2014-2015
SOUTHERN ILLINOIS UNIVERSITY
NATIONAL HEALTH LAW MOOT COURT COMPETITION

Transcript of Record
Docket No. 14-1184

Supreme Court of the United States
October Term, 2014

Sunset ManorCare, LLC,
Petitioner,

v.

Equal Employment Opportunity Commission,
Respondent.

COMPETITION PROBLEM

SPONSORED BY:

Center for Health Law and Policy
Southern Illinois University School of Law

Department of Medical Humanities
Southern Illinois University School of Medicine

The American College of Legal Medicine

The American College of Legal Medicine Foundation

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW CANADA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
PLAINTIFF,	)	
	)	
v.	)	CASE NO. CIV-12-1524
	)	
SUNSET MANORCARE, LLC,	)	
DEFENDANT.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on cross-motions by the parties. The EEOC filed a civil complaint against Defendant Sunset ManorCare, LLC (Sunset), alleging that its Employee Transfer Policy violates the Americans with Disabilities Act (ADA) by failing to provide for reassignment of employees with disabilities to the most equivalent open position for which that employee is qualified, when the employee can no longer perform the essential functions of the employee's current position. The Commission specifically alleged that Sunset discriminated against its employee, Lucy Fernandez, by refusing her reassignment to an open, equivalent position. Sunset filed an Answer to the EEOC's complaint, asserting among other things, an affirmative defense that the Commission failed to conciliate this case in good faith before initiating the civil action. The EEOC moved for summary judgment on the conciliation issue, asserting that no judicial review of the process was provided under the statute, but even if there was, there were no factual issues as to the Commission's good faith. In addition, the Commission moved for summary judgment on the ADA claim, asserting that there were no material facts in dispute regarding Sunset's transfer policy and refusal to accommodate Fernandez, and that it is entitled to judgment as a matter of law. Sunset then filed a cross-motion for summary judgment, asserting that it was entitled to judgment as a matter of law on the legality of its transfer policy. Sunset also opposed dismissal of its affirmative defense, asserting it had created a factual issue as to the EEOC's good faith conciliation efforts.

For the reasons that follow, this Court GRANTS the EEOC's motion for summary judgment regarding Sunset's affirmative defense, DENIES the EEOC's motion for summary judgment on the ADA issue, and GRANTS Sunset's cross-motion for summary judgment on the ADA issue.

FACTUAL BACKGROUND

This case arises out of the employment practices of Sunset ManorCare, LLC. Sunset is one of the largest providers of assisted living facilities in the United States. Sunset has over 400 facilities located in 29 states. The services Sunset provides include assistance with daily living activities, health services and medication administration, housekeeping and maintenance, recreational and educational activities, transportation, and dementia care. To provide these services, Sunset employs several thousand employees in positions that run the gamut from skilled medical professionals and health care administrators, to minimum wage workers with no particular training.

The EEOC began investigating Sunset's employment practices in February, 2012, after a charge was filed with the Commission by an employee in the company's facility in Capital City, New Canada. That employee, Lucy Fernandez, charged that Sunset had discriminated against her because of a disability. Specifically, Fernandez alleged that she had been given a ten pound lifting restriction by her doctor as a result of a back injury she experienced from a bad fall that occurred while she was vacationing in Colorado, a condition for which she was expecting to have surgery sometime in the next year. Fernandez, who worked as a Certified Nursing Assistant (CNA), was therefore unable to perform the essential tasks of her job, which included helping move residents as well as equipment.[1] Sunset and Fernandez explored whether Fernandez could be reasonably accommodated in the CNA position in a way that would limit her need to lift to within her doctor's parameters, but they mutually agreed that was not possible.

Fernandez determined that there was an alternative position open at the same location for which she met the minimum qualifications, and whose essential functions she could perform. Specifically, the position was titled "Pharmacy Technician." That position involved working with the facility's on-site pharmacist to provide residents with their prescription medications. The technician position's minimum qualifications included a working familiarity with medication and medical terminology, and its preferred qualification included having a Pharmacy Technician certificate.[2] The open position and Fernandez's current position were roughly equivalent in terms of pay. Fernandez believed her CNA training more than qualified her for that position, although she did not have the preferred certificate. Fernandez contacted Human Resources and indicated she wished to be transferred to the pharmacy position, because it met the lifting requirements imposed by her doctor. She was informed, however, that the company had an Employee Transfer Policy, and under that policy, she would have to be the most qualified individual applying for the job in order to be transferred into it.

