Supreme Court Says Employers Need Not Violate Seniority System as ADA Reasonable Accommodation

By Francis P. Alvarez

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In an eagerly awaited decision testing the scope of what is a "reasonable accommodation," the U.S. Supreme Court ruled an employer ordinarily will not be required to violate a seniority system to comply with the Americans with Disabilities Act. In *US Airways, Inc. v. Barnett*, U.S., No. 00-1250, the Court ruled that preferring a disabled employee over two, more senior employees in an assignment request was not "reasonable in the run of cases" and, absent a showing of "special circumstances" to justify such a preference, courts should find such accommodations "unreasonable."

The plaintiff, a cargo handler for US Airways, injured his back on the job and subsequently invoked the company's seniority system to transfer to a less physically demanding mailroom position. When he learned that two employees with greater seniority planned to bid on the same job, he requested an exception to allow him to remain in the mailroom. The employer decided not to make the exception, and the employee lost his job.

The employee sued the employer, claiming it violated the ADA when it refused to bend its seniority system and to engage in an interactive process to determine other possible reasonable accommodations. In its defense, the employer argued the ADA did not require it to violate the seniority system, even if that were the only means to keep the disabled individual employed. Although the trial court agreed with the employer and granted its motion for summary judgment, the U.S. Court of Appeals for the Ninth Circuit reinstated the employee's claim and ruled an employer may have to disregard a *bona fide* seniority system to accommodate a disabled employee.

Supreme Court: Violations of Seniority Systems Are Presumed Unreasonable

Ruling 5-4 to vacate the Ninth Circuit's decision, the U.S. Supreme Court held that, in *most cases*, the ADA does not require an employer to violate a *bona fide* seniority system as a reasonable accommodation. In doing so, the Court rejected the positions of both parties and forged a new standard, essentially adopting a middle ground between the two.

The employer argued that breach of a *bona fide* seniority system policy is never a "reasonable" accommodation because it would provide individuals with disabilities more than "equal" treatment, something it claimed the ADA does not grant. While the Court found this argument linguistically logical, it ignored a fundamental premise of the ADA, that preferences sometimes are necessary to provide disabled individuals with an equal employment opportunity. The Court stated that, "by definition, any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially." The Court concluded that preference, by itself, does not make a proposed accommodation "unreasonable."

On the other hand, the employee contended that in ADA reasonable accommodation cases, an individual must show only that a proposed accommodation is "effective," not reasonable. The "reasonableness" of a proposed accommodation should be considered only as part of the employer's burden of showing that the accommodation posed an "undue hardship" on the operation of its business. To do anything else would make the terms "reasonable accommodation" and "undue hardship" virtual mirror images, which in turn would create a practical dilemma in sorting out who bore the burden of proof on such issues.

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Rejecting this position, the Court found that, in ordinary English, "reasonable" does not mean "effective" and the concept of "effectiveness" is conveyed in the term "accommodation." The Court also observed that an effective accommodation could prove unreasonable because of its impact on fellow employees, even though an employer, looking at the matter from a purely business perspective, might be relatively indifferent.

Ultimately, the Court fashioned a rule that could be considered by some as a "compromise." Essentially, the ruling establishes a burden shifting approach to analyzing requests for accommodations under the ADA. At the outset, an employee carries the burden of proving that an accommodation is "reasonable." An employee can do this by showing that the accommodation is "reasonable on its face" or, assuming it is not, that there are "special circumstances" that make the accommodation "reasonable" in the specific situation at hand. Once this is established, the burden then shifts to the employer to prove the proposed accommodation poses an undue hardship on the operation of the business.

With regard to the facts of the case before it, the Court held that violating a seniority system "would not be reasonable in the run of cases" unless the employee can show some additional facts, i.e., special circumstances, that make a violation of the seniority system reasonable in his particular situation. For example, the Court said the employee may be able to show that the employer already had made exceptions to the seniority system in its policy or practices. If so, the burden would then shift to the employer to show that violating the seniority system would pose an undue hardship on its operations.

To further justify its position, the Court stated that the primary purpose of the ADA is to "diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace…. These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike. They sometimes will require affirmative conduct to promote entry of disabled people into the workforce. . . They do not, however, demand action beyond the realm of the reasonable."

Many difficult questions are left unanswered by the ADA statute and regulations. It may be that these questions -- including the issue of "direct threat to self" currently before the Supreme Court in Chevron USA, Inc. v. Echazabal -- are resolved only by analyzing them in terms of the statute's "primary purpose," as the Court did here. In those future cases, the above passage from the Court's opinion may be relied upon frequently.

