

# Employment Practices Liability

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## Federal Court Says ADA Does Not Require Reassignment of Employee Without Competition

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**Executive Summary:** If an employee can no longer perform the essential functions of his or her position due to a disability, one common form of reasonable accommodation under the Americans with Disabilities Act (ADA) is reassignment to a vacant position. Last week, in *U.S. Equal Employment Opportunity Commission v. St. Joseph's Hospital*, 2016 WL 7131479 (11th Cir. 2016), the Eleventh Circuit (the federal appeals court over Florida, Georgia and Alabama) **rejected** a long-standing position of the U.S. Equal Employment Opportunity (EEOC) that as long as the disabled employee is qualified for the position the employer **must** place the employee in the vacant position and cannot require the employee to compete for it.

**Background:** A nurse at St. Joseph's Hospital suffered from spinal stenosis, which required her to use a cane for support. The nurse worked in the hospital's psychiatric ward, and the hospital became concerned about her placement in that department because of the possibility that patients could use the cane as a weapon. The hospital offered the nurse the opportunity to remain employed at the hospital and gave her 30 days to apply for other positions for which she was qualified. The hospital also waived its requirement that internal candidates be in their current position for more than six months before applying for a new position and have no final written warnings in their record. The nurse had recently been demoted for failing to follow hospital procedures and had a final written warning in her file, but in an effort to further accommodate her, the hospital waived these requirements. The nurse, however, was required to compete with other applicants for any position for which she applied. The nurse was qualified for three of seven positions for which she applied, but the hospital hired better-qualified applicants. Because the nurse was not able to secure employment within the 30-day period provided to her, she was terminated.

**Court Decision:** The ADA requires an employer to reasonably accommodate a disabled employee. 42 U.S.C. § 12112(a). Among the list of accommodations that may be reasonable is reassignment to a vacant position. In this case, consistent with its long-standing guidelines, the EEOC argued that the hospital violated the ADA by requiring the nurse to compete for a vacant position she was qualified to perform. The Eleventh Circuit disagreed. Relying upon a Supreme

Court decision that reassignment is not required when it would violate the rules of an employer's established seniority system, the Eleventh Circuit found that requiring reassignment in violation of an employer's best-qualified hiring or transfer policy is not reasonable. Notably, the court stated, "[p]assing over the best-qualified applicants in favor of less-qualified ones is not a reasonable way to promote efficient or good performance." The court further noted that "'the ADA was never intended to turn nondiscrimination into discrimination' against the non-disabled." According to the court, the ADA does not require an employer to turn away a superior applicant in favor of a disabled employee.

**Bottom Line:** When employers have hiring or transfer policies in place, such as a superiority system or a best-qualified applicant provision, the ADA does not require a reassignment that violates the company policies. This case may have turned out differently had St. Joseph's Hospital not had a best-qualified applicant policy in place. Because it did, the court found the ADA only requires that an employer allow the disabled employee to compete equally for a vacant position. Just as the hospital did here, employers can find other ways to accommodate the disabled employee when they require the employee to compete for positions. For example, here, the hospital waived the requirements that the employee have been in her current position for six months and that she have no final warnings on file. When it comes to reassignments and the ADA, employers should look at their policies to determine whether any requirements can be waived to accommodate the disabled employee or whether any other measures can be taken to further assist the employee in finding reassignment within the workforce. Note that the Eleventh Circuit's decision is a split from other circuits and, depending on the employer's location, the employer may need to consider placing the disabled individual in the open position even if he or she is not the best qualified.

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