Under the Employee Transfer Policy, when determining who would be most qualified, the company takes into account such things as length of service with the company, recent job evaluation scores, and any other specialized or technical skills required for the position. If an employee wishes to be considered for an open position covered under the policy,[3] the employee has to submit an application to Human Resources, which then determines which applicant is the "best qualified" and refer that person to the relevant supervisor. After a six week "probationary" period, the assignment to the new position becomes permanent unless there is a documented concern about the quality of patient care.

Unfortunately for Fernandez, another employee who had worked at the company for four years (Fernandez had only been there two) also sought the open technician position, and that person had a

[1] The parties stipulate that lifting more than ten pounds was an essential function of the CNA position. The parties also stipulate that Lucy Fernandez is an individual with a disability, as that term is defined under the ADA Amendments Act, 42 U.S.C. § 12102(1) (2012).

[2] The State of New Canada requires that Pharmacy Technicians be certified, but provides a process whereby a person can get that certification through on the job training.

[3] The Employee Transfer Policy did not apply to certain management and administrative positions.

Pharmacy Technician certificate. He had been working in the pharmacy part time (the open position was full time), waiting for a full-time opening to occur for which he was most qualified. The company considered him a highly valuable employee, because his evaluation scores were outstanding, among the highest at the facility. The company determined that he was the most qualified for the full-time Pharmacy Technician position and offered it to him.[4] It instead offered Fernandez a position as an Educational Services Aide. That position, while it did not require lifting over the limit set by Fernandez's doctor, paid considerably less ($9.00/hr. instead of $13.25/hr. as a Pharmacy Technician).

Fernandez did not consider the Educational Services Aide position to be equivalent to her current position, but she accepted it rather than lose her job altogether. At this point, Fernandez contacted the EEOC. She alleged that Sunset's failure to offer her the Pharmacy Technician position and instead offer her an inferior position amounted to discrimination on the basis of disability. She sought back pay, compensatory damages, and either "reinstatement" in the Pharmacy Technician position or front-pay in the form of a pay raise.

After receiving Fernandez's charge of disability, the EEOC sent Sunset notice of that charge and the Commission's intention to investigate the matter. The Commission requested additional information from Sunset on its transfer policy and how it had been applied to other employees. The information Sunset provided indicated the policy was long-standing and consistently applied in all of its 400+ facilities. The Employee Transfer Policy was communicated to employees in the Company's Employee Handbook, and employees were also made aware of how the system worked when first hired. Sunset emphasized the heavy reliance on annual evaluation scores. The evaluations were conducted by each employee's direct supervisor, who was required to provide concrete justification for the evaluations. Sunset asserted that uniformity of application was a fundamental component of the policy, and that employees had developed expectations as to how the policy operated to provide both promotions and lateral transfers within the company. Sunset asserted that it had not failed to accommodate Lucy Fernandez because it objectively applied its Employee Transfer Policy to determine she was not the most qualified applicant for the Pharmacy Technician position, and Fernandez does not dispute the fact the other employee was in fact more qualified. Sunset asserts that it offered Fernandez the most equivalent open position for which she was the best qualified applicant.

On April 5, 2012, the EEOC issued a finding of reasonable cause to believe Sunset had discriminated against Fernandez under the ADA by failing to provide her with a reasonable accommodation. Simultaneously, the Commission sent Sunset a letter in which it invited Sunset to engage in a conciliation process designed to effect voluntary compliance with the ADA's obligations to reasonably accommodate Sunset's employees. In the letter, the Commission asserted its belief that Sunset's Employee Transfer Policy systemically discriminated against a class of employees with disabilities. The Commission also presented Sunset with an agreement to be signed by both parties, in which Sunset not only admitted that it had discriminated against Lucy Fernandez, but also

[4] The parties stipulate that the employee who was placed in the Pharmacy Technician position was more qualified for that position than Fernandez. While Fernandez also had above-average evaluation scores, they were not as high as the other employee's.

acknowledged the unlawful nature of its transfer policy and agreed to adopt a new policy that provided for automatic transfers when an otherwise qualified employee with a disability needed a job reassignment as a reasonable accommodation and there were no case-specific circumstances showing undue hardship. Sunset responded to the letter on April 13, 2012, by asserting that it did not believe its current "best qualified" policy violated the ADA, and requesting information from the EEOC as to all of the employees the Commission believed to have been discriminated against by Sunset's policy. Sunset indicated it would be willing to discuss any case, such as Fernandez's, where specific actions of discrimination were articulated by the Commission. Sunset was not willing under the circumstances, however, to sign any agreement that included a finding that its transfer policy was per se unlawful.

