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An Accommodation is Ordinarily Presumed to Be Unreasonable If It Violates an Employer's Bona Fide Seniority System Unless the Employee Can Show Special Circumstances That Make It Reasonable: *U.S. Airways, Inc. v. Barnett*

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AN ACCOMMODATION IS ORDINARILY PRESUMED TO BE UNREASONABLE IF IT VIOLATES AN EMPLOYER'S BONA FIDE SENIORITY SYSTEM UNLESS THE EMPLOYEE CAN SHOW SPECIAL CIRCUMSTANCES THAT MAKE IT REASONABLE: *U.S. AIRWAYS, INC. V. BARNETT*

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CONGRESS PASSED the American with Disabilities Act[1] (ADA) to provide legal recourse against disability-based discrimination in employment and to direct a national mandate to eliminate it.[2] Courts, however, have repeatedly issued decisions that narrow the scope of the ADA and strictly interpret its broad provisions against employees.[3] Although the Supreme Court rejects a per se bar approach to seniority systems in *U.S. Airways, Inc. v. Barnett*, the reality of its holding creates a heavy, blanket presumption of non-reasonableness for all accommodations that violate a seniority system. Though the Court leaves a small hole through which a disabled employee may prevail, it undermines the policies and principles of the ADA by setting an almost unattainable threshold for the employee while attributing too much power to seniority systems.

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[1] 42 U.S.C.A. §§ 12101-12213 (West 2003).

[2] *Id.* § 12101(b).

[3] *See generally* William Smith, *Drawing Boundaries*, 88 A.B.A. 49, 50 (2000) (citing cases).

After working ten years at U.S. Airways, Robert Barnett injured his back in 1990 while on the job and could no longer work as a cargo handler.[4] He invoked his seniority rights to transfer to the company's mailroom. In 1992, Barnett's position became open to seniority-based bidding by other employees. Barnett requested that U.S. Airways make an exception and allow him to remain in his mailroom position as a reasonable accommodation (RA) pursuant to the ADA. U.S. Airways, however, refused to make an exception and allowed other employees to bid on Barnett's job. Consequently, Barnett was immediately unemployed.

Barnett brought suit in the U. S. District Court for the Northern District of California claiming that U.S. Airways discriminated against him by refusing to reasonably accommodate his disability. The district court held that in light of the ADA exemption for undue hardship, having to deviate from U.S. Airways' seniority system would impose undue hardship on both U.S. Airways and its non-disabled employees and granted summary judgment to U.S. Airways.[5]

An en banc decision by the Ninth Circuit Court of Appeals reversed.[6] The Ninth Circuit conducted its own analysis of Barnett's request in the context of undue hardship. The court stated that a seniority system does not provide a per se bar to reassignment, rather it is merely "a factor in the undue hardship analysis" and that a "case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer."[7]

In July 2002, the U. S. Supreme Court handed down a 5-4 decision that vacated the Ninth Circuit's holding and remanded the case.[8] The Court held that an employer's demonstration that an RA conflicts with seniority rules would ordinarily, as a matter of law, render the accommodation unreasonable. The Court also held that an employee could overcome summary judgment by showing that special circumstances exist, which make the accommodation nevertheless reasonable in his case.

The ADA compels an employer to make "reasonable accommodations" to an employee's disability, unless the employer can

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[4] U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516 (2002) [hereinafter *Barnett II*].

[5] Barnett v. U.S. Airways, Inc., 228 F.3d 1105, 1109 (9th Cir. 2000) [hereinafter *Barnett I*].

[6] *Id.* at 1122.

[7] *Id.* at 1120.

[8] *Barnett II*, 122 S.Ct. at 1525.

prove the accommodation causes "undue hardship on the operation of the business."[9] Congress suggests "reassignment to a vacant position"[10] as an RA;[11] however, the employer is not required to "bump" another employee out of his or her position.[12] Undue hardship is defined as an action "requiring significant difficulty or expense" in light of factors such as the employer's size, operations, financial resources, responsibilities, and other employees.[13] In any disability discrimination case, the employee must first prove that the reassignment is reasonable, which the ADA sets at a relatively low threshold: a reassignment only has to be "feasible for the employer."[14] It is important to note that, unlike other federal employment-discrimination laws, the ADA does not provide employers with a defense or exemption for bona fide seniority systems.[15] The Equal Employment Opportunity Commission (EEOC)[16] is the agency assigned to issue regulations to carry out the statutory language of the ADA and has produced several well-accepted interpretive aids that help decipher the scope of its provisions.[17] Despite all of the interpretive help from the EEOC and the ADA's goal of providing "clear and comprehensive"[18] provisions, the various circuits have historically disagreed[19] on exactly what the RA requirement entails and have recently turned to the Supreme Court for guidance.

