

Reverse discrimination and transfers as ADA accommodations

Earlier this year, the EEOC published [*Veterans and the Americans with Disabilities Act \(ADA\): A Guide for Employers*](#). In this guide, the EEOC asks the following question:

May a private employer give preference in hiring to a veteran with a disability over other applicants?

According to the agency, the answer is “yes.” The ADA does not prohibit “affirmative action on behalf of individuals with disabilities. Thus, a private employer may—but is not required to—hire an individual with a disability who is qualified (including a veteran with a disability) over a qualified applicant without a disability.”

ADA affirmative action?

If you think about it, this statement makes a lot of sense, even though it differs from other laws that prohibit discrimination.

Title VII, for example, prohibits reverse discrimination because it makes no differentiation on the basis of majority or minority status. It merely prohibits discrimination on the basis of race, sex, religion, national origin and so forth.

The ADA, on the other hand, only protects the disabled. For one to be covered by the ADA, one must meet the specific statutory definition of “disability.”

If this difference was not already clear enough, the ADA Amendments Act of 2008 (ADAAA) added a section to the statute expressly stating that the ADA does not protect those who claim discrimination because of a “lack of disability.”

Disability preference, transfers

What happens, however, if you are not dealing with a disabled job applicant, but a disabled employee who requests a transfer to an open position as a reasonable accommodation? Are you required to overlook better qualified, nondisabled employees and provide the transfer as a reasonable accommodation?

The ADA’s regulations provide that “reassignment to a vacant position” may qualify as a reasonable accommodation.

But, that statement only raises the question: Is that accommodation mandatory for employees who can no longer perform the essential functions of their jobs, or just one part of a matrix of accommodations that an employer should consider?

Courts are divided

Recently, in *EEOC v. United Airlines*, the 7th Circuit answered that question.

In that case, the EEOC challenged United's "Reasonable Accommodation Guidelines," which provide that transfers to open positions are competitive, and that disabled employees will only receive "priority consideration over a similarly qualified applicant."

The 7th Circuit concluded that this policy passes muster under the ADA. The court wrote: "The ADA does not require employers to reassign employees, who will lose their current positions due to disability, to a vacant position for which they are qualified."

The 6th Circuit, which covers Ohio, appears to follow a similar approach.

There exists, however, a split among the federal courts, with a minority interpreting the ADA as requiring the transfer as a reasonable accommodation.

What employers must do

What does this mean for your business? It means that this area of the law is unsettled. It means that if you are considering a transfer as a reasonable accommodation, your location will dictate the legality of your decision.

It means that the Supreme Court will likely weigh in on this issue at some point and provide some clarity. (It tried to once, but the parties settled before the court could rule.)

And, it also means that no matter the rule of law, you should ensure that the disabled employee is actually qualified for the position he or she seeks. No matter whether a transfer is discretionary or mandatory, no employee—disabled or not—is entitled to a job for which he or she is not qualified.

When is reassignment right for disabled employees?

Employers should consider reassigning a disabled employee to a vacant position when an accommodation isn't possible in an employee's present job or when accommodating the current job would cause an undue hardship for the employer.

Reassignment may be a reasonable accommodation if both you and the employee agree that it's more appropriate than an accommodation in the present job.

Note: The reassignment accommodation is required only for current employees. You don't have to consider a different position for a job applicant if he or she can't perform the essential functions of the position, with or without a reasonable accommodation.