A Divided Court Delivers Five Opinions
The majority opinion in the case was written by Justice Breyer and was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor and Kennedy. Four Justices wrote concurring or dissenting opinions, illustrating the divisions within the Court on the appropriate standard and burdens of proof in reasonable accommodation cases:

Justice O'Connor joined the majority opinion, but she also wrote in a concurring opinion that she found the test applied by the majority "problematic." In her view, the key issue in determining whether an employer must bend a seniority system to provide a reasonable accommodation is whether the system is "legally enforceable." Where a seniority system is adopted pursuant to a handbook policy that an employer reserves the right to alter, according to Justice O'Connor, an exception to the system might be justified. Although her position would seem to conflict, she sought to avoid a "stalemate" and joined in the majority opinion, stating the test applied by it "will often lead to the same outcome as the one I would have adopted."

Justice Stevens also issued a concurring opinion, noting that the following questions should be resolved when the case proceeds on remand:

- did the mailroom position held by Barnett become open for bidding merely in response to a routine airline schedule change, or as the direct consequence of the layoff of several thousand employees;
- should the requested accommodation be viewed as an assignment to a vacant position, or as the maintenance of the status quo; and
- what impact would a violation of the seniority policy have on other employees.

These questions echo a major concern voiced by the Court - to what extent would violations of the seniority policy negatively impact the rights of other employees.

Justice Scalia filed a dissenting opinion in which Justice Thomas joined. The "principal defect" of the majority's opinion, he stated, is its mistaken interpretation that the ADA suspends all employment rules and practices if a proposed accommodation is a "reasonable" means of enabling a disabled employee to keep a job. When one departs from the view that reasonable accommodation is limited to "disability-related obstacles," the ADA's accommodation provision "becomes a standardless grab bag -
leaving it to the courts to decide which workplace preferences (higher salary, longer vacations, reassignment to positions to which others are entitled) can be deemed ‘reasonable’ to ‘make up for’ the particular employee’s disability.” In conclusion, Justice Scalia suggested that the majority opinion left the question of seniority systems in a state of uncertainty that “can be resolved only through constant litigation.”

Justice Souter also wrote a dissenting opinion in which Justice Ginsburg joined. Examining legislative history, Justice Souter concluded Congress intended that the impact on a collectively bargained seniority system be considered as only “one factor” in assessing undue hardship. Consequently, he found it inappropriate that “greater weight” would be given to a seniority system that was imposed unilaterally by an employer and not subject to protection by another federal statute, i.e., the National Labor Relations Act.

Implicitly answering one of the questions Justice Stevens posed for further consideration, Justice Souter characterized the accommodation request as one “seeking not a change but a continuation of the status quo ... [a]ll [Barnett] asked was that US Airways refrain from declaring the position ‘vacant’; he did not ask to bump any other employee and no one would have lost a job on his account.” Finally, turning the tables on the use of handbook disclaimers—a common and useful employer tool—Justice Souter observed that violating the seniority policy as an accommodation was reasonable since US Airways had taken great pains through the use of such a disclaimer to ensure the company could not be expected to follow the policy.

The Effect of Barnett on Reasonable Accommodation Requests
Since the Barnett case involved a unilaterally adopted seniority system, both union and nonunion employers now must determine what the impact will be on their seniority systems. Even more challenging, employers must assess how the analysis in Barnett applies to requests for accommodations involving other kinds of employer policies and practices.

1. Implications for Non-Collectively Bargained Seniority Systems

The US Airways seniority system was an employer established policy and not pursuant to a collective bargaining agreement. Recognizing the importance of seniority systems, the Court noted they create and fulfill employee expectations of “fair, uniform treatment,” as well as promoting job security, opportunities for predictable advancement, and predictability in employment decisions, such as layoffs.

Unlike collectively bargained seniority systems, employer established seniority systems preserve employer control, and as Justice Souter observed, employers typically reserve the right to modify or depart from the policy at their discretion. However, from an ADA accommodation perspective, retaining the control to deviate from employer policies may undercut the argument that making exceptions is “unreasonable.” Employers attempting to avoid or defend employee handbook claims by disclaiming any contractual obligation to provide the stated benefits might find, paradoxically, they are increasing their obligations to bend those policies when faced with an ADA accommodation request.

It remains to be seen if the federal courts will consider the impact of handbook disclaimers when they assess whether violating a seniority policy (or other policies) contained in an employee handbook is a reasonable accommodation. Nevertheless, employers should expect plaintiff employment lawyers to argue that handbook disclaimers and other policies that have been unilaterally modified are evidence of “special circumstances,” rebutting the presumption that violating a seniority system “would not be reasonable in the run of cases.”