Like a fast moving train, the Court tracks its course of the RA requirement through several points of contention before getting to the heart of its decision. The Court begins by correctly dismissing, as a misreading of the statute, U.S. Airways' assertion

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[9] 42 U.S.C.A. § 12112(b)(5)(A).

[10] *Id.* § 12111(9)(B).

[11] *See generally* Paul Panken, *Representing the Restaurant Industry*, SG104 ALI-ABA 373 (2002) (discussing the reasonable accommodation provision of the ADA).

[12] Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

[13] 42 U.S.C.A. § 12111; *see generally* David Harger, *Drawing the Line Between Reasonable Accommodation and Undue Hardship Under the ADA: Reducing the Effect of Ambiguity on Small Businesses*, 41 U. KAN. L. REV. 783 (discussing undue hardship).

[14] Sprague v. United Airlines, Inc., No. Civ.A.97-12102-GAO, 2002 WL 1803733, at *2 (D. Mass. Aug. 7, 2002).

[15] 42 U.S.C.A. § 12113; *Barnett I*, 228 F.3d at n.10.

[16] 42 U.S.C.A. § 12116; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL § 600.1.

[17] *See generally* Stephen Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439 (discussing aids and guides).

[18] 42 U.S.C.A. § 12101(b).

[19] *See e.g.*, Stephen Befort & Tracey Donesky, *Reassignment Under the ADA: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045, 1061 (discussing cases from various circuits).

that the ADA requires "equal" but not "preferential" treatment of disabled employees.[20] The Court explains, to the contrary, that the ADA recognizes that preferential treatment may be necessary to accomplish its mandate for equal opportunity.[21] The very nature of RA's calls for employers to treat disabled employees differently than non-disabled ones by revising or removing work-place barriers to employment.[22] The Court also clarifies that a position qualifies as vacant under the ADA even though a seniority system will automatically assign an employee to it. The vacancy of a position hinges on its availability, and according to the Court, seniority systems allow a position to become open for bidding even though an employee like Barnett currently occupies it.[23] The Court then appropriately rejects Barnett's definition of "reasonable accommodation" that reads "reasonable" as "effective."[24] Guided by the ordinary meaning of the term "reasonable" and its use in the ADA, the Court concludes that "reasonable" cannot mean "effective" and justifies its reading via an example: an effective accommodation, one that meets the employee's disability needs, can still be unreasonable if it imposes an undue hardship on the employer.[25]

The heart of the Supreme Court's decision is found in its discussion of Barnett's other contention, and, unfortunately, it is here where the Court's analytical train of thought runs off track. Barnett asserts a two-pronged argument for why a seniority system cannot, in and of itself, defeat an accommodation as unreasonable. First, in accordance with the Ninth Circuit, Barnett asserts that a seniority system should be a factor, but not a determinative one, in the undue hardship analysis.[26] Ultimately, Barnett wants the Court to assess undue hardship on a case-by-case basis to determine the impact on the individual employer and the expectations of its employees. Therefore, any blanket presumption or per se rule would be inappropriate. For the second prong, Barnett points out that requiring an "employee [to] counter a claim of 'seniority rule violation'" to prove that a reas-

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[20] *Barnett II*, 122 S.Ct. at 1520-21.

[21] *Id.* at 1521.

[22] *Barnett I*, 228 F.3d at 1118.

[23] *Barnett II*, 122 S.Ct. at 1521.

[24] *Id.* at 1522-23.

[25] *Id.* at 1522.

