LAW WATCH

00–6 A Legal Newsletter from Foley & Lardner MAR. 15, 2000

Barnett v. U.S. Air

The Ninth Circuit Court of Appeals recently took the unusual step to withdraw its three-judge panel decision ***Barnett v. U.S. Air, Inc.*** and to re-hear the decision *en banc*, that is, before a court consisting of **eleven** appellate court judges. The Ninth Circuit is the federal Court of Appeals governing Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands, and it is the largest and one of the most influential federal appellate courts in the nation. The ***Barnett*** decision was significant because in it, the Ninth Circuit addressed several fundamental issues arising under the ADA and held, as a matter of first impression, that (1) **it is the employee's burden to demonstrate the existence of a reasonable accommodation that was available to employer**, and (2) **an employer is not required to violate its seniority system to give disabled employees preference over non-disabled employees**. The court has calendared a rehearing of the case on June 22, 2000, with the following issues presented for reconsideration:

> Did the district court err in granting summary judgment on Barnett's action under the Americans with Disabilities Act because it (1) found that employers have no obligation to engage in an "interactive process"; (2) placed improper burdens of proof upon Barnett; and (3) found that no genuine issues of material fact existed as to whether U.S. Air discriminated against Barnett.

NINTH CIRCUIT TO RECONSIDER ADA OBLIGATIONS AND EMPLOYERS' SENIORITY SYSTEMS

Executive Summary

Action: On February 1, the Ninth Circuit Court of Appeals decided to empanel an en banc court of eleven judges to re-hear a significant case concerning the relationship between an employer's seniority system and requests for accommodations made pursuant to the Americans With Disabilities Act ("ADA").

Impact: Employers cannot assume that reliance on their seniority systems will provide a complete defense to an ADA claim if an employee seeks a transfer due to his or her inability to continue in his or her existing position as the result of an ADA "disability."

Effective Date: Immediately.

Background

The plaintiff, Robert Barnett, was an employee of U.S. Air who sustained job-related injuries that permanently limited his ability to perform certain jobs. Based upon these limitations, Barnett was only able to work in a swing-shift mailroom position. However in 1992, employees with more seniority than Barnett bid on his position. Based upon his more junior seniority, Barnett could only bump into a cargo position, which he could not perform due to his physical work restrictions. Barnett requested that U.S. Air accommodate him under the Americans With Disabilities Act, by making an exception to its seniority system and allowing him to remain in his mailroom job. U.S. Air did not grant this request.

U.S. Air eventually removed Mr. Barnett from the mailroom position and placed him on a leave of absence because he could not perform the cargo position. While on his leave of absence, Barnett requested that U.S. Air provide him with accommodations in the cargo position by purchasing special lifting equipment, or by modifying the cargo position so that he would perform only desk work. After U.S. Air denied these requests, Barnett filed a lawsuit for discrimination under the ADA.

Issues of First Impression

The U.S. District Court for the Northern District of California granted summary judgment to U.S. Air. On October 6, 1998, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the ruling in a 2-1 decision. On October 28, 1999, the panel augmented its original decision, again affirming judgment in favor of US Air. The ***Barnett*** Court ruled on two ADA issues of first impression in the Ninth Circuit: (1) to state a claim under the ADA, an employee must demonstrate the existence of a specific "reasonable accommodation" available to the employer; and (2) employers do not generally have to consider making exceptions to a seniority system as a form of reasonable accommodation.

Interactive Process Regarding Reasonable Accommodation

Relying upon a number of federal Courts of Appeals that have considered this issue, ***Barnett*** first held that an employee's prima facie burden under the ADA includes the burden of showing that a specific reasonable accommodation was available to the employer at the time the employee's limitations became known. However, the court was also careful to note that by providing the employee with this legal burden, "we do not mean to suggest that an employer does not have any role in assessing and finding a reasonable accommodation for a disabled employee at the time that limitations become known. Moreover, we are not suggesting that in order for an accommodation to be reasonable, the employee must have suggested it to the employer."

Although an employer's failure to engage in an "interactive process" with an employee regarding reasonable accommodations will not automatically result in discrimination under the ADA, an employer who fails to engage in this interactive process may risk missing an accommodation known to the employee but not considered by the employer. As such, we believe it makes "good sense" for an employer to engage in an interactive process with employees who have a known disability which limits the employees' ability to perform the essential functions of their jobs.

Seniority Systems

Barnett next considered the relationship between the ADA and seniority systems. Because the ADA does not directly address this issue, the court looked to federal cases interpreting the Rehabilitation Act and found that "federal courts almost uniformly adopted a per se rule that reasonable accommodation under the Rehabilitation Act **did not require employers to infringe on the seniority rights** of other employees" (emphasis added). The court also found ambiguous statements about seniority systems contained in the ADA's legislative records. The ***Barnett*** panel noted that although Congress considered seniority rights as one factor to be weighed in the reasonable accommodation analysis, it was not a dispositive factor.

