

## Reassignment Podcast Final CC

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>> CALEB BERKEMEIER: Welcome to ADA Today, a podcast of the Mid-Atlantic ADA Center. My name is Caleb Berkemeier, training specialist for the ADA Center, and I'm joined by Nancy Horton, our information specialist.

We are not coming to you from our recording studio in Rockville, Maryland at TransCen Headquarters because we are still in quarantine. The date is May 1<sup>st</sup>. Perhaps by the time this episode is released, things will be looking better and we can only hope.

Nancy, how are you doing?

>> NANCY HORTON: So far so good, Caleb. Thanks for asking.

>> CALEB BERKEMEIER: Our topic for today is reassignment. We're going to look at it from the perspective of the courts in our region.

Before we get into what reassignment is, Nancy, could you just give us a brief background on this issue in the courts in our region? Has it been addressed?

>> NANCY HORTON: Yes, it has, Caleb. This has been a pretty thorny issue across the country. Actually, something that has been debated for years, reassignment in employment as a form of reasonable accommodation. And it has been addressed by many courts across the country, including several in our region.

>> CALEB BERKEMEIER: Okay. So, I think what we'll do is start with just a little overview of what reassignment is in case anyone is not clear on that and then talk about some of the challenges and what a recent decision in our region is on this issue.

So, reassignment is a reasonable accommodation and it is considered to be, by the Equal Employment Opportunity Commission, an accommodation of last resort. There has to be a job that exists and that is vacant in order for someone to be reassigned to it. You don't have to create a new job but you don't have to move another employee in order to create a vacancy to reassign an employee.

If you reassign, the job should be equivalent in status and pay, benefits, but if that kind of position doesn't exist, it is possible to reassign to a lower position.

Nancy, if someone is reassigned to a lower position, does the employer have to maintain the same rate of pay?

>> NANCY HORTON: No. Generally not, only if an employer would routinely do that for employees who are being transferred, for example. But typically, as part of reasonable accommodation, an employer would not have to maintain a higher rate of pay if someone is reassigned to a lower level position because that is all that is available at that time.

>> CALEB BERKEMEIER: Okay. And the employee must of course be qualified for the position as well, whatever they are being reassigned to.

Now, according to the EEOC, does the employee need to be the best qualified or do they need to compete for that position?

>> NANCY HORTON: No. It has always been the EEOC's position that the employee only needs to be minimally qualified. They have to meet the minimum qualification standards for the job but they do not have to be the best qualified. Nor do they have to compete with other applicants or other employees who might be seeking transfers for other reasons.

The only real exception to that is that if the employer has a seniority system that is consistently applied in the workplace, then someone who has seniority and might be seeking that same vacant job would have seniority over someone who is seeking a position as a reassignment, but that's a pretty narrow exception.

>> CALEB BERKEMEIER: Now, what about if the employee could be qualified for the job if they received a little bit of training? Does the employer have to do that?

>> NANCY HORTON: Generally not. Again, unless it's something that the employer routinely does, and many employers do hire people or place people in positions and provide them with at least some level of training in order to take over a new position or to be hired, and so that is more of an equal opportunity issue. The employer would have to provide whatever training or other assistance they routinely provide, but they wouldn't have to provide anything out of the ordinary to enable the individual to become qualified.

>> CALEB BERKEMEIER: Okay. So, that is EEOC's stance in a nutshell. Is there anything that we might have missed?

>> NANCY HORTON: I don't think so. I think that's a pretty good nutshell.

>> CALEB BERKEMEIER: Okay. Now, there have been some challenges to this position and there are two main ones that I have seen that employers are saying.

First of all, there seems to be a complaint that reassignment actually looks a lot like affirmative action which they say is not supposed to be part of the ADA. What could you say about that issue? What is the difference between affirmative action and preferential treatment?

>> NANCY HORTON: Well, the ADA generally does not require affirmative action. That's true. The basis of the ADA is non-discrimination, equal opportunity. However, the EEOC's position has always been, and based on the statute, that reasonable accommodation as one piece within the ADA is by nature, something that is preferential, if you will. It requires employers to do unique things, out of the ordinary things, things that they don't do for other workers, for all workers in general.