[26] *Barnett I*, 228 F.3d at 1120.

signment is reasonable would create an improper shift in burden of proof from employer to employee.[27]

In addressing the first prong, the Court refuses to look at the reassignment under an undue hardship analysis because it believes, instead, that seniority systems speak to an employee's need to show that an accommodation is reasonable on its face.[28] The Court also rejects the case-by-case approach and concludes that a bona fide seniority system is a determinative indicator of unreasonableness. In its analysis, the Court takes the ADA's designated undue hardship factors and incorrectly applies them to the reasonableness of Barnett's request. The Court names the importance of "seniority to employee-management relations" as the basis for its holding.[29] It opines that the importance of such a system is directly tied to employee expectations of fair/uniform treatment, job security, predictable advancement, and the incentive to invest in a company to reap long-term benefits.[30] Furthermore, the Court does not want to substitute case-specific decisions for the more "uniform, impersonal operation of seniority rules."[31] It cites its own prior decisions as well as those of lower courts as an affirmation of the power of seniority systems to trump the need to accommodate.[32] The Court believes that, ordinarily, the cost to all employees of disrupting an established seniority system far outweighs the benefit of accommodating a disabled employee. The Court's reasoning is misguided for two reasons.

First, the Court's case precedent can be distinguished by the fact that the cases are dealing with collectively bargained seniority systems.[33] U.S. Airways' seniority system, like many others, is unilaterally imposed by management. The Court maintains this difference does not matter because the same advantages and problems with violations are found in both types of systems.[34] To the contrary, this difference is important because it proves troublesome the Court's blanket presumption that applies equally to both kinds of systems and shows that a case-by-case

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[27] *Barnett II*, 122 S.Ct. at 1522.

[28] *Id.* at 1523.

[29] *Id.* at 1524.

[30] *Id.*

[31] *Id.*

[32] *Id.* (citing a line of cases from various circuits).

[33] Brian Kavanaugh, *Collective Bargaining Agreements and the ADA: A Problematic Limitation of 'Reasonable Accommodation' for the Union Employee*, 1999 U. ILL. L. REV. 751 (1999).

[34] *Barnett II*, 122 S.Ct. at 1524.

analysis is needed. With collectively bargained systems, contractual obligations with the union make the system legally enforceable; therefore, employees are justified in expecting the items on the Court's list.[35] Non-collectively bargained systems, however, do not share the same legal obligations or required consistency. U.S. Airways, for example, reserves the right to "change any and all portions of the seniority system at will."[36] Nevertheless, the Court grants the system bona fide status because it had been in place for so long. The Ninth Circuit and Justice O'Connor's concurrence raise the same point of concern: when no legally bargained-for rights are involved, it does not seem as though a seniority system would bar accommodation.[37] Even under the Court's guise of reasonableness, Barnett's accommodation would have a very insignificant effect on U.S. Airways' cost, operations, and other employees. Other employees are not legally entitled to the position because the system is not legally enforceable; Barnett already occupied the position, so there is no "bumping" involved, and permanently reassigning him to the mailroom would only maintain the status quo.[38] In addition, the type of discretionary decisions employers would have to make under a case-by-case analysis, which the Court fears, is the only kind that addresses the "individualized needs of the disabled employee and the specific burdens" placed on employers.[39] Second, the Court's presumption that seniority systems trump RA's conflicts with EEOC guidelines, legislative history, and the ADA's modus operandi.[40] The ADA and the EEOC emphasize that it is reasonable[41] for employers to make exceptions for the disabled to disability-neutral workplace policies that it would not make for the non-disabled. The EEOC

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[35] *See* Panken, *supra* note 11, at 419 (discussing EEOC doctrine versus circuit court decisions).

[36] *Barnett II*, 122 S.Ct. at 1522.

[37] *Id.* at 1526-28 (O'Connor, J., concurring); *accord*, *Barnett I*, 228 F.3d at 1119.

[38] *Barnett II*, 122 S.Ct. at 1525-26 (Stevens, J., concurring) (questioning "maintain[ing] the status quo" and "exactly what impact the grant of [Barnett's] request would have on other employees").

[39] *Barnett I*, 228 F.3d at 1120.

[40] Because there is no legislative history or ADA/EEOC discussion on non-union seniority systems, it is necessary and helpful to look at such statements on unionized systems for guidance on how to handle a unilateral policy, while still keeping the differences between the two types of systems in mind.