The EEOC did not respond specifically to Sunset's response; instead, on April 20th, it sent Sunset a letter indicating that because agency priority was focused on remedying systemic discrimination, given Sunset's refusal to address the company-wide transfer policy, the Commission believed further attempts at conciliation would be a waste of its limited resources. Ten days later, the EEOC initiated this civil action. In its complaint, the EEOC alleged that Sunset had engaged in discrimination under the ADA "against a class of employees across Sunset' entire operations, by the operation of Sunset's Employee Transfer Policy, and specifically as to employee Lucy Fernandez." The EEOC also asserted that it had fulfilled all precursors to initiating the federal civil lawsuit.

Sunset filed a timely Answer to the EEOC's complaint, asserting as an affirmative defense that the Commission failed to meets its statutory obligation to make a good faith effort to conciliate the claim before initiating civil litigation. Sunset requested the Court, as a sanction for the EEOC's failure, to dismiss all claims. In its Answer, Sunset also asserted that even if the civil suit was properly initiated, Sunset met its obligation to accommodate Fernandez when it offered her the Educational Services Aide position. Sunset argues that its transfer policy is not per se unlawful, nor did it operate unlawfully in the facts of Fernandez's case. Because the EEOC has not identified any other set of facts involving any other specific employees, Sunset asserted that the EEOC's complaint should be dismissed.

In response, the EEOC moved for summary judgment on Sunset's affirmative defense, asserting that no judicial review of the conciliation process was proper. The EEOC asserts that the remedies and procedures under the ADA are the same as those set out for Title VII of the Civil Rights Act of 1964, and under Title VII, there is no provision for judicial review of EEOC's conciliation efforts. Alternatively, the EEOC asserted that there were no issues of fact or law regarding EEOC's good faith in the conciliation process, and for that reason, it was entitled to judgment on the affirmative defense. Sunset responded to the motion by asserting that the Court did have jurisdiction to review the conciliation process to determine if the EEOC acted in good faith, and that there were factual issues to be resolved regarding whether the Commission met that standard.

The EEOC additionally moved for summary judgment on the ADA accommodation issue, asserting that there were no facts in dispute regarding Sunset's Employee Transfer Policy or the circumstances in Lucy Fernandez's case. In regard to the Policy, the Commission asserts it violates the ADA as a matter of law because it allows Sunset to deny a qualified employee with a disability transfer to a vacant position even when the employee is 1) qualified for the position in question and able to

perform the essential functions of the vacant position with or without a reasonable accommodation and 2) needs the transfer because the employee is unable to perform the essential functions of the job the employee currently holds and there is no reasonable accommodation that will permit the employee to perform those essential functions. In regard to Lucy Fernandez's specific case, the EEOC asserts that the facts are undisputed that Lucy Fernandez needed to be reassigned to a vacant position as a reasonable accommodation of her disability, that she was qualified for the Pharmacy Tech position and could perform the essential functions of that job, and that Sunset did not offer her the job because under its policy, it deemed another employee the "most qualified" applicant and therefore awarded him the job. Sunset opposes the motion for summary judgment and files its own, agreeing that no material facts are in dispute regarding the Policy or Lucy Fernandez's case,[5] but asserting that it is entitled to judgment as a matter of law because it has in all respects complied with the ADA.

As explained more fully below, the Court agrees with the EEOC that the affirmative defense raised by Sunset is inappropriate as a matter of law. Thus, the Commission is entitled to summary judgment dismissing this portion of Sunset's Answer. That is not to say, however, that the Court lacks the ability to address the Commission's lack of good faith. This Court agrees with Sunset that there are significant issues of fact regarding whether the EEOC met its statutory obligation to conciliate in good faith. Ordinarily, the Court would issue a stay of the proceedings until the conciliation process has been appropriately exhausted. That issue is made moot, however, by the Court's ruling on the cross-motions for summary judgment. The Court finds that Sunset's Employee Transfer Policy complies with the ADA as a matter of law, and that there are no material questions of law or fact regarding whether Sunset lawfully applied the policy in Lucy Fernandez's case. Therefore, the Court will deny the Commission's motion but grant Sunset's cross-motion for summary judgment.

