



U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

March 19, 2012

**MEMORANDUM FOR MARY ANNE GIBBONS,  
GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT,  
UNITED STATES POSTAL SERVICE**

*Re: Whether a Collective Bargaining Agreement May Require that the United States Postal Service Apply Seniority Rules to Vacant Positions Notwithstanding Requests by Disabled Employees for Reasonable Accommodations under the Rehabilitation Act*

You have requested our opinion on a legal question that has arisen during collective bargaining negotiations between the United States Postal Service ("USPS" or "Postal Service") and the American Postal Workers Union, AFL-CIO ("APWU" or "Union"). See Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, General Counsel and Executive Vice President, USPS, *Re: Request for Opinion* (Nov. 14, 2011) ("USPS Letter"). USPS and the Union wish to adopt a contract term requiring that all assignments to vacant positions comport with the seniority rules provided in the current collective bargaining agreement ("CBA"). Under this provision, applicable seniority rules would trump other considerations in allocating vacant positions, even when a less senior employee requests the position as a reasonable accommodation for his or her disability under the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (2006).

You have advised us that the Postal Service has strictly followed a collectively bargained seniority system for many years and during many labor agreements. You have also acknowledged that the Rehabilitation Act might require deviation from the seniority rules in special circumstances, though you maintain that such circumstances would be exceedingly rare. On that understanding of your consistently applied *bona fide* seniority system, we agree that, in the "run of cases," implementation of the proposed provision will not offend the Rehabilitation Act. Our conclusion follows from the Supreme Court's holding in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002), that "to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'" While special circumstances may require deviation from the seniority system in particular cases, *see id.* at 405, you have not asked us to address any particular circumstances here.

I.

A.

Seniority provisions have been a consistent feature of the collective bargaining agreements between the Postal Service and the Union for more than 30 years. The current CBA sets forth seniority principles in Article 12 and in additional articles related to specific crafts. See CBA between APWU and USPS art. 12, § 2.A (May 26, 2011) ("Except as specifically

provided in this Article, the principles of seniority are established in the craft Articles of this Agreement.”); *see, e.g., id.* art. 37, § 2.B (setting forth seniority rules for the clerk craft and stating that the “rules apply to all employees in the regular work force when a guide is necessary for filling vacant assignments and for other purposes”).<sup>1</sup> These provisions prescribe an elaborate seniority system governing vacancies and work assignments. As you explain, the system “is designed to guarantee that seniority is applied in a manner that is transparent, objective, and procedurally fair. From filling vacancies to reassigning or ‘excessing’ employees, seniority determines the outcome under a comprehensive set of rules for posting, bidding, and seniority calculation.” USPS Letter at 4.

The relevant CBAs historically have allowed duty assignments without regard to seniority in only two sets of circumstances. First, the Postal Service may designate some positions as “best qualified,” meaning that USPS has the discretion to choose the applicant it deems most qualified for the position, irrespective of seniority. *See* USPS Letter at 5. The CBA limits the number of best-qualified positions. *See id.* In the clerk craft, for instance, only approximately two percent of the regular workforce—3,300 out of 153,000—occupies positions designated as best-qualified. *Id.*

Second, Article 13 of the agreement provides a mechanism for establishing light-duty assignments that may be available for medical reasons without regard to seniority. *See id.* That mechanism operates at the local level: Local negotiators are authorized to convert a limited number of “normal positions” subject to the seniority system into light-duty assignments. CBA between APWU and USPS art. 13, §§ 3.A-3.C. To “insure that no assigned full-time regular employee will be adversely affected” by the light-duty designations, *id.*, local negotiators may only convert “residual vacancies”—that is, vacancies that exist after the seniority-based bidding process has occurred. USPS Letter at 4-5. In short, light-duty assignments under Article 13 do not implicate seniority “because the assignment is usually created from a list of duties or tasks (not actual vacancies in the regular workforce) that have been reserved for light duty.” USPS Letter at 5.

In the current round of contract negotiations, the Postal Service and APWU have proposed a new term that would provide:

The parties agree that consistent with the parties’ current collective bargaining agreement on the application of seniority, future temporary assignments, reassignments, or reemployment of fully or partially recovered employees to work in APWU represented crafts will be to residual vacancies or to uniquely created assignments consisting of duties that would otherwise be properly performed by non-career employees.

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<sup>1</sup> The CBA’s various seniority provisions are not only lengthy and complex, but also influenced by the “law of the shop.” *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 63-64 (1981). We accordingly defer to your explanation of the meaning and application of the seniority rules. As explained below, most critical is your assurance that “the agreement’s seniority rules . . . are and have been strictly followed.” Email for H. Jefferson Powell from William D. Bubb at 1 (Dec. 23, 2011, 10:16 a.m.) (“Bubb Email”). On that basis, we understand the USPS seniority system to be a *bona fide* one. *See, e.g., AT&T v. Hulteen*, 129 S. Ct. 1962, 1969 (2009).

*Id.* at 1 (footnote omitted). We understand this term to mean that the Postal Service may assign an ill or injured employee to a different position only if the position remains vacant after more senior employees have declined to bid on it. *See id.* at 3-4. That is to say, the seniority rules will apply to all positions to which they currently apply under the CBA, regardless of bidding employees' disability status. Thus, our understanding is that this term does not alter the parties' agreement or practice under prior collective bargaining agreements; it simply explains the existing agreement and practice.

