

Disability Discrimination: US Supreme Court Places Seniority Rights Above Accommodation To An Employee's Disability.

What takes priority, a disabled employee's right to ask for a light-duty position as reasonable accommodation to the employee's disability, or another employee's right to bid for the position under a seniority system?

One Worker's Seniority Takes Precedence Over Another Worker's Disability

The US Supreme Court has ruled that seniority rights take precedence over accommodation to disability. It was a disability discrimination lawsuit filed by an airline baggage handler with a back condition.

We have covered this issue in our newsletter as lower US courts have handed down decisions relating to nurses specifically and to the healthcare field in general.

See *Back Condition: Nurse Not Entitled To Preference In Transfer.*, Legal Eagle Eye Newsletter for the Nursing Profession (10)3, March, 2002, p. 5., or *Nurse's Lifting Restriction: Hospital Ruled Not Liable For Disability Discrimination.*, Legal Eagle Eye Newsletter for the Nursing Profession (8)7, July, 2000, p. 2.

The typical case is a worker who cannot perform a physically demanding job. A nurse with lifting restrictions from a back problem asks to transfer out of orthopedics into pediatrics, or a disabled CNA asks to work as a unit secretary. However, there are rules for allotting open positions on the basis of seniority at the healthcare facility and the disabled employee is not the most senior person who is qualified and asks for the job.

In the healthcare field the courts have consistently valued other employees' seniority rights over disabled employees' right to accommodation under the Americans With Disabilities Act. The US Supreme Court has now expressly endorsed that approach to these often difficult cases. *US Airways, Inc. v. Barnett*, 70 U.S.L.W. 4285 (April 30, 2002).

When an employee asks for a specific job reassignment as an accommodation to the employee's disability, and the employer can show that the disabled employee getting the job would conflict with existing seniority rules, the accommodation asked for is not "reasonable accommodation" as that phrase is used in the US Americans With Disabilities Act.

This is not a hard and fast rule and a disabled employee may still have a valid argument.

There is still room for argument when the employer is in the habit of granting exceptions that go against its own seniority rules.

If non-disabled employees are known to get the benefit of exceptions to the employer's seniority rules, and disabled employees do not get exceptions in their favor, that is discriminatory.

If the employer is in the habit of often changing the employer's own seniority rules unilaterally, and refuses to do so for the benefit of a disabled employee, that is also discriminatory.

UNITED STATES SUPREME COURT, 2002.

Sexual Assault: Nurses Failed To Step In, Hospital Ruled Liable.

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Hospital Not Liable

For Resident Physician's Misconduct

Paradoxically, the court ruled that the hospital *was not* liable for the resident physician's misconduct while the hospital *was* liable for the nurses' failure to step in and prevent what he did.

Course and Scope of Employment

In general terms, the law holds employers liable for their employees' wrongful acts only when those acts are committed within the course and scope of their employment.

The court ruled that the resident was acting completely outside the course and scope of his employment with the hospital when he assaulted this patient. Thus the hospital was not liable for what he did.

In other sexual assault cases other courts have held employers liable for their employees' misconduct. A common scenario that leads to civil liability is when a personal caregiver who is assigned to care for a particular patient assaults the patient while caring for her. Legal liability can arise when male or female caregivers become sexually involved touching private bodily areas during the course of legitimately necessary personal care.

The legal distinction in this case seems to have been that this resident had no caregiving relationship with this patient. He merely used his status as a physician at the hospital to obtain access to a vulnerable individual.

The Hospital Was The Only Defendant

It is also noteworthy that the patient's lawyers elected to sue only the hospital, not the resident physician or the nurses. The strategy in these cases is just to obtain compensation for the victim.

Insurance for a named-insured's errors and omissions by law does not and cannot compensate the victim of the named-insured's intentional misconduct. *N.X. v. Cabrini Medical Center*, 739 N.Y.S.2d 348 (N.Y. App., 2002).