EEOC's DUTY TO CONCILIATE

Sunset asserts as an affirmative defense to the EEOC's complaint that the Commission failed to conciliate the charges in good faith prior to initiating this civil cause of action. The EEOC urges the Court to summarily reject that defense, on the grounds that there is no such defense provided in the relevant statutory provisions. The issue is one of first impression in this circuit. The EEOC's duty to conciliate in ADA cases is based on that statute's express incorporation of the remedies and procedures set out in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12117(a) (2012) (cross-referencing 42 U.S.C. § 2000e–5). In pertinent part, Title VII provides that "[i]f after investigation, the Commission determines there is reasonable cause to believe that the [discrimination] charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e–5(b) (2012).

Although the statute does not expressly provide for judicial review of the conciliation process, a number of circuit courts have considered the issue and concluded that at least some form of review is proper. Some circuits have found an affirmative defense for the employer, directing courts to consider

[5] For purposes of its motion, Sunset conceded that the Pharmacy Technician position was an equivalent position to that of the CNA position Fernandez held.

whether the EEOC has "(1) outline[d] to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer[ed] an opportunity for voluntary compliance; and (3) respond[ed] in a reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Asplundh Tree Expert Co.,* 340 F.3d 1256, 1259 (citing *EEOC v. Klingler Elec. Corp.,* 636 F.2d 104, 107 (5th Cir. 1981)). Other circuits have required the EEOC only to make "a showing of some effort" at conciliation. *See EEOC v. Zia Co*., 582 F.2d 527, 532 (10th Cir. 1978) (suggesting that EEOC's failure to conciliate may warrant a stay of the proceeding but not deprive the court of jurisdiction to hear the claim). One circuit, the Seventh, has explicitly rejected a "failure to conciliate" defense. *See EEOC v. Mach Min., LLC*, 738 F.3d 171, 184 (7th Cir. 2013) (concluding nothing in § 2000e-5(b) provides for judicial review).

This Court finds the rationale of the cases providing for the three part test to be most persuasive. First, the Court disagrees with the Seventh Circuit that because the statute does not explicitly mention a standard of review, it is not appropriate for courts to review the EEOC's actions. As the Tenth Circuit observed, the language of the conciliation statute is mandatory and "it is inconceivable . . . that good faith efforts are not required." *Zia Co.,* 582 F.2d at 533. As to the appropriate test for good faith, the three part test appropriately focuses on reasonableness of the EEOC's efforts and the employer's response. *Klingler Elec. Corp.*, 636 F.2d at 107. The circumstances of a case such as this, where the employer has indicated a willingness to engage in the process, albeit not to the sweeping terms demanded by the Commission, demonstrates the need to ensure that an adequate conciliation process has been provided. Otherwise, the EEOC could evade its obligation under the statute in favor of litigation in nearly any case, citing "agency priorities." Even the minimal good faith test would permit the Commission to engage in a sham effort, quickly calling off conciliation simply because an employer did not agree to the Commission's precise terms. The Court believes that the three part test best complies with the intent of the statute to require a true good faith effort to conciliate.

That said, the Court does not believe an affirmative defense is the appropriate approach. The Court agrees with the reasoning of the Fifth Circuit that dismissal is a too harsh a sanction. *See Klingler Elec. Corp*., 636 F.2d at 107. Instead, the Court would be inclined to grant a stay of the proceedings under 42 U.S.C. § 2000e-5(f)(1) (2012). *See Klingler* (noting that "[t]his approach will preserve the authority of the EEOC so long as it acts in good faith, while encouraging voluntary compliance and reserving judicial action as a last resort"). Sunset indicated a willingness to engage in further efforts at conciliation, and the Commission should have at least attempted to explore that before launching this federal case. Because of how the Court resolves the issues in the pending cross-motions for summary judgment, however, the Court concludes such a stay is not necessary, even if on the facts, the Court might conclude the EEOC failed to make a good faith attempt to conciliate.

EMPLOYER'S DUTY TO REASSIGN TO A VACANT POSITION

The heart of the dispute in this case is Sunset's Employee Transfer Policy. The EEOC asserts that the policy violates the ADA by making qualified employees in need of reasonable accommodation compete for a vacant position, rather than being automatically reassigned to that position when they are unable to perform the essential functions of their current position. Sunset asserts that the ADA does not require it to disrupt the expectations of other employees under an objective and uniformly applied

"best qualified" transfer policy. The parties disagree as to proper interpretation of *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), as it relates to this issue.

