IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	Docket No. 10 C 1699
Plaintiff,	)	Chicago, Illinois
v.	)	February 3, 2011
	)	9:00 o'clock a.m.
UNITED AIR LINES, INC.,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

Court Reporter: GAYLE A. MCGUIGAN, CSR, RMR, CRR
Official Court Reporter
219 South Dearborn Street
Room 1944
Chicago, Illinois 60604
(312) 435-6047

(Proceedings had in open:)

THE CLERK: 10 C 1699, Equal Employment Opportunity Commission versus United Air Lines, Inc.

THE COURT: Before this Court is Defendant's motion to dismiss Plaintiff's Second Amended Complaint for failure to state a claim. For the reasons that follow, the motion is granted.

Background: Plaintiff Equal Employment Opportunity Commission alleges in its Second Amended Complaint that Defendant United Air Lines, Inc., is in violation of the Americans with Disabilities Act, "ADA," because its guidelines require qualified employees with disabilities to compete for vacant positions that are needed as a reasonable accommodation. Under Defendant's guidelines, in order to receive priority consideration for placement in a vacant position as an accommodation, a disabled employee must be at least tied in qualifications with the best applicant. The ADA prohibits employers from discriminating on the basis of disability. Included in its definition of discrimination is the failure to make reasonable accommodations for a disabled employee, including reassignment to a vacant position. 42 U.S.C. 12111 (9)(B), 12112(b)(5)(A).

Defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant contends that Plaintiff can

prove no set of facts entitling it to relief because this Court is bound to follow the Seventh Circuit's ruling in ***EEOC versus Humiston-Keeling, Inc.*** In ***Humiston-Keeling***, the Court held that the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant." 227 F.3d 1024, 1029 (2000). Plaintiff makes no allegation that Defendant's policy is spurious or inconsistently applied.

Analysis: In ***Humiston-Keeling***, the Seventh Circuit rejected a claim by the EEOC that is identical to the one in this case, namely that the reassignment provision of the ADA requires that a disabled employee receive a position over a more qualified nondisabled employee as long as the disabled employee is capable of performing the work required for the position. The Court held that such an interpretation would convert the ADA from a non-discrimination law into a "mandatory preference" law and would be inconsistent with the aims of the ADA. Rather, the Seventh Circuit interpreted the reassignment provision as requiring the employer to consider whether it is possible to assign the disabled worker to another position in which his or her disability will not be a hindrance. If such a reassignment is feasible, and there are no other superior applicants, then the ADA mandates reassignment. 227 F.3d at 1027-29.

The circuits are split as whether reassignment is mandatory under the ADA. For example, the Tenth Circuit has held that reassignment must be offered to a disabled employee regardless of whether there are better qualified applicants. ***Smith versus Midland Brake, Inc.***, 180 F.3d 1154, 1167(1999). But the Eighth Circuit has held that reassignment under the ADA requires only that an employer allow a disabled worker to compete for the job desired as an accommodation. ***Huber versus Wal-Mart Stores, Inc.***, 486 F.3d 480, 483 (2007).

Generally, even when there is disagreement among the circuits, this Court is bound to follow Seventh Circuit precedent. See ***U.S. ex rel. Rice v. Cooper,*** 95 C 5507, 1997 WL 282734 at *4 (N.D. Ill. May 16, 1997). Plaintiff argues, however, that ***stare decisis*** does not apply because ***Humiston-Keeling*** has been overruled or at the very least undermined by the United States Supreme Court in ***U.S. Airways versus Barnett,*** 535 U.S. 391 (2002). In ***Barnett***, the Supreme Court held that ordinarily, an accommodation is not reasonable if it conflicts with the rules of an employer's seniority system. However, in so ruling, the Court rejected defendant's argument that the ADA never requires an employer to grant an accommodation to a disabled employee if' test accommodation would violate a disability neutral rule. The Court reasoned that preferences for disabled employees in the form of reasonable accommodations are sometimes necessary to carry out

the goals of the ADA, even if the difference in treatment violates an employer's disability neutral rule. As examples, the Court noted that neutral workplace rules limiting break time or furniture expenses may require exceptions for disabled employees. 535 U.S. at 394-97.

However, the high Court in *Barnett* did not face the precise issue presented here: Whether a disabled employee must be given a preference in obtaining a vacant position where the employer has guidelines requiring that vacant positions go to the best qualified applicant. Further, the Court noted that the ADA "requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy." *Barnett*, 535 U.S. at 397. The Seventh Circuit has consistently drawn a distinction between requiring employers to eliminate obstacles to hiring disabled employees and requiring employers to hire disabled employees even in the face of superior applicants. *Humiston-Keeling*, 227 F.3d at 1028-29.

Barnett did not explicitly overrule *Humiston-Keeling* and it is far from clear that it did so implicitly. In face, in a Rehabilitation Act case, applying the same standards as are used for an ADA claim, the Seventh Circuit described *Barnett's* holding regarding seniority rules as "bolster[ing]" the *Humiston-Keeling* rule. *Mays versus Principi*, 301 F.3d 866, 872

(7th Cir. 2002). Since then, the Seventh Circuit has continued to cite *Humiston-Keeling* with favor. See *King versus City of Madison,* 550 F.3d 598, 600-01 (2008) (finding employer provided reasonable accommodation for disabled employee who failed to obtain a job outside her bargaining unit because she was not the most qualified applicant); *Craig versus Potter,* 90 Fed. App'x 160, 163 (2004) (holding in a Rehabilitation Act case that it would be unreasonable to force employer to abandon its policy of hiring the best applicant). This Court is bound to follow those rulings.

As additional support for its argument, Plaintiff points to the EEOC's regulations interpreting a reasonable accommodation as including reassignment to a vacant position. 29 C.F.R. 1630.2(o)(2)(ii). The EEOC has interpreted the reasonable accommodation requirement as requiring more than just that the disabled employee be allowed to compete for a vacant position. Rather, under the EEOC's interpretation, "reassignment means that the employee gets the vacant position" if qualified for it. "Otherwise, reassignment would be of little value and would not be implemented as Congress intended." Enforcement Guidance, http://www.eeoc.gov/policy/docs/accommodation.html. Plaintiff argues this Court should defer to its interpretation of the reassignment provision.

However, agency interpretations are entitled to

deference only where the intent of Congress is unclear. *Chevron versus Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). In *Humiston-Keeling*, the Seventh Circuit found no ambiguity in the reassignment provision and expressly rejected the same interpretation that the EEOC puts forward today. It found the reassignment provision is not rendered meaningless simply because reassignment is not mandatory whenever the disabled employee is minimally qualified for the position. Rather, the Court held, the provision serves to obligate the employer to consider the possibility of reassignment to another position, rather than merely undertaking efforts to help the worker do the job for which he or she was hired. Further, the law mandates reassignment whenever it is feasible and there is no superior applicant. 227 F.3d at 1027-28.

A complaint should be dismissed under Rule 12(b)(6) only if it is clear that the "plaintiff can prove no set of facts in support of her claim that would entitle her to relief." *Doherty versus City of Chicago,* 75 F.3d 318, 322 (7th Cir. 1996). Given that *Humiston-Keeling* is directly on point and has not been overruled by the Seventh Circuit, this is such a case.

Conclusion: Defendant's motion to dismiss is granted.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/s_____ _____
GAYLE A. McGUIGAN, CSR, RMR, CRR Date
Official Court Reporter