So, the EEOC's position is that reasonable accommodation is different. It does require preference to do things for workers that you don't do for all workers. So, you know, employers that argue that non-competitive reassignment, giving a position, moving an employee into a position when they may have a more qualified candidate is the same as affirmative action, but the EEOC doesn't take that position.

>> CALEB BERKEMEIER: The other challenge that I've seen is that employers say having to go with a candidate who is not necessarily the best qualified but meets the minimum amount of

qualification standards is actually an undue hardship because if they can't put the best people into the positions, from their perspective, then that is somehow going to make it difficult for them to operate at their optimum level. What do you think of that challenge?

>> NANCY HORTON: Well, I mean, I think it's an interesting, you know, argument essentially because it is an argument that fits into the framework of the ADA, if you will. These are arguments that I think you, again, did a good job of putting it in a nutshell there that if an employer can't choose the most qualified candidate that they have, then it's - that in and of itself creates an undue hardship. An undue hardship is a limitation on reasonable accommodation and always has been. Only reasonable accommodations need to be provided, not accommodations that impose an undue hardship.

>> CALEB BERKEMEIER: So, why don't we turn to the courts. How have they handled this issue?

>> NANCY HORTON: Well, they have really split which is why it's an interesting issue and it's, you know, an interesting issue to sort of keep our eye on as it has evolved over the years. Courts really have split pretty significantly on this issue.

I mean, the EEOC and the Department of Justice which takes employment cases when it's public employers, state and local government entities. So, the EEOC and the Department of Justice have always argued that position that is in - outlined in the EEOC's regulations and their enforcement guidance materials that reassignment needs to be noncompetitive.

But some of these arguments that some employers have made, several courts have agreed with employers and others have agreed with the federal government.

So, we've got several courts in the Southeast and up through the Midwest that have agreed with some of the employers' arguments on this issue and have said that reassignment does not require this noncompetitive aspect, that employees with disabilities who need reassignment can just compete with other applicants.

On the other hand, we do have several courts of appeals which are sort of the mid-level courts in the federal court system. We have district courts that are at the lower level of the federal

court system and when those district court decisions are appealed, they go to circuit courts, courts of appeals, and finally we have the Supreme Court.

So, we have several circuit courts siding with these employer arguments and we also have several agreeing with the federal government's position on this, including a couple of circuits in the Midwest and out toward the west as well as the appeals court for the District of Columbia which is in our region. That court here in our region has held that reassignment, like other types of accommodations, mean more than just equal opportunity to compete against other applicants but that employers need to you know, give some preference when the reassignment is a form of accommodation.

>> CALEB BERKEMEIER: The courts that have come down against EEOC's position on this, do you have a sense of why or how they justify their conclusion that reassignment should be competitive?

>> NANCY HORTON: I think basically it's that they are - they are persuaded by the argument that it poses an undue hardship by preventing employers from placing the most qualified candidates that they have available to choose from. And I know one of the things that we really wanted to talk about today is that not only do we have a split among the courts of appeals across the country, but we actually now have a split within the fourth circuit here which encompasses the states of Maryland and Virginia and West Virginia which are in our region here in region three in the Mid-Atlantic region, as well as the states of North and South Carolina. That's the fourth circuit court of appeals.

Recently in recent years, we've seen a split shaping up within the fourth circuit.

We had a couple of decisions within the fourth circuit, one of which came out of North Carolina and another which was in Virginia in the Eastern District of Virginia, and that was a case that it was United States v. Woody which was actually a case that the Department of Justice brought against the Richmond City Sheriff's Office.

And in both of those cases, the courts sort of sided with the employers and agreed that no sort of preference was required, that employers simply needed to allow these employees with

disabilities who needed to be moved into new jobs to compete for those positions.

But pretty recently, we had a decision in Maryland court which went the other way and agreed with the EEOC's position and held that reassignment needs to be preferential, needs to be if the individual is minimally qualified and there is no seniority system that would override that, that the individual should be provided with the position as a form of reasonable accommodation. That was a case that the EEOC brought against the M&T Bank.

And so, now we have this split within the fourth circuit itself which encompasses part of our region. So, it's a very interesting issue that is shaping up here across the country.

So, until such time as one of these cases or some case maybe that comes along in the future gets to the Supreme Court, we - we're going to have this sort of inconsistency across the country and even within our region.