The ADA provides that employers are required to "[m]ake reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5) (2012). "Reasonable accommodation" may include, among other things, "reassignment to a vacant position." *Id.* § 12111(9)(B) (2012). The EEOC's Guidelines indicate that reassignment should be considered an accommodation of "last resort," required only when it has been determined there are no effective accommodations available that will allow the individual to perform the essential functions of her current job, or when any such accommodations would pose an undue hardship on the employer. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. app. § 1630.2(o) (2013). The vacant position should be one with roughly equal status and pay. *See id.* Employers are not required to promote individuals with disabilities or create new positions for them, if they would not otherwise do so except for their obligation to reasonably accommodate that individual's disability. *See id*.

The United States Supreme Court addressed an employer's obligation to reassign an employee with a disability in its *Barnett* decision. In *Barnett*, the plaintiff sought to be placed in an alternate position permanently as an accommodation for his disability. *Barnett*, 535 U.S. at 394. According to US Airways seniority system, at least two other more senior employees were entitled to that position. *Id.* The Supreme Court found that while reassignment to a vacant position would ordinarily be reasonable "in the run of cases," where it conflicted with an employer's seniority system, the employee must show special circumstances that warranted requiring the employer to make an exception to its policy. *Id.* at 403, 406.

Barnett did not make it clear whether the "special circumstances" test applies outside of a seniority system. Prior to *Barnett*, some courts had held that the ADA mandates reassignment of a qualified employee with a disability, rather than just allowing the employee with a disability to compete for the open position, unless the employer can prove the reassignment would be an undue hardship. *See, e.g. Smith v. Midland Brake, Inc.,* 180 F.3d 1154, 1164-65 (10th Cir. 1999) (en banc) (concluding individuals with a disability have a "right to reassignment"). Post-*Barnett*, the Seventh Circuit overruled its prior precedent to the contrary and agreed with cases like *Midland Brake* that an employer was required to reassign the employee with a disability, regardless of the employer's "best qualified applicant" policy. *EEOC v. United Airlines, Inc*., 693 F.3d 760, 764 (7th Cir. 2012).

Other courts, however, have found the employers are not required to automatically reassign less-qualified employees with a disability. *See, e.g., Huber v. Wal-Mart Stores, Inc*., 486 F. 3d 480 (8th Cir. 2007). *Huber* reasoned that the ADA is not an affirmative action statute. *Id.* at 483. Although the Eighth Circuit cited extensively from a Seventh Circuit case that was later overruled by that circuit, the Eighth Circuit also specifically considered the impact of *Barnett* on its reasoning. *See id.* at 483-84. The court noted *Barnett* concluded a less qualified employee could not simply invoke an entitlement to an open position based on his disability when it would disrupt the expectations of a higher seniority status employee. *See id.* at 484.

The EEOC argues in this case that any reliance on the "special circumstances" test in *Barnett* is inapposite, because this case does not involve seniority system. That is true, and Sunset concedes that the policy in question is not a true seniority plan. Sunset argues, however, that the consistent, uniform application of its policy and the objective nature of its criteria create expectations in other employees that are equivalent to the type of seniority system at issue in *Barnett*, which was not a collectively-bargained policy. *See Barnett*, 535 U.S. at 404 (dismissing any relevant difference between collectively bargained and non-collectively bargained seniority systems). The EEOC points out that the Seventh Circuit rejected such an argument in *United Airlines*. *See United Airlines, Inc*., 693 F.3d at 764. This Court finds, however, that the Seventh Circuit's reasoning was too dismissive. The Supreme Court in *Barnett* allowed for an employer's enforcement of a seniority system that was not contractual, because if found the employees had an expectation of "consistent, uniform treatment." *Barnett*, 535 U.S. at 404. There is no reason that other employer policies cannot create similar employee expectations. This Court finds the policy in the case at bar to be such a policy.

Employees expect job decisions to be made based on a competitive process whereby the best qualified individuals are selected for a position. Courts have historically deferred to employer personnel decisions regarding job qualifications. *See, e.g., Fischbach v. D.C. Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (emphasizing that "the court must respect the employer's unfettered discretion to choose among qualified candidates"). Even the ADA recognizes this, allowing job qualifications that are job-related and consistent with business necessity even when those qualifications might screen out individuals with disabilities. 42 U.S.C. § 12113(a) (2012). The policy in the case at bar has objective criteria—length of service, evaluation scores, and specialized or technical skills. There is no allegation in this case that the policy was applied in a non-objective fashion. The employee who was indeed "best qualified" for the Pharmacy Technician position had as strong an expectation that he would be placed in that position as the more senior employee in *Barnett* had regarding the position at issue in that case.

