



# Court: Employees Seeking Accommodation Must Compete For Reassignment

SPLIT IN CIRCUITS COULD LEAD TO SUPREME COURT INTERVENTION

Insights

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The 11th Circuit Court of Appeals ruled that a disabled worker forced to leave her position because of her physical impairment must compete for vacant jobs when seeking reassignment, handing a victory to her former employer. By concluding that employers have no obligation to provide preferential treatment to individuals with disabilities when attempting to accommodate them via reassignment, the court decision runs in direct conflict with various other circuits – and the EEOC – which have ruled otherwise. Unless and until the Supreme Court steps in to resolve the circuit split, employers must be sure to carefully navigate the various standards that exist across the country when accommodating their employees.

Here are three things you need to know about the 11th Circuit's decision in *EEOC v. St. Joseph's Hospital* (December 7, 2016).

## 1. Jury Concluded That Employer Acted In Good Faith

The case involved a nurse, Leokadia Bryk, who worked in the psychiatric ward of St. Joseph's Hospital in Tampa, Florida. In 2009, after being diagnosed with arthritis and undergoing hip replacement surgery, Bryk began to use a cane to alleviate her constant back pain. Eventually her managers became concerned that a patient could dispossess Bryk of the cane and use it as a weapon. In 2011, her supervisor informed her that she could no longer use the cane in the psychiatric ward because it posed a safety risk to herself and others.

This meant that she was deemed unqualified for her position at the hospital, although the human resources team worked with her to identify possible reasonable accommodations that would allow her to continue to work at St. Joseph's. Upon concluding that the only possible accommodation that might work was reassignment to a vacant, the hospital informed her that she had a 30-day period to identify and apply for other positions. The human resources team informed her that she would be allowed to compete with other internal applicants, but would receive no preferential treatment.

The evidence revealed that over 700 available jobs existed at the hospital during this time period, and Bryk applied for seven of those positions. However, she was not even offered an interview for any of the positions, as she was not determined to be qualified enough to merit the next step in the hiring process. For example, she applied for an Educational Specialist position, but she was deemed not to

have enough education experience. The person eventually hired for the job had previously worked as a teacher for several years. Also, she applied for a Home Health Clinician position, which would have required her to care for patients in their homes following discharge from the hospital. She admittedly had limited experience performing post-surgery wound care (because her main experience was in the narrow field of psychiatry), and thus was not the best-qualified candidate.

Therefore, the hospital terminated her employment in November 2011, and the Equal Employment Opportunity Commission (EEOC) filed an Americans with Disabilities Act (ADA) lawsuit against St. Joseph's on her behalf in 2013. The lawsuit alleged, among other things, that the hospital violated the ADA by not reassigning Bryk to a vacant position without requiring her to compete with other applicants for those jobs.

The case eventually went to a federal jury trial. Although the jury agreed that the hospital failed to provide a reasonable accommodation, it also concluded that the hospital sufficiently proved that it made good faith efforts to accommodate Bryk. With that, the jury ruled in the hospital's favor.

## **2. Appeals Court Ruled That "Affirmative Action" Is Not Required**

The EEOC filed an appeal with the 11th Circuit Court of Appeals (which oversees cases arising out of Florida, Georgia, and Alabama), and earlier this month the court affirmed the ruling in favor of the employer. The appeals court said that it agreed with the lower court that "the ADA does not require reassignment without competition for, or preferential treatment of, the disabled."

The court first noted that the language of the statute itself does not require employers to take such steps. The ADA offers a non-exhaustive list of accommodations that "may" be reasonable, including reassignment to a vacant position. The court pointed out that the statute does not say that reassignment is "always" reasonable. "Had Congress understood the ADA to mandate reassignment," the court said, "it could have easily used mandatory language. That it did not do so at least suggests that it did not intend reassignment to be required in all circumstances."

The court then pointed out that the Supreme Court offered a framework for determining whether a job reassignment was reasonable (although under different circumstances). According to the SCOTUS, reassignments are only required under the ADA if they are "reasonable in the run of cases." And according to the 11th Circuit, requiring reassignment to an employee who is not best qualified is not reasonable. As the court stated:

As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.

For these reasons, the 11th Circuit affirmed the decision of the lower court and preserved the employer's victory.

### **3. Warning: Other Courts Disagree**

While this decision is a complete victory for the employer in this case, and serves as a solid ruling for employers in Florida, Georgia, and Alabama, it is not a cause for celebration across the country. There still remains a large swath of employers in various jurisdictions who face competing obligations under the law.

The 11th Circuit's decision noted that its ruling was in line with cases from the 5th Circuit (Texas, Louisiana, and Mississippi) and the 8th Circuit (Missouri, Minnesota, Arkansas, Iowa, Nebraska, North Dakota, and South Dakota). However, the EEOC contends that several other circuits disagree and mandate the alternate view, requiring reassignment without competition despite any best-qualified hiring party. It points to decisions from the 7th Circuit (Illinois, Indiana, and Wisconsin), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), and the D.C. Circuit.

Therefore, employers should consult with their legal counsel before finalizing any interactive process that includes reassignment as a possible accommodation to determine the proper current standard in your business location. While it is possible that the Supreme Court could take notice of the widening split among the circuits and agree to accept a reassignment case to settle the debate once and for all, until that day occurs, there exists no unifying and consistent standard that would make life more predictable for employers.

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