>> CALEB BERKEMEIER: Yeah. That case is EEOC v. M&T Bank and we'll put a link to that on the webpage for this episode if anyone wants to take a look at it. It's really interesting. A lot of interesting stuff in there.

The one question I had is so, for employers who are in an area that is covered by a court that has sided against the EEOC, what does that look like on a practical level? Say an employee files a complaint with EEOC because their employer failed to accommodate them by reassigning them noncompetitively.

What does the EEOC do with the knowledge that it's an area where a court has sided against them. Do they still go through the same process?

>> NANCY HORTON: They certainly might and they certainly, you know, I can't - obviously, we don't speak for the EEOC. But this sort of brings up an interesting point because one of the sort of arguments that was part of the M&T Bank case which was very contentious and went back and forth and round and round for quite some time, where the employer was arguing that they did have this policy of hiring the most qualified candidate but the EEOC argued in that case that even if they did have such a policy, there was evidence that they didn't really follow it, that they didn't consistently follow such a policy in practice

and that they selected candidates who were not objectively the most qualified.

So, I think that the EEOC would certainly still look at complaints to see that you know, an employer is not just saying well, we have this policy but you know, they're really not following it.

Certainly, employers that are in areas where courts have ruled that reassignment only needs to be a competitive opportunity can certainly follow that practice but that would be the caution is that they really need to make sure that they really are in fact doing that and doing it consistently. I don't think that would automatically preclude anyone, an individual or worker with a disability, from bringing a complaint in those areas.

>> CALEB BERKEMEIER: Yeah. That makes sense. So, but if we assume that the employer has done everything exactly as they should have, does that mean that ultimately the court decision trumps the EEOC?

>> NANCY HORTON: Well, yes. Where it, you know, courts are sort of the final say. Courts sometimes have disagreed with federal agencies and until either the Supreme Court issues a ruling that then we have a consistent you know, application of that across the country, or Congress does something to amend the law, for example, to clarify an issue potentially and we've seen this happen before with the ADA Amendments Act. The courts can make rulings and they sometimes disagree with the federal agencies and so there is some back and forth. It's our system. You know, we have this system of checks and balances.

So, right now, this is just an issue that at this point in time does remain somewhat unsettled as far as consistently across the country.

So, employers need to sort of pay attention to where they're operating and certainly, many employers operate across state borders, across different regions. There could be employers that have operations in different court districts or circuits where they actually have different guiding court decisions. So, it really can be a challenging issue.

Of course, you know, following the EEOC's position and their guidance is always certainly a safe thing for employers to do and many employers are very proactive about accommodations and

trying to retain workers with disabilities in these kinds of things. So, they certainly - a court decision doesn't mean that they have to follow something that is sort of a lesser standard. They certainly could follow the EEOC's guidance if they choose to do that as their own policy.

>> CALEB BERKEMEIER: Yeah. Maybe one more question here as we wrap up. I thought it was interesting that in this decision, the court said that on the issue of whether or not reassignment is an accommodation that requires some level of preferential treatment, they said that the plain language of the statute itself convinces them that this is the case, which I thought was interesting because if the plain language is so convincing, then why is there a split?

>> NANCY HORTON: Well, I think that is a very, very interesting point because they went right back to the statute. They - they went back beyond the regulation. So, they weren't really arguing about whether it's EEOC was right or wrong or went too far with their interpretation and their regulations. I thought that was interesting as well. They went back and looked at the law itself which was passed by Congress and which is always supposed to, you know, courts are supposed to go by that. Laws are set by Congress.

And so, they really went back to the statute and that's exactly what they said in their decision, that they felt like because the statute said that the individual needs to be qualified, not the best qualified but qualified, it really - it really hinged on that.

So, I agree. I think that was a very interesting aspect of that ruling.

>> CALEB BERKEMEIER: Well, very complicated, very interesting, and we'll have to continue to keep our eye on it as these things develop.

Nancy, thank you for joining us and helping us understand this.

>> NANCY HORTON: My pleasure.

>> ANNOUNCER: ADA Today is produced by the Mid-Atlantic ADA Center. For questions about the Americans with Disabilities Act, call the ADA National Network toll-free at 1-800-949-4232, and visit our website at ADA Info dot ORG.

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