



ON THE LEGAL FRONT

The Supreme Court Ruling in US Airways v. Barnett

Art Gutman
Florida Institute of Technology

In 1990, Robert Barnett injured his back and could no longer perform the heavy lifting duties required of his cargo handling job at US Airways. Using his seniority, he transferred to a physically less demanding mailroom job. Two years later, Barnett was notified his mailroom job was being opened for bidding under the airline's unilaterally imposed seniority system and that two employees more senior to Barnett had bid for the job. Barnett, in turn, made three accommodation requests: (a) that he remain in the mailroom job; (b) that he be returned to cargo handling outfitted with equipment permitting him to perform heavy lifting duties; or (c) that his cargo handling job be restructured to include only warehouse office work. The airline did not respond for 5 months, at which point Barnett was notified he no longer had the mailroom job but could bid for other jobs within the company for which he was qualified (and there were none).

In his ADA lawsuit, Barnett challenged US Airway's seniority system. He also charged that US Airways failed to flexibly interact with him on his three accommodation requests and that he experienced retaliation. The district court granted summary judgment to US Airways on all three charges. The 9th Circuit (*Barnett v. US Airways*, 2000) upheld the judgment on retaliation but remanded for trial on flexible interaction and created, at least temporarily, fresh case law for unilaterally imposed seniority systems. The Supreme Court's majority ruling dealt only with the seniority issue.

Collectively Bargaining v. Unilateral Imposition

There was no tension in *Barnett* between reassignment to vacant positions, a statutorily mandated accommodation, and *collectively bargained* seniority agreements (or CBAs). Many circuit courts had ruled on this issue, each concluding a reassignment request that conflicts with a bona fide CBA is *unreasonable as a matter of law* (e.g., *Davis v. FPL*, 2000; *Eckles v. Conrail*, 1996; *Foreman v. Babcock*, 1997; *Kralik v. Durbin*, 1997; & *Smith v. Midland Brake*, 1999). Indeed, after the *Barnett* ruling, the 9th Circuit itself ruled that "an accommodation that is contrary to the seniority rights of other employees set forth in a CBA would be unreasonable per se" (*Willis v. Pacific Maritime*, 2001).

Rather, the issue in *Barnett* was whether seniority rules unilaterally imposed by the employer require a different employer defense than seniority rules established via a CBA. In explaining the distinction in the later (*Willis*) case, the 9th Circuit stated the following:

In *Barnett*...we declined to adopt a per se rule where a seniority system was unilaterally imposed by an employer. We noted that under such circumstances, “no bargained for rights are involved.” Unlike the situation in *Barnett*, the instant matter involves a bargained for seniority system contained in a CBA. Here, the rights of other union members under the...NLRA are implicated.

The *Barnett* ruling was that a unilateral seniority system is “not per se a bar to reassignment,” but rather, a “factor to be considered in the *undue hardship analysis*.” In other words, the 9th Circuit espoused a two-tier view of seniority systems. On one hand, if a CBA seniority system is bona fide (i.e., a BFSS), a request for reassignment that conflicts with its provisions is *unreasonable as a matter of law*.¹ On the other hand, if it is unilaterally imposed, an otherwise reasonable reassignment request² forces the employer into a statutory affirmative defense (undue hardship).

The Supreme Court Ruling³

The evening news reports implied a narrow 5–4 Supreme Court ruling favoring US Airways. In actuality, only two justices (Souter & Ginsburg) voted to uphold the 9th Circuit ruling, not four. Their argument was that unlike Title VII (and other laws), there is no statutory BFSS defense in the ADA. Souter argued that *Barnett* had carried his burden of showing that his request was reasonable (i.e., “plausible or feasible”) and that it would result in “minimal disruption” to the airline’s operations.

The remaining seven justices were fractured in their viewpoints and a majority of five was fashioned only because O’Connor agreed to a ruling that she would phrase differently if left to her own devices. One commonality among the remaining seven justices is that none would burden defendants on a case-by-case basis to prove reasonability or undue hardship for either a unilaterally imposed or a collectively bargained system.

For their part, Scalia and Thomas, who dissented from the majority opinion, did not distinguish between unilateral and collectively bargained agreements and voted to summarily overturn the 9th Circuit ruling. Scalia argued

¹ It should be noted, however, that in at least one case (*Aka v. Washington Hospital Center*, 1998), the court ruled that the employer’s interpretation of a CBA was at odds with its “plain meaning.”

² Reassignment to vacant jobs is a statutorily mandated accommodation. The request is reasonable given plausible reasons to believe the employee can perform the essential function of the vacant job.

³ Additional information on *Barnett v. US Airways* (April 29, 2002) is available at <http://laws.findlaw.com/us/000/00-1250.html>.

that accommodations are for obstacles or barriers to performance of essential job functions that form a nexus to the disability (e.g., equipment that might help Barnett perform heavy lifting). By this definition, a seniority system is orthogonal to the disability and constitutes no obstacle.

The majority ruling was written by Breyer, who spoke for Kennedy, O'Connor, Rehnquist, and Stevens. O'Connor and Stevens also wrote separate concurrences.

Breyer ruled that "the relevant seniority system advantages, and related difficulties that result from violations of seniority rules, are not limited to collectively bargained systems." He also ruled that a reassignment request that conflicts with any type of seniority system is *ordinarily* not reasonable as a matter of law. Or in Breyer's words:

[T]he seniority system will prevail in the run of cases. As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is *ordinarily* to show that the accommodation is *not reasonable*. Hence such a showing will entitle an employer/defendant to summary judgment on the question *unless there is more*.

