U. S. SUPREME COURT: ADA DOES NOT REQUIRE EMPLOYERS TO IGNORE ESTABLISHED SENIORITY RULES IN ACCOMMODATING DISABLED EMPLOYEES

Last month, the United States Supreme Court continued its trend of issuing Americans with Disabilities Act (ADA) decisions favorable to employers (*see also* the recent ADA case discussed in the February 2002 *VLCT News*, Legal Corner, p. 5). In *U.S. Airways, Inc. v. Barnett*, 2002 WL 737494 (2002), the Court addressed the following ADA issue: How does the ADA resolve a conflict between the interests of a disabled worker who seeks assignment to a particular position as a "reasonable accommodation" and the interests of other workers with superior rights to bid for the job under the employer's seniority system? Does the employee's accommodation demand "trump" the seniority system? In considering this issue, the Court addressed the following relevant facts:

The Plaintiff, Barnett, injured his back while working at U.S. Airways. He then invoked his seniority rights and was transferred to a less demanding job in the mailroom. Subsequently, at least two employees senior to Barnett decided to bid for the mailroom job. Barnett asked U.S. Airways to make an exception to the company's seniority rules and allow him to remain in the mailroom despite the seniority status of the other two employees. U.S. Airways eventually refused Barnett's request and he lost his job. Barnett filed suit under the ADA, claiming that the mailroom job amounted to a reasonable accommodation and that U.S. Airways discriminated against him by refusing his request.

In deciding the seniority issue, the Court first considered the relevant ADA provisions. The statute prohibits an employer from discriminating against a qualified individual with a disability, and it defines "qualified individual" as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. "Discrimination" under the ADA includes an employer's failure to make a reasonable accommodation unless the employer can show undue hardship. The Court noted that normally a request similar to Barnett's would be reasonable within the meaning of the statute but for the fact that it would violate the employer's seniority system rules. The Court concluded that it would not be a reasonable accommodation in the "run of cases" that a proposed assignment "trump the rules of a seniority system."

The Supreme Court did, however, leave a small window of opportunity for employees who can demonstrate "special circumstances" that would warrant a finding that their ADA rights would prevail over a seniority system. Such special circumstances may include proof that the employer's seniority system is inconsistently applied – thereby reducing employee expectations that the system will be followed. The employee may also show that the seniority system already has enough exceptions so that one further exception is unlikely to matter. In any event, the Court noted that employees bear the burden of showing special circumstances, which means that the employee must show why an exception to the seniority policy constitutes a reasonable accommodation when in the ordinary case it would not.

A word of caution: It is unclear how the Vermont Supreme Court would rule if faced with a similar issue under Vermont's Fair Employment Practices Act (although ordinarily the Vermont Supreme Court tends to follow the United States Supreme Court's

ADA decisions when considering similar statutory provisions under VFEPA). For this reason, and as a matter of prudent practice, it is critical that municipalities seek the advice of an attorney when dealing with accommodation requests or other related disability issues.

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