[41] 29 C.F.R. § 1630.2(o) (1999) (defining an RA as "any change in the work environment or in way things are customarily done that enables . . . [a disabled] individual to enjoy employment opportunities"); *see also Barnett II*, 122 S.Ct. at 1522.

also rejects any blanket rule that prioritizes a seniority system over an RA.[42] Additionally, legislative history, which the Ninth Circuit cites in its opinion, indicates Congressional intent for seniority systems to be one of multiple factors considered.[43] The Court's holding allows an employer to circumvent the undue hardship burden by only requiring it to show the existence of a seniority system. The Court fails to reconcile the authority it grants to seniority systems with the lack of an ADA defense for bona fide seniority systems.[44]

In addressing the second prong of Barnett's argument, the Court dismisses Barnett's concern over an improper shift in burden of proof by tracing the way lower courts have reconciled RA with undue hardship.[45] While it is true that the cited decisions do follow a proper burden-shifting procedure, the Supreme Court's holding creates the very burden of proof dilemma to which Barnett is referring. The Court unduly raises the bar for the employee to establish a prima facie case of an RA, when the burden should really be on the employer to prove undue hardship. Just as Barnett and the Ninth Circuit feared, an employee essentially has to prove the absence of hardship because the Court has assumed "that which is the employer's burden to prove."[46] While the holding seems to make sense for legally binding union systems, an employer with a unilateral seniority policy enjoys the same advantage from the Court's presumption of unreasonableness, and the employees bear an undue burden.

The Court's holding seems to be a victory for employers who are unwilling to sacrifice convenience, policy, or operations to accommodate disabled employees. The ADA wanted employers to reasonably foot the bill for making workplace changes to increase the number of disabled people in the workforce, but the *Barnett* decision significantly narrows that obligation.[47] Fewer accommodations will be available to employees, for a seniority system will automatically eliminate positions to which they were previously entitled under the ADA.[48] Lower courts will likely see

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[42] *Barnett I*, 228 F.3d at 1119.

[43] *Id.* (discussing House and Senate reports).

[44] *Id.* at n.10; *see Barnett II*, 122 S.Ct. at 1532 (Soutter, J. & Ginsberg, J., dissenting).

[45] *Barnett II*, 122 S.Ct. at 1523.

[46] *Barnett I*, 228 F.3d at 1120.

[47] Vikram Amar & Alan Brownstein, *Reasonable Accommodations Under the ADA*, 5 GREEN BAG 2D 361, 368 (2002).

[48] Sara Jurand, *Seniority Trumps ADA, Supreme Court Rules*, 38 JUL TRIAL 14, 16 (2002).

a surge in litigation regarding what constitutes special circumstances because the Court fails to provide sufficient guidelines. The Court does give a short, non-exhaustive list of conditions that may defeat summary judgment, but circuits will have to decide on their own whether an employee has shown enough to prove that their seniority system is not sufficiently bona fide.[49] Employers may also want to review their case for special circumstances to avoid losing summary judgment. Although few courts have had the opportunity to implement the *Barnett* holding, the Seventh Circuit recently applied *Barnett* to mean that an employer does not have to give a disabled employee a break from the employer's normal method of filling vacancies in order to keep her job when a better qualified employee wants the position.[50] The Seventh Circuit's reading extends the presumption made for seniority systems to a more general disability-neutral work policy and broadens the exceptions made for seniority to include employee qualifications. Unfortunately, the decision continues the trend set by the Supreme Court that reinforces a pro-employer mentality and limits the efficacy of the ADA.

The Supreme Court's decision raises the burden of proof and lowers the probability that an otherwise qualified employee will be able to work in spite of a disability. The Supreme Court must recognize that the collective rights of non-disabled employees do not have to suffer in order for disabled employees to succeed, and courts, including the Supreme Court, should proceed with a sense of the consequences of moving drastically in either direction.

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[49] *Compare* Wood v. Crown, No. 4:01-CV-40127, 2002 WL 2005451, at *8 (S.D. Iowa Aug. 29, 2002), *with* EEOC v. Value Merch. Co., No. 01-2224-DJW, 2002 WL 1932533, at *7 (D. Kan. Aug. 9, 2002) *and* Dilley v. Supervalu, Inc., 296 F.3d 958, 963-64 (10th Cir. 2002).

[50] Mays v. Principi, No. 01-4227, 2002 WL 2019361, at *5 (7th Cir. Sept. 5, 2002).

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