Clearly, it was the latter part of this ruling that fractured the court. Although Breyer clearly strikes down the burden on defendants implied in the 9th Circuit ruling, it leaves room for the plaintiff to prove "there is more," or that there are "special circumstances" that would make a request that ordinarily is unreasonable, reasonable on the "particular facts" of a given case. Indeed, Breyer suggested two sample proofs, including (a) that the employer in a unilateral system alters the conditions too frequently and (b) that the system in place already contains exceptions used in the past.

In her concurrence, O'Connor stated she preferred a ruling that "the effect of a seniority system on the reasonableness of a reassignment as an accommodation for the purposes of the ADA depends on whether the seniority system is legally enforceable." She further suggested that "unenforceable" agreements feature the employer's right to change the system and disclaimers that reduce employee expectations that the system will be followed. Having noted that, O'Connor also stated that:

Because I think the Court's test will often lead to the correct outcome, and because I think it important that a majority of the Court agree on a rule when interpreting statutes, I join the Court's opinion.

In other words, a plain reading of O'Connor's concurrence suggests she was sympathetic to the notion that unlike a CBA, a unilaterally imposed system permitting the employer to alter the conditions at will is suspect,⁴ whereas a CBA is not.

⁴ Indeed, US Airways' system did permit the employer to change the rules "without notice," but there was no evidence that the airline had done so at any time in the past.

Finally, in his concurrence, Stevens focused on three fact-specific issues that Robert Barnett could use to prove his “special circumstances.” These included (a) whether the mailroom job was opened for bidding in response to a routine airline scheduling change or as a direct consequence of a large-scale layoff, (b) whether the requested accommodation is an assignment to a vacant position as opposed to maintenance of the “status quo,” and (c) the impact of Barnett’s request on other employees.

Conclusions

Despite the fractures among the justices, the ultimate ruling in this case seems fair. First, it preserves the run of cases on CBAs. If a CBA is bona fide, prior case law is unanimous in its view that accommodations that conflict with its provisions are unreasonable as a matter of law. Of course, the CBA must be bona fide. Occasionally, plaintiffs have proven that seniority systems were designed with discriminatory motives (see for example *US v. Georgia Power*, 1983). Also, no system is bona fide if a company or union acts in contradiction to the plain meaning of the agreement (see Footnote 1). Nevertheless, ordinarily, it is difficult to prove that a BFSS is not bona fide, and we can only hope it is the exception, not the rule, when a company or union acts in ways that contradict the provisions.

Second, it is also fair, it seems, to distinguish between CBAs and unilaterally imposed plans. To suggest that seniority systems are bona fide only when unions are involved seems absurd on its face. At the same time, there is likely greater opportunity to abuse an imposed plan than a CBA, particularly if the company reserves the right to alter the provisions without notice and there is no employee representation to question how the provisions are imposed. However, where the 9th Circuit ruling went afoul of the Supreme Court was to presuppose that the potential abuses in an imposed plan imply an affirmative employer defense in every single case. Once again, if abuses are the exception, not the norm, as presupposed by the majority of the Supreme Court, it does make sense that where there are exceptions (i.e., abuses), the burden falls to the plaintiff to prove them. Clearly, the majority ruling gives plaintiffs that opportunity, whereas Scalia and Thomas would not.

Finally, when one considers how Robert Barnett was treated, one can envision illegal motives for mistreatment. The ADA run of cases clearly implies that both employees and employers have a duty to *flexibly interact* on issues of reasonable accommodation. Indeed, employers have lost cases they probably would likely have won because they assumed an accommodation request was unreasonable and failed to interact with employees (see for example *Bultmeyer v. FWCS*, 1996; *Criado v. IBM*, 1998; *Dalton v. Suburu-Izuzu*, 1998; *Feliberty v. Kemper*, 1996; *Hendricks-Robinson v. Excel*, 1998; & *Ralph v. Lucent*, 1998). In the present case, Barnett made three specific requests and US Airways never interacted with him on any of them. They

waited 5 months, removed him from the mailroom job, and notified him that he could apply for other vacant jobs for which he was qualified, perhaps knowing there were none available.

In short, my belief is that the Supreme Court preserved Robert Barnett's right to prove he was illegally mistreated in accordance with the ADA without placing an undue burden on the defendant. Contrary beliefs are welcome: Artgut@aol.com.

References

- Aka v. Washington Hospital Center, 156 F.3d 1284 (CA DC, 1998).
- Barnett v. US Airways, Inc., 228 F.3d 1105 (CA9, 2000).
- Bultmeyer v. FWCS, 100 F.3d 1281 (CA7, 1996).
- Criado v. IBM, 145 F.3d 437 (CA11, 1998).
- Dalton v. Suburu-Izuzu, 141 F.3d 667 (CA7, 1998).
- Davis v. FPL, 205 F.3d 1301 (CA11, 2000).
- Eckles v. Conrail, 94 F.3d 1041 (CA7, 1996).
- Feliberty v. Kemper, 98 F.3d 274 (CA7, 1996).
- Foreman v. Babcock, 117 F.3d 800 (CA5, 1997).
- Hendricks-Robinson v. Excel, 154 F.3d 685 (CA7, 1998).
- Kralik v. Durbin, 130 F.3d 76 (CA3, 1997).
- Ralph v. Lucent, 135 F.3d 166 (CA1, 1998).
- Smith v. Midland Brake, 180 F.3d 1154 (CA10, 1999).
- US v. Georgia Power Company, 685 F.2d 890 (CA5, 1983).
- Willis v. Pacific Maritime, WL 21294 (CA9, 2001).

