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Does ADA Require Transfers in all Accommodation Situations?

In Colorado and the Tenth Circuit, court cases are clear that an employer is required to give a disabled employee a vacant position for which the employee is "qualified" with or without reasonable accommodations. This obligation is superior to the employer's right to select the "most qualified" applicant over one who is a "merely qualified" applicant with a disability who can be accommodated. The employer does not have the choice to accommodate or not, in favor of a superior applicant. Smith v. Midland Brake, Inc. 180 F.3d 1154 (1999); Bristol v. Clear Creek County, 281 F.3d 1148 (10th Cir. 2002).

This position is backed up by the Equal Employment Opportunity Commission Guidelines, which explains that reassignment does not mean only that the employee is permitted to compete for vacant positions. It means that if the employee is "qualified", he or she gets the job. Otherwise, reassignment would be of little value and would not be implemented as Congress intended, according to the EEOC guidelines. The EEOC seems to think that because there is always a superior applicant to be found, no accommodations would ever occur. Even without the ADA, any applicant with a disability could compete—unsuccessfully--for any open position, the EEOC guidelines explain.

This view is not universal, however. Two other circuits—the 7th and the 8th (which are both in the Midwest) have cases holding that the employer is not required to turn away a superior applicant (the "most qualified" applicant) in favor of a less desirable applicant with a disability, even if "qualified". The most recent of those cases was against Walmart, which had a written policy that any vacancy would go to the "most qualified" applicant without regard to disability. Under this Walmart policy, a non-disabled applicant from outside the company was hired over the employee with a disability. This resulted in the employee getting a job that paid about half of the other vacancy. The issue framed in the Walmart case, and the Humiston-Keeling case from the 7th circuit, was not "qualified" versus "most qualified" or "less qualified" but whether or not the employee with a disability had a "right" to a transfer. These cases said: no absolute right to a transfer exists because the ADA is not a "mandatory preference statute".

What This Means For Counties

The law is clear for Colorado counties. Despite the opinions in other parts of the country, if a vacancy exists for which an employee with a disability is qualified; the employer has the duty to place the employee in that position so long as they can perform the essential duties of the job with or without reasonable accommodations. If the pay of that position is less or more does not matter. The applicant can decide to accept or turn down any vacancies for which they are qualified under this standard.

At the time the county is presented with a verbal or written request for an accommodation under the ADA, they should first verify the validity of the disability by using the medical process. If the interactive process (a series of discussions with the employee and with disability experts) shows that no reasonable accommodation allows the employee to perform their current essential job duties, the county is not free to terminate the employee without doing more.

A county should find out what vacancies exist or are anticipated in the next 90 days. The county should request or get an up to date or current application form from the employee; don't use an old inaccurate one. Consider whether that employee is qualified for any of the openings, with or without reasonable accommodations. Finally, extend an offer in writing to the employee for any opening for which they are qualified, not the best qualified. If a county follows and records this process, they can feel assured that they are complying with the intent of ADA.

For more information, contact CTSI at 303-861-0507.