *Barnett*:

> By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.[15]

Other cases recognize that the EEOC's position is more in line with *Barnett*[16] and that both *United Airlines* and *Barnett* undercut *Huber*.[17]

This issue is currently before the Fifth Circuit.[18] Although that court has not directly decided the question, it has issued language that some interpret as supporting *Huber* over the EEOC's position. Within the dicta of *Daugherty v. City of El Paso*, the court wrote: "Stated another way, we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."[19]

But that language in *Daugherty* was tied to its facts and is distinguishable. There, the plaintiff, a part-time worker, was not seeking reassignment to a parallel job but rather to a full-time job (a promotion in effect), even though such jobs were filled by seniority.[20] The plaintiff also rejected a job offered to him by the employer and insisted on another job for which he did not meet the qualifications.[21]

Moreover, *Daugherty* relied on a case citing the Rehabilitation Act, decided at a time when reassignment was not a permissible accommodation at all (which is no longer the case).[22] Finally, *Daugherty* predates *Barnett*, and the panel's resistance to "preferences" for individuals with disabilities is contrary to *Barnett's* statement that by definition, any accommodation "requires the

("Furthermore, Johnson need not demonstrate that he formally applied for the West Virginia position. He need only show that such a position existed, and he has clearly done so in this case. A reasonable fact-finder could conclude that McGraw–Hill was not looking to accommodate Johnson but was, instead, seeking to terminate him." (citations omitted)).

10 Hubert v. Wal-Mart Stores, Inc., 486 F.3d 480, 483–84 (8th Cir. 2007).

11 *See* Huber v. Wal-Mart Stores, Inc., 552 U.S. 1074 (2007); 552 U.S. 1136 (2008).

12 *Huber*, 486 F.3d at 483–84 (citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027–29 (7th Cir. 2000)).

13 *United Airlines,* 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (Although *EEOC v. United Airlines* was a panel opinion, "every member of the court in active service approved overruling *Humiston-Keeling* and it was suggested that the panel use Circuit Rule 40e for that purpose.").

14 U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); *see also* EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013).

15 *U.S. Airways*, 535 U.S. at 397.

16 *See, e.g.*, Montemerlo v. Goffstown Sch. Dist., SAU No. 19, No. 12–CV–13–PB, 2013 WL 5504141, at *6 n.6 (D.N.H. Oct. 4, 2013).

17 *See, e.g.*, Kosakoski v. PNC Fin. Servs. Grp., Inc., No. 12-CV-00038, 2013 WL 5377863, at *15–17 (E.D. Pa. Sept. 26, 2013).

18 EEOC v. Methodist Hosps. of Dall., 218 F. Supp. 3d 495 (N.D. Tex. 2016), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017).

19 Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 2000).

20 *Id.* at 696.

21 *Id*. at 699. Other cases favorably citing *Daugherty* are likewise distinguishable. For example, in *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004), the defendant actually offered the plaintiff another position, and the reassignment in *EEOC v. Sara Lee Corp*., 237 F.3d 349, 354 (4th Cir. 2001), would have violated a seniority policy.

22 *See* Chiari v. City of League City, 920 F.2d 311 (5th Cir.1991). For the change in position under the Rehabilitation Act with regard to reassignment, see, for example, *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 633–34 (6th Cir. 1999).

employer to treat an employee with a disability differently, i.e., preferentially."[23] Any pre-*Barnett* analysis on this issue is suspect, as the Seventh Circuit noted in *United Airlines*.[24]

The most recent addition to the case law is hardly illuminating. In *EEOC v. St. Joseph's Hospital, Inc.*,[25] the Eleventh Circuit concluded that allowing an employee to compete for a reassignment was enough, if there is a company policy to hire the best-qualified applicant.[26] But that would seem to be unnecessary dicta, since the opinion affirmed the jury verdict that—whatever the scope of the reassignment obligation—the employer's refusal to reassign was a failure to accommodate under the facts of the case.[27] Moreover, the three reasons for its rejecting the EEOC position are all open to dispute. First, the court noted that the statutory list is of things (including reassignment) that "may" be reasonable accommodations.[28] Although doubtlessly true that reassignment is not a reasonable accommodation in every case, the statutory wording does nothing to explain when it is or is not reasonable. Second, the court extended *Barnett* far beyond its holding, applying *Barnett*'s special rules specific to seniority policies—which the Supreme Court noted get special deference[29]—to all neutral workplace policies,[30] which do not get such deference.[31] In doing so it also ignored the language in *Barnett* that the accommodation obligation can require treating employees "preferentially."[32] Third, it relied on *Huber* while rejecting precedent from the courts in the Seventh, Tenth, and D.C. Circuits, but the basis for that rejection is questionable.[33] As shown above, most authorities favor the EEOC's position that reassignment requires actual placement. Therefore, employers that take a different position are putting themselves at risk, and "should proceed with caution."[34] Until the question is finally resolved, it may make practical sense for employers to follow the EEOC guidance. That certainly is the position that best accomplishes the ADA's purposes of establishing "a clear and comprehensive national mandate for the elimination of discrimination"; enacting "strong, consistent, enforceable standards addressing discrimination"; and ensuring the ADA's "broad scope of protection."[35]

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[23] U.S. Airways, Inc. v. Barnett, 535 U.S. at 397.

[24] EEOC v. United Airlines, Inc., 693 F.3d at 762–65.

[25] EEOC v. St. Joseph's Hosp., 842 F.3d 1333 (11th Cir. 2016).

[26] *St. Joseph's*, 842 F.3d at 1345.

[27] *Id*. at 1348.

[28] *Id*. at 1345.

[29] U.S. Airways, Inc. v. Barnett, 535 U.S. at 403–05.

[30] *St. Joseph's*, 842 F.3d at 1345–46.

[31] *U.S. Airways*, 535 U.S. at 397–98.

[32] *Id*.

[33] For example, the *St. Joseph*'s panel stated that *EEOC v. United Airlines, Inc.* did not actually decide the issue, instead just remanding it to the district court for decision. *St. Joseph's,* 842 F.3d at 1347 n.6. But that cannot be fully squared with the opinion in *United Airlines*, which first observed that its earlier precedent, *Humiston-Keeling*, had rejected the EEOC's position, then stated that "every member of the court in active service approved overruling *Humiston–Keeling*," and then issued its opinion "overruling *Humiston–Keeling*." EEOC v. United Airlines, Inc., 693 F.3d 760, 760–61 (7th Cir. 2012). The *St. Joseph*'s panel also selectively quoted or arguably overstated the other contrary precedent. *See* 842 F.3d at 1347 n.6 (citing Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999)); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998).

[34] *See* Natalie C. Rougeux, *Oh, What A Tangled Web We Weave When We Decipher Employee Leave*, 61 Fed. Law. 38, 43 (2014).

[35] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. § 12101 (2012)).