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In *Duvall v. Georgia-Pacific Consumer Products, L.P.*, the U.S. Court of Appeals for the Tenth Circuit held that positions filled by temporary contract workers were not “vacant” for purposes of triggering the employer’s obligation to reassign a disabled employee as a reasonable accommodation under the Americans with Disabilities Act.

Tenth Circuit Holds that Positions Filled By Temporary Workers Are Not Vacant for Purposes of Reassignment Under the ADA

By Margaret Parnell Hogan and Stephanie L. Hankin

In a case of first impression, the U.S. Court of Appeals for the Tenth Circuit recently considered whether positions filled by temporary contract workers are “vacant” for purposes of reassignment as a reasonable accommodation under the Americans with Disabilities Act (ADA). In *Duvall v. Georgia-Pacific Consumer Products, L.P.*, No. 08-7096 (June 9, 2010), the court held that, because similarly situated nondisabled employees could not apply for or obtain positions filled by temporary contract employees, the employer was not obligated to reassign a disabled employee to such nonvacant positions.

Tenth Circuit Law on Reassignment Under the ADA: A Refresher

In *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), the Tenth Circuit determined that an employer’s duty to reassign disabled employees to vacant positions is mandatory under the ADA. Under *Midland Brake*, if a disabled employee can be accommodated by reassignment to a vacant position, the employer must do more than merely consider the employee alongside other applicants for that position. Instead, the employer must offer the employee the vacant position.

However, *Midland Brake* recognized several specific situations in which reassignment is not reasonable, including:

- when reassignment would require an employer to create a new job for a disabled employee;
- when reassignment would constitute a promotion for the disabled employee;
- when reassignment would contravene the employer’s “important fundamental policies underlying legitimate business interests;” and
- when the position to which the disabled employee seeks to be reassigned is not vacant.

With respect to the last situation, until *Duvall*, the Tenth Circuit had not defined when a position is “vacant” for purposes of triggering an employer’s obligation to reassign a disabled employee to that position.

Background

Plaintiff Travis Duvall, who suffered from cystic fibrosis, worked in the shipping department of a paper mill owned by Georgia-Pacific Consumer Products, L.P. In 2005, Georgia-Pacific decided to outsource its shipping operations to a company called Network Logistics Solutions (NLS). As part of this transition, Duvall transferred to a machine operator position in the Georgia-Pacific converting department. As Georgia-Pacific employees (Duvall included) transferred out of the shipping department, their former positions in that department were filled by temporary contract workers (who were provided by a third-party temporary staffing company). The temporary contract workers remained in place until the NLS staff was ready to take over the shipping department.

By April 2006, Duvall was experiencing severe breathing difficulty due to the dusty environment in the converting department and requested a reasonable accommodation. During the interactive process with Georgia-Pacific, Duvall asked that he be put either back in his previous position in the shipping department, which was then occupied by a temporary contract worker pending the permanent outsourcing of the department, or in a position in the storeroom, which was also in a state of flux with a number of temporary contract workers filling some of the storeroom positions. Georgia-Pacific refused Duvall’s requests, and he was placed on short-term disability leave for three months.

Subsequently, in July 2006, the company offered Duvall the choice between a temporary position in the shipping department, which would not offer regular shifts or predictable hours, or a full-time position as a storeroom clerk, which entailed a significant pay cut. Despite the reduction in pay, Duvall accepted the storeroom position.

In December 2006, Duvall filed suit against Georgia-Pacific in the U.S. District Court for the Eastern District of Oklahoma, alleging that the company failed to reasonably accommodate his disability in violation of the ADA when it did not reassign him to the shipping department or the storeroom upon his request. The district court granted summary judgment for Georgia-Pacific, holding that the shipping department and storeroom positions filled by temporary workers were not “vacant” within the meaning of the ADA.

The Tenth Circuit’s Decision

On appeal, the Tenth Circuit considered the definition of “vacant” for purposes of reassignment under the ADA. The court held that “when a disabled employee seeks the reasonable accommodation of reassignment to a vacant position, positions with the company are ‘vacant’ for the purposes of the ADA when they would be available to similarly-situated nondisabled employees to apply for and obtain.” The court noted that, in framing this definition, it sought to avoid “transforming the ADA from an antidiscrimination statute into a mandatory preference statute.”

Applying this new definition to Duvall’s case, the Tenth Circuit affirmed the district court’s decision to grant summary judgment to Georgia-Pacific. The appellate court held that, at the time Duvall sought reassignment to the shipping department and storeroom positions, such positions – which were being filled by temporary contract workers either until they would be permanently filled with NLS employees or until Georgia-Pacific determined to make the storeroom positions vacant again for its own employees – were not “vacant” because they were not available for nondisabled Georgia-Pacific employees to apply for and obtain.

Recommendations for Employers

In light of the holding in *Duvall*, employers with operations in the Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) should:

- Revise their policies and procedures for reassigning disabled employees as an accommodation to reflect the Tenth Circuit’s new definition of a “vacant” position.
- Re-train supervisors and Human Resources representatives regarding the obligation to reassign disabled employees to vacant positions as an accommodation.
- Consult outside counsel if it is unclear whether a position is “vacant” for purposes of reassigning a disabled employee.

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