Similarly, employers should expect employees to point to formal and informal exceptions to seniority systems as “special circumstances” that justify a violation to provide a “reasonable accommodation.” Since one exception might lead to another, employers should reevaluate their willingness to make exceptions to other policies or practices to avoid establishing a “precedent.”

2. Implications for Collectively Bargained Seniority Systems

Until now, the federal appeals courts have held unanimously that an accommodation request under the Rehabilitation Act and ADA cannot trump a collectively bargained seniority system. Since the Supreme Court was not asked to address that issue, those decisions presumably remain good law, and the Court appears to have cited those decisions with approval. Two justices also suggested that collectively bargained seniority systems are inviolate because the National Labor Relations Act and settled law make them per se enforceable. That being said, Barnett implicitly may have established a new standard for all reasonable accommodation cases, and federal courts might be inclined to reevaluate accommodation cases involving requests for violations of collectively bargained seniority systems. For example, an employee might argue that the Court rejected “per se” rules for all accommodation requests and that “special circumstances” could be established through evidence that the union and employer routinely waive the obligations under a seniority system. Ultimately, it is likely
that courts will continue to grant deference to collectively bargained seniority systems. However, as with non-collectively bargained systems, evidence of "exceptions" might make winning such cases on a motion for summary judgment more difficult than before.

3. Implications for Accommodations Unrelated to Seniority Systems

Perhaps the most interesting question following Barnett is how it will be applied in cases that do not involve seniority systems. As noted above, a fair reading of Barnett suggests that it provides an analytical framework for all reasonable accommodation cases. Under such a framework, an employee would carry the burden of proving that any proposed accommodation is "reasonable on its face," i.e., "ordinarily reasonable" or "reasonable in the run of cases."

Sometimes, the accommodation might be so minor that this could be accomplished very easily. In other circumstances, the accommodation would not be "reasonable on its face" and the employee would have to present "special circumstances" that make it reasonable in the specific situation at issue. In either case, at that point, it would be up to the employer to show that, in its own specific circumstances, granting the accommodation would present an "undue hardship."

It also is very difficult to predict whether the presumption that an accommodation "would not be reasonable in the run of cases" will be applied to policies other than seniority systems. The Court's majority opinion in Barnett references a number of accommodations including modification to "disability-neutral" rules concerning employee break periods, office furniture budgets, and office assignments. The opinion suggests these accommodations do not seriously compromise employee expectations regarding fairness and due process and clearly were contemplated by Congress. One could infer from those statements that the Court finds such accommodations "reasonable in the run of cases" and the relevant consideration for the employer is whether the accommodation imposes an undue hardship on the operation of its business.

The text of the ADA and the EEOC’s Regulations, however, provide a host of other potential accommodations including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." Only time will tell whether courts find these accommodations "reasonable in the run of cases."

Two specific accommodations likely to be scrutinized after Barnett are requests for additional leave beyond an employer's policies and requests for reassignment to vacant positions on a preferential basis, i.e., where the disabled employee is minimally qualified, but less qualified than other employees seeking the position. As with seniority systems, employees have "expectations of fair, uniform treatment" regarding leave and transfer policies. Nevertheless, the EEOC takes the position that, absent a showing of undue hardship by the employer, both of these accommodations are required under the ADA if they are the means of keeping an employee with a disability employed. Employers will need to track whether the federal courts presume these and other accommodations "would not be reasonable in the run of cases." In fact, it is quite possible courts might answer these questions differently, further exacerbating the challenge faced by employers and their counsel.

Conclusion

As the first Supreme Court ADA reasonable accommodation decision, Barnett obviously is an important ruling for employers. On balance, the decision seems to favor employers. The compromise forged by the Court in Barnett, however, is complex and employers may have difficulty applying it.

From a prevention perspective, Barnett continues to support the view that there are few "per se" rules under the ADA and the key to compliance lies with "individualized assessment." However, the decision seems to suggest that employers seeking to minimize the need to make "reasonable accommodation" exceptions to "disability-neutral" policies, such as seniority policies, should consider limiting exceptions made in other circumstances. A blanket "no exceptions" approach obviously runs counter to the concept of "individualized assessment."

In all likelihood, the divided Court in Barnett is a harbinger of more conflict and division as the federal district and appellate courts attempt to apply the ruling to cases involving requests for accommodations unrelated to seniority systems. Employers and their counsel will need to track these cases closely to discern the best strategy for complying with the ADA in day-to-day employment decisions.

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