Thus, this Court concludes that the ADA does not require an employer to automatically reassign an employee to an open position merely because the employee with a disability meets the minimum qualifications for that position, when there is another, more qualified employee for that position under the employer's consistent, uniformly applied transfer policy. Such reassignment would not be reasonable in the run of cases, and the employee much show special circumstances that warrant requiring the employer to make an exception to its policy. For this reason, the EEOC is not entitled to summary judgment on the claim that Sunset's policy is per se unreasonable. To the contrary, Sunset is entitled to summary judgment unless there is evidence of special circumstances that create a factual question on whether an exception to the Employee Transfer Policy is reasonable or an undue hardship. The Commission has not brought forth any evidence that Sunset has ever failed to follow its Employee Transfer Policy as written, or make any exceptions to its "best qualified" hiring procedures that would

undermine the expectations created by the transfer policy.[6] Therefore, there are no questions of fact and Sunset is entitled to summary judgment in this case as a matter of law.

ORDER

The EEOC's motion for summary judgment regarding Sunset's affirmative defense is GRANTED. The EEOC's motion for summary judgment asserting the Employee Transfer Policy violates the ADA as a matter of law is DENIED. Sunset's cross-motion for summary judgment asserting that its policy complied with the ADA as a matter of law is GRANTED. The complaint in this case is dismissed WITH PREJUDICE.

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The Honorable Joey Jerimiah

DATE: October 1, 2012

[6] The Court recognizes the policy has a probationary period, which the Commission asserts makes it non-objective, but it is the selection for the position that is at issue here, not how employees are evaluated once they are in the position. There has been no evidence provided that the probationary period has been applied in such a way as to undermine the expectations about how employees are selected under the "best qualified" criteria.

United States Court of Appeals

FOR THE THIRTEENTH CIRCUIT

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No. 13-1823

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Equal Employment Opportunity Commission, Appellee and Cross-Appellant v. Sunset ManorCare, LLC., Appellant and Cross-Appellee	* * * * * * * * * * * *	Appeal from the United States District Court for the Southern District of New Canada

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Submitted: February 4, 2013
Filed: December 16, 2013

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Before Nelson, Simpson and Ryan, Circuit Judges.

The Equal Employment Opportunity Commission (EEOC) appeals the decision of the Federal District Court for the Southern District of New Canada, dismissing its complaint against Sunset ManorCare, LLC (Sunset). Sunset cross-appeals the district court's granting of a motion for summary judgment dismissing its affirmative defense that the EEOC failed to adequately conciliate the charge before filing its civil suit.

In the court below, the EEOC alleged that Sunset violated the Americans with Disabilities Act (ADA) when it refused to reassign one of its employees, Lucy Fernandez, to an open Pharmacy Technician position despite the fact Fernandez required the transfer as an accommodation of her lifting disability, she was qualified for the position, and the position was equivalent in pay and status to her prior position as an CNA. The EEOC more broadly asserts that Sunset's Employee Transfer Policy violates the ADA because it requires qualified employees with disabilities to compete for open positions even when they seek reassignment

as a reasonable accommodation of their disabilities. Sunset raised an affirmative defense to the EEOC's complaint, asserting that the Commission had failed to conciliate the charge as required by 42 U.S.C. § 12117(a) (2012) (cross-referencing 42 U.S.C. § 2000e–5). The EEOC moved for summary judgment on Sunset's affirmative defense as well as on the accommodation issue. The Commission asserted its conciliation process is not subject to judicial review, and that there is no issue of fact or law that Sunset has violated the ADA. Sunset filed a cross-motion for summary judgment on the accommodation issue, asserting that the issues raised by its Employee Transfer Policy were subject to the "special circumstances" test set forth in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), and that the EEOC has failed to create any issues of law or fact that any special circumstances exist in this case.

The district court agreed that judicial review of the Commission's conciliation process was proper, and that the Commission had failed to conciliate adequately, but declined to recognize an affirmative defense to the federal claim based on that finding. The district court suggested the EEOC had not acted in good faith and a stay of proceedings would ordinarily have been appropriate. Nonetheless, the district court instead dismissed the Commission's complaint on the grounds that the Commission failed to create an issue of either law or fact regarding the lawfulness of Sunset's Employee Transfer Policy under the ADA.