Based upon these ambiguities, the majority was swayed by legal opinions from several other federal appellate courts that concluded the ADA does not require employers to give disabled employees preference over non-disabled employees in hiring and reassignment decisions. Although Judges Wiggins and Rymer initially declined to adopt either a "per se" or a "case by case" analysis, they subsequently amended this portion of the decision to hold that **employers are not required to alter a seniority system to accommodate a disabled employee under the ADA, regardless of whether the seniority system was arrived at through collective bargaining or was developed through the policies and practices of a non-union employer**. "The ADA required no more than equality among disabled and non-disabled employees in hiring and reassignment decisions, and requiring an employer to ignore a bona fide seniority system effectively gives disabled employees preference over similarly situated non-disabled employees."

In his dissenting opinion, Judge Fletcher criticized the majority's deferential treatment of seniority systems that are not created pursuant to collective bargaining agreements. According to Judge Fletcher, federal labor law and public policy demand deference to collective bargaining agreements and their provisions, which policies can limit the ADA obligations of employers. Judge Fletcher also noted that **no other federal circuits courts** have held that **non-collectively bargained seniority systems are exempt** from reasonable accommodation consideration under the ADA, and he concluded that there is no legitimate federal public policy warranting judicial deference to policies unilaterally created by a non-union employer.

Order to Withdraw

On February 1, 2000, the Ninth Circuit ordered that the case be reheard by the *en banc* court consisting of eleven of the Ninth Circuit's appellate judges and ordered that the three-judge panel decision not be cited as precedent. Under Ninth Circuit Rules, an en banc hearing is not favored and ordinarily will not be ordered unless (1) the en banc consideration is necessary to secure or maintain uniformity of the courts' decisions or (2) the proceeding involves a question of exceptional importance. Because these two issues are matters of first impression within the Ninth Circuit, it is clear that the court has ordered an *en banc* hearing because of the exceptional importance of these issues to all employers subject to the Ninth Circuit's reach. Moreover, because of the influence of the Ninth Circuit throughout the country, it is likely that its rulings on these fundamental issues under the ADA will be quite significant.

Conclusion

Appellate courts around the country are struggling to determine the full scope of employers' obligations under the ADA. An *en banc* decision by the Ninth Circuit addressing the burdens of proof under the ADA, the impact of the failure to engage in an interactive process with an affected employee, and the interrelationship between seniority systems and ADA accommodations will be a significant addition to the developing case law under the ADA.

At this juncture, employers should not assume that reliance on a seniority system will insulate them from claims under the ADA. And, as always, it remains good practice to meet with disabled employees and investigate together all possible accommodations, including transfer, that will permit the employee to continue working. If the employee requests an accommodation that would violate the terms of a valid seniority system, the full impact of the request — on other similarly situated

employees, on the union, if any, and on the integrity of the system as a whole — should be evaluated before a decision is made.

If you would like more information about the ***Barnett*** decision, or about obligations under the ADA generally, please contact **Lynn Goodfellow** in our San Diego office, **Bud Bobber** in our Chicago office, **Guy Farmer** in our Jacksonville office, **Rick Albert** in our Los Angeles office, **Michael Auen** in our Madison office, **Tom Pence** or **Ann Mennell** in our Milwaukee office, **Dick DuRose** in our Orlando office, **Bob Wenbourne** in our Sacramento office, **John Douglas** in our San Francisco office, or the member of the firm who normally handles your legal matters.

Law Watch *is a review of recent legal developments prepared by the law offices of Foley & Lardner.*

The information reported should not be construed as legal advice, nor utilized to resolve legal problems.

CHICAGO, IL
330 North Wabash Avenue
Chicago, IL 60611-3608
Tel – (312) 755-1900

DENVER, CO
1999 Broadway
Denver, CO 80202
Tel – (303) 294-4400

JACKSONVILLE, FL
200 Laura Street
Jacksonville, Fl 32202-3527
Tel - (904) 359-2000

LOS ANGELES, CA
2029 Century Park East
Los Angeles, CA 90067-3021
Tel - (310) 277-2223

MADISON, WI
150 East Gilman Street
Madison, WI 53703-1441
Tel – (608) 257-5035

MILWAUKEE, WI
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
Tel – (414) 271-2400

ORLANDO, FL
111 North Orange Avenue
Orlando, FL 32801-2386
Tel – (407) 423-7656

SACRAMENTO, CA
300 Capitol Mall
Sacramento, CA 95814-4338
Tel - (916) 443-8005

SAN DIEGO, CA
402 West Broadway
San Diego, CA 92101-3542
Tel - (619) 234-6655

SAN FRANCISCO, CA
One Maritime Plaza
San Francisco, CA 94111-3404
Tel - (415) 434-4484

TALLAHASSEE, FL
300 East Park Avenue
Tallahassee, Fl 32301-1596
Tel - (850) 222-6100

TAMPA, FL
100 North Tampa Street
Tampa, FL 33602-5804
Tel - (813) 229-2300

WASHINGTON, D.C
3000 K Street
Washington, DC 20007-5109
Tel - (202) 672-5300

WEST PALM BEACH, FL
777 South Flagler Drive
West Palm Beach, FL 33401-6163
Tel - (561) 655-5050

Recent issues of Law Watch are also available on our web site at:

www.foleylardner.com

Check out Publications and Resource Center, then select Law Watch. You may wish to bookmark this page and refer to it frequently.

You may also subscribe to Law Watch and have it delivered electronically to your e-mail address by visiting our website.