

EEOC Asks 7th Circ. To Revive United Airlines ADA Suit

By **Megan Stride**

Law360, Chicago (October 20, 2011, 7:39 PM ET) -- An attorney for the U.S. Equal Employment Opportunity Commission told the Seventh Circuit on Thursday that it should overturn its precedent regarding employer policies for reassigning disabled workers to new posts and revive the agency's case against United Airlines Inc.

At oral arguments, EEOC attorney Barbara Sloan told the appeals court that in light of a 2002 U.S. Supreme Court ruling, it should disregard its own 2000 ruling in which it held that the Americans with Disabilities Act does not require that employees who can no longer perform their job because of a disability receive positions over more qualified, nondisabled employees.

The EEOC is challenging the dismissal of its suit accusing United Airlines of violating the ADA by requiring disabled employees looking for a job transfer to compete with other employees for vacant positions, rather than simply reassigning the disabled workers to those jobs.

United Airlines has argued, meanwhile, that the Illinois district court that dismissed the case was required to follow the Seventh Circuit's precedent, under which, the company claims, a competitive transfer policy like that allegedly used by United Airlines uses does not violate the ADA.

Arguing for the airline company, Nina Stillman of Morgan Lewis & Bockius LLP told the Seventh Circuit panel that United Airlines does maintain reasonable accommodation guidelines as required for disabled employees who request a job transfer.

"Everything being equal, the person who is disabled is going to get the job," Stillman told the appeals court panel.

In its brief, the EEOC argued that while reassignment to a new position qualifies as a reasonable accommodation for disabled individuals, United Airlines' policy is not really a reassignment program because the company forces disabled workers to compete for new jobs instead of appointing them there.

The EEOC said United Airlines policy was really a "best-qualified selection policy," one which the defendant argues is acceptable under the Seventh Circuit's 2000 ruling in *EEOC v. Humiston-Keeling* in which it held that employers can require disabled employees to compete for reassignment positions.

Sloan told the panel Thursday it should revisit that 2000 decision given the Supreme Court's 2002 ruling in *US Airways v. Barnett*, which the EEOC asserts held that a preference for disabled workers — including reasonable accommodations like reassignment — may be required even if that preference would violate a company's disability-neutral policy.

The EEOC also said in its brief that the court should revisit *Humiston-Keeling* because that ruling was based on policy, and not on the plain language and legislative history of the ADA.

Stillman, however, told the appeals court on Thursday that that the EEOC's position was based only on its disagreement with *Humiston-Keeling's* outcome, and with Seventh Circuit decisions that followed and reinforced that ruling.

United Airlines argued in its brief that there have been no legislative changes to the relevant sections of the ADA since the Seventh Circuit established its precedent in 2000, and that no Supreme Court decisions — including *Barnett* — directly address the issue at hand.

"Indeed, in *Barnett* the Supreme Court did not address, directly or indirectly, the reasonableness (presumptive or otherwise) of an employer's use of a competitive transfer policy where that employer has a policy of selecting the most qualified candidate for a given position," the company wrote in its brief.

That issue was addressed in *Humiston-Keeling*, however, the airline argued, adding that the 2000 ruling should stand.

Judges Richard D. Cudahy, Michael S. Kanne and Diane S. Sykes sat on the panel for the Seventh Circuit.

Nina Stillman of Morgan Lewis & Bockius LLP argued for United Airlines.

The case is *EEOC v. UAL*, case number 11-1774, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by John Quinn.