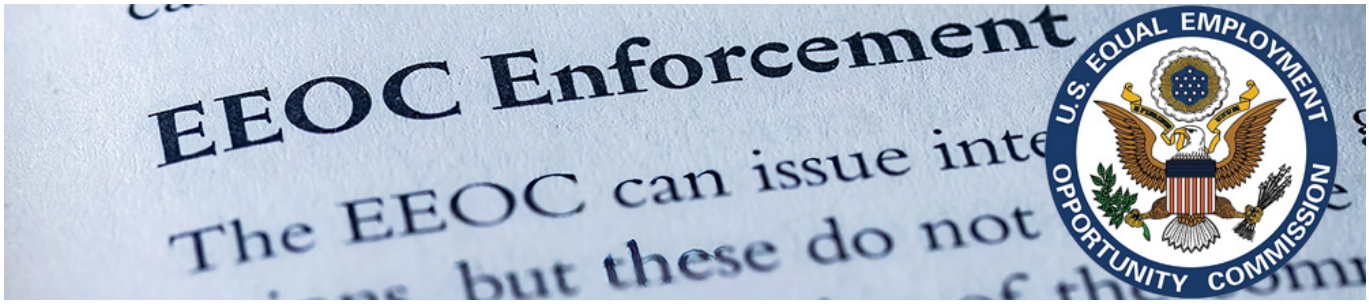
EEOC Attacks "Most Qualified Candidate" Hiring Policy



By [Janet A. Hendrick]

A federal appeals court provided two important reminders for employers when navigating the so-called "interactive process" required by the Americans with Disabilities Act when disabled employees show a need for a job accommodation. In *EEOC v. Methodist Hospitals of Dallas*, the Fifth Circuit Court of Appeals held on March 17, 2023 that an employer's policy of hiring the most qualified candidate did not violate the ADA and thus employers need not give preferential treatment in hiring to disabled employees seeking reassignment. The appeals court also held that because the employee in the case was responsible for breakdown in the ADA interactive process, Methodist did not violate the ADA in refusing to reassign the employee to a vacant position.

The EEOC's Lawsuit

The EEOC filed the case against Methodist in 2015 in federal court in Dallas after a Methodist fired a patient care technician in 2012. The employee sought reassignment, unsuccessfully applying for several open jobs, at Methodist after she injured her back and was unable to continue working as a patient care technician. Methodist offered her unpaid leave after she exhausted FMLA leave and asked her to contact human resources to discuss her employment. When she did not respond or contact HR, Methodist terminated her employment.

The employee appealed her termination and Methodist gave her additional time to apply for personal leave, but the employee again failed to respond, and Methodist terminated her again. The employee filed a charge of discrimination with the EEOC. The EEOC issued a decision in favor of the employee and then filed the lawsuit against Methodist.

In the lawsuit, the EEOC claimed that Methodist's policy of hiring the most qualified applicant violates the ADA by forcing disabled employees to compete for open positions, which in the EEOC's view, is not a reasonable accommodation. The EEOC also alleged that Methodist violated the ADA by refusing to reassign the employee to an open position for which she applied.

Methodist filed a motion for summary judgment, which the district court granted. The EEOC appealed to the Fifth Circuit, which has appellate jurisdiction over district courts in Texas, Louisiana, and Mississippi.

Preferential Reassignment as a "Reasonable Accommodation" under the ADA

Among possible reasonable accommodations for qualified employees who have a disability is reassignment to a vacant position. The EEOC refers to reassignment as the "accommodation of last resort," meaning reasonable efforts to keep the disabled employee in their existing job have failed. Whether employers have to give preference to disabled employees seeking reassignment or may require the disabled employee to compete with other candidates has resulted in a split among the federal appeals courts, with all but one that has ruled on the issue holding that the ADA does not require such preferential treatment. [1] One such court said that preferential reassignment "recasts the ADA—a shield meant to guard disabled employees from unjust discrimination—into a sword that may be used to upend entirely reasonable, disability-neutral hiring policies and the equally reasonable

expectations of other workers." [2]

The Fifth Circuit Rejects that the ADA Requires Preferential Reassignment

The Fifth Circuit agreed with the majority of other appeals courts, holding that the EEOC's position "turns the shield of the ADA into a sword," and "imposes substantial costs on the hospital and potentially on patients." The court went so far as to say that "[w]hen the lives of patients are on the line, mandatory reassignment in violation of a best-qualified system is unreasonable in the run of cases." The court emphasized that discretion in hiring is "fundamental to the employer's freedom to run its business in an economically viable way," [3] and such a policy in a "non-profit, acute care hospital promotes the prevention of infection, illness, and medical error," and "advances the safety of hospital employees and the health of the … patients and communities they serve."

Ultimately, the appeals court held that mandatory reassignment in violation of Methodist's most qualified applicant policy is not reasonable in the run of cases, but remanded the case to the district court, which failed to address the second step of the inquiry: whether special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts.

The "Last Person Standing" Wins

The appeals court next turned to the EEOC's claim that Methodist violated the ADA by failing to accommodate the employee by reassigning her to a vacant position. This part of the opinion analyzes the ADA's requirement that employees and employers engage in an interactive process so that they can together determine what reasonable accommodations may be available. The court found that although Methodist was not always immediately responsive to the employee's inquiries, by failing to respond to Methodist, the employee was the ultimate

cause of the breakdown of the interactive process. Because "at summary judgment, an employee's 'unilateral withdrawal from the interactive process is fatal to [her] claim,' so long as the employer 'engage[d] in a good-faith, interactive process with [the employee] regarding [her] request for a reasonable accommodation,"[4] the Fifth Circuit affirmed the trial court's grant of summary judgment on the claim of failure to accommodate the employee.

Takeaways

- Federal courts within the Fourth (Maryland, North Carolina, South Carolina, Virginia), Fifth (Louisiana, Mississippi, Texas), Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota) and Eleventh (Alabama, Florida, Georgia) Circuits have held that mandatory reassignment of disabled employees is not required.
- The Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming) has held that a most qualified candidate policy violates the ADA.
- The Seventh Circuit (Illinois, Indiana, Wisconsin) has suggested it might find a most qualified candidate policy unlawful under the ADA.
- As I always remind my clients, employers should ensure they are the "last person standing" in the ADA interactive process with employees. Courts across the country, including the Fifth Circuit, have held that the party that causes the breakdown in the interactive process by, e.g., failing to respond to inquiries, is the party that loses on a failure to accommodate claim under the ADA.

Footnote:

[1] The Fifth Circuit discusses these courts' rulings on pages 944-945 of the decision.

[2] *Elledge v. Lowe's Home Centers, LLC*, 979 F.3d 1004, 1015 (4th Cir. 2020).

[3] Quoting *Elledge*, 979 F.3d at 1014.

[4] Quoting *Gordon v. Acosta Sales & Mktg., Inc.*, 622 Fed. App. 426, 430 (5th Cir. 2015); *Griffin v. UPS*, 661 F.3d 216, 225 (5th Cir. 2011).We closely monitor labor and employment law developments that may impact our clients' operations and will continue to provide updates. If you have questions about the issues raised in this article, please contact a Phillips Murrah labor and employment attorney https://phillipsmurrah.com/services/labor-employment.

About the author:

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