This Court agrees with the district court's decision to dismiss the affirmative defense, although not with its suggestion it retained jurisdiction to review the conciliation process. Federal discrimination law does not provide the courts with any authority to scrutinize the Commission's conciliation efforts, whether through consideration of an affirmative defense of failure to conciliate or through issuing a stay of the proceedings. Thus, while the court below reached the right decision to grant the motion to dismiss, it erred in retaining jurisdiction to evaluate the EEOC's conciliation efforts. On issues raised by the cross-motions for summary judgment, this Court concludes Sunset's Employee Transfer Policy violates the ADA as a matter of law by requiring employees with disabilities to compete for open positions rather than automatically reassign them to those positions when they are qualified to perform them and need reassignment as an accommodation of last resort, and the employer has presented no case-specific evidence of undue hardship. The district court erroneously denied the EEOC's summary judgment motion and granted Sunset's. Therefore, the district court's order dismissing Sunset's affirmative defense is AFFIRMED, but its order dismissing the EEOC's complaint is REVERSED AND REMANDED for entry of judgment in favor of the Commission and determination of relief.

We will first address the ADA claim, as that is the basis for the lower court's dismissal of this proceeding.

Reassignment to a Vacant Position under the ADA

The district court concluded the EEOC failed to create an issue of either law or fact that Sunset's Employee Transfer Policy, which conditions reassignment to vacant positions within the company on the employee being the most qualified individual seeking that position, violated Sunset's obligations to reasonably accommodate employees with disabilities under the ADA. In doing so, the district court misconstrued the scope of the ADA's accommodation mandate.

The ADA's reasonable accommodation provision was intended to be broadly construed. The Supreme Court in *US Airways, Inc. v. Barnett* endorsed the "ordinarily or in the run of cases" standard for evaluating whether an accommodation is reasonable. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 402(2002) (citations omitted). The Court in *Barnett* reasoned that "reassignment to a vacant position" is ordinarily reasonable, which would generally then require the employer to show undue hardship to justify denying an open, equivalent position to a qualified employee with a disability. *Id.* at 403. "Undue hardship" requires a showing of "special (case-specific) circumstances." *Id.* (citations omitted).

Barnett specifically rejected the employer's argument that an accommodation is unreasonable if it requires "preferential treatment" of an individual with disability, as when the accommodation requires employers to make an exception to a "neutral" rule or policy. *Id.* at 397. The majority in *Barnett* endorsed only a narrow exception to that basic proposition, namely for well-established and consistently applied seniority systems. *See id.* at 405-06.

The district court attempts to extend *Barnett* to the type of policy at issue in this case, suggesting it is the equivalent of the US Airway's seniority policy. The Seventh Circuit recently addressed a similar argument that had been made in one of its earlier decisions. *See EEOC v. United Airlines, Inc.*, 693 F.3d 760, 763-64 (7th Cir. 2012) (overruling *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002)). That circuit concluded that exceptions to "best qualified" policies do not invoke the same concerns about "property rights and administrative concerns (and resulting burdens)" as exceptions to seniority plans. *Id.* at 764. We think the Seventh Circuit is correct. No employee was automatically entitled to the Pharmacy Technician position in this case, unlike the situation where the position vacancy was handled under a seniority plan.[1] We adopt the same position on this issue as the Seventh Circuit.

We find that the ADA requires employers to automatically reassign an employee with disabilities to an open position that is equivalent in pay and status when that employee is

[1] The fact the positions are assigned only on a "probationary" basis for the first six weeks reinforces this conclusion.

unable to perform the essential functions of the position the employee currently holds but is qualified and able to perform the essential functions of the equivalent open position, unless the employer can prove undue hardship. That an employer may prefer to select for that position another employee with what the employer deems to be better qualifications is irrelevant to whether the accommodation is reasonable and does not in itself establish undue hardship. The ADA mandates reassignment as a form of reasonable accommodation. 42 U.S.C. § 12112(9)(B) (2012). Only if the employer creates a genuine issue of fact that the reassignment would pose a significant difficulty or expense would summary judgment be inappropriate. *See id.* § 12111(10)(A) (defining undue hardship). Here, the only argument Sunset has raised is that the reassignment is unreasonable because it would violate its Employee Transfer Policy. It has not shown any evidence beyond that of significant difficulty or expense related to Fernandez's reassignment request.

Because Sunset conceded in the court below that the Pharmacy Technician position was equivalent in pay and status to the CNA position Fernandez held, and has presented no relevant facts regarding any undue hardship, there are no material issues of fact in dispute. The Commission is entitled to judgment as a matter of law. The district court should have granted the Commission's motion for summary judgment.

Judicial Review of Conciliation

Because the district court will be directed to address relief upon remand, the issue of the district court's review of the conciliation process remains active. The district court rejected Sunset's "conciliation defense" but suggested it would have stayed the proceeding for further conciliation if it had not rejected the ADA claim altogether. On remand, Sunset might renew its request in the form of a motion for stay. We find such a stay would not be proper, for reasons similar to why there is no affirmative "conciliation defense."

As the district court correctly noted, the ADA incorporates the procedures of Title VII of the Civil Rights Act of 1964, including the obligation to conciliate. *See* 42 U.S.C. § 12117(a) (2012) (ADA); *id.* § 2000e-5(b) (Title VII). The district court, relying on precedent established in several other circuits, concluded that it was proper for that court to review the sufficiency of the conciliation process, although it rejected Sunset's claim of an affirmative defense based on failure to conciliate in good faith. Instead, the district court suggested that the proper course was to issue a stay, directing the Commission to continue with the conciliation process. We believe the better position in this case is stated by the Seventh Circuit, which finds no basis for judicial review.

The Seventh Circuit recognized there are two problems with the district court's position in this case. *EEOC v. Mach Mining, LLC,* 738 F.3d 171 (7th Cir. 2013). First, nothing in the

statute expressly provides for judicial review of the conciliation process. *See id.* at 174. Rather, the statutory language emphasizes that conciliation matters are firmly within the discretion of the agency. *See id.* Second, there is no meaningful standard of review provided. *Id.* at 175. A court simply cannot determine whether the EEOC has met the required standard or not. *See id.* While some courts have implied an obligation to meet a good faith standard, there is no basis for such a standard in the statute. *Id.* The statute also makes the Commission's process confidential. *Id.* at 174-75 (quoting 42 U.S.C. § 2000e-5(b)). As the Seventh Circuit properly concluded, any inquiry into the sufficiency of the conciliation process runs afoul of that confidentiality requirement. *See id.*

These concerns extend to the trial court's suggestion the proper approach is to stay litigation and direct the parties to engage in further conciliation. The problem is the same as for the affirmative defense, namely establishing what is enough conciliation to warrant proceeding with litigation. Except in the extreme case where the Commission has made absolutely no attempt to conciliate, the district court would inevitably be drawn into evaluating the substance of the conciliation process. Nothing in the statute supports such an inquiry.

Even if we were to agree that review of the conciliation process were in some form proper, the applicable standard, as the district court acknowledges, would be good faith. As the Tenth Circuit recognized when applying the good faith standard, once the EEOC offers a conciliation agreement and the employer rejects that offer, the Commission is under no further obligation to conciliate. *EEOC v. Keco Indus., Inc.,* 748 F.2d 1097, 1101-02 (6th Cir. 1984). The facts in this case show that the EEOC made a conciliation offer and Sunset rejected any efforts that would have included finding its transfer policy unlawful as a general matter. The EEOC was not required to engage further in what it deemed a fruitless process to secure the broad rights of Sunset's employees with disabilities, and in good faith could have determined that would be accomplished only through an order of the federal court. *See id.*

Therefore, we conclude that the district court erroneously engaged in judicial review of the EEOC's conciliation efforts, and that neither its finding that the EEOC failed to adequately conciliate nor its suggestion of a stay of the proceeding was proper. The dismissal of the affirmative defense is affirmed, but the district court retains no jurisdiction to review the conciliation process. The case shall be remanded to the district court with directions to enter an order of judgment for the EEOC and proceed to consideration of the Commission's claims for relief, consistent with the other provisions of this opinion of the Court.

CONCLUSION

This Court, having considered the record and hearing the parties' oral arguments, hereby AFFIRMS the district courts' summary judgment dismissal of Sunset's affirmative

defense that the EEOC failed to conciliate in good faith, but REVERSES the decision of the district court to deny the EEOC's motion for summary judgment and alternatively grant Sunset's cross-motion on the ADA issues. This case is remanded for proceedings consistent with this opinion.

United States Supreme Court

Sunset ManorCare, LLC,
Petitioner,
v.

Equal Employment Opportunity Commission,
Respondent

No. 14-1184

June 30, 2014

Petition for writ of certiorari to the Thirteenth Circuit Court of Appeals is **GRANTED** limited to the following Questions:

1. Whether and under what standards may a court review the EEOC's conciliation process?

2. Does the Americans with Disabilities Act require the employer to reassign a qualified employee with a disability to a vacant, equivalent position when necessary to accommodate that employee's disability, or may the employer apply its "best qualified" selection process?