## B.

The Rehabilitation Act prohibits the Postal Service, among other Executive agencies, from discriminating on the basis of disability. 29 U.S.C. § 794(a) (2006) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by . . . the United States Postal Service."). Congress has instructed that "[t]he standards used to determine whether [the Rehabilitation Act] has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under . . . the Americans with Disabilities Act of 1990 ["ADA"], 42 U.S.C. § 12112(a) (2006 & Supp. III 2009)]." *Id.* § 794(d). Thus, "[a]n employment discrimination claim under section 794 of the Rehabilitation Act is analyzed under the same standards applicable to Title I of the ADA." *Oliveras-Sifre v. Puerto Rico Dep't of Health*, 214 F.3d 23, 25 n.2 (1st Cir. 2000); *see also Barnett*, 535 U.S. at 403 (interpreting the ADA in accord with case law construing "the linguistically similar Rehabilitation Act").

Under the ADA, an employer discriminates against an employee with a disability if the employer fails reasonably to accommodate the employee's disability. 42 U.S.C. § 12112(b)(5) (2006). An employer is obligated to provide a reasonable accommodation to "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8) (2006 & Supp. III 2009). A reasonable accommodation may take one of several forms. The employer may, for instance, alter the employee's current job or work schedule to allow the individual to perform the position's essential functions. *Id.* § 12111(9)(B). The employer may also "reassig[n]" the individual "to a vacant position." *Id.* "Reassignment," the Equal Employment Opportunity Commission ("EEOC") has explained, "is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship" on the employer. EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002, at 19 (Oct. 17, 2002) ("*EEOC Enforcement Guidance*"), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited Mar. 15, 2012).<sup>2</sup>

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<sup>2</sup> "The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of" a range of factors set forth by statute. 42 U.S.C. § 12111(10) (2006). An employer is not required to provide an accommodation that would impose an undue hardship on its operations. *Id.* § 12112(b)(5)(A).

## II.

The question presented here is whether the CBA's seniority rules conflict with the Rehabilitation Act when an employee who requests reassignment to a position as a reasonable accommodation of a disability is less senior than other applicants for the same job. As a general matter, we do not believe that this circumstance creates a conflict. So long as the rules of a *bona fide* seniority system are applied strictly—and you explain that in this instance they are—they need not bend to requests for reasonable accommodation. On the contrary, making an exception to the seniority system for particular employees would adversely, and unreasonably, affect other USPS employees' settled expectations in the system. See *Barnett*, 535 U.S. at 404 (explaining that the "important employee benefits" that are created by a seniority system depend on "the employees' expectations of consistent, uniform treatment").

### A.

Our conclusion follows from the Supreme Court's decision in *Barnett*. There an employee injured his back while working as a cargo handler for U.S. Airways and was transferred to a less physically demanding position in the mailroom. *Id.* at 394. But when the mailroom position became open as a matter of routine to seniority-based bidding, a more senior employee out-bid the injured employee for the job. The plaintiff-employee asked U.S. Airways to accommodate his disability under the ADA by exempting him from the seniority system so that he could stay in the mailroom, but the airline declined. *Id.*

The Court held that, given "the importance of seniority to employee-management relations," it is "ordinarily . . . unreasonable" for an employer to reassign a disabled employee in disregard of seniority rules. *Id.* at 403. The Court noted that "[t]he lower courts have unanimously found that collectively bargained seniority trumps the need for reasonable accommodation in the context of the linguistically similar Rehabilitation Act." *Id.* (citing, among other cases, *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1047-48 (7th Cir. 1996)). And it explained that "the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment." *Id.* at 404. "[T]o require the typical employer to . . . substitute a complex case-specific 'accommodation' decision made by management for the more uniform, impersonal operation of seniority rules," the Court said, "might well undermine" the settled "expectations of consistent, uniform treatment . . . upon which the seniority system's benefits depend." *Id.* The Court therefore "conclude[d] that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" grounds for the employer's denial of the accommodation request. *Id.* at 405.

As the Court made clear, however, the ordinary rule may not hold true for every employer or for every application of a settled seniority rule. In some instances, the employer's practices might have unsettled the very expectations that seniority rules are designed to cement. A disabled plaintiff accordingly "remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system . . . the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* The "plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the

point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference.” *Id.* Or “[t]he plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.” *Id.*

Under *Barnett*, then, “the typical employer” need show no more than “the existence of a seniority system” to receive a presumption of lawfulness. *Id.* at 404. As long as the seniority system is applied consistently, such an employer need not reassign a disabled employee to a particular position if another employee is entitled to that position under the employer’s established seniority system. But the employer is entitled to no presumption of lawfulness if its ostensible seniority system is not strictly administered—that is, if it is honored more in the breach or is rife with discretionary exceptions. In addition, an accommodation may be necessary if the employee establishes “special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.” *Id.* at 406. Put another way, established seniority rules on their face trump disability accommodation requests, but those rules might be required to give way as applied to particular circumstances—for example, if the employer’s practices with respect to seniority suggest that employees might not have settled expectations that the system will be applied without exception.

For present purposes we only address the first half of the *Barnett* rule—the facial validity of denying accommodation requests in light of settled seniority rules. The CBA on its face establishes a longstanding, *bona fide* seniority system. And you inform us that the “the agreement’s seniority rules . . . are and have been strictly followed.” Bubb Email at 1. Under *Barnett*, then, USPS may apply the established seniority system “in the run of cases” to deny disability accommodation requests for vacant positions to which more senior employees are entitled. 535 U.S. at 403. This conclusion means that USPS and the Union may implement the proposed new contractual term providing that the seniority rules apply to all positions to which they currently apply under the CBA, regardless of bidding employees’ disability status.

We need not—indeed, cannot—resolve whether special circumstances may entitle individual employees to exemptions from the seniority rules in particular cases, because that inquiry will be fact-intensive and case-specific. So long as the seniority rules are strictly followed, however, we presume that such circumstances will be rare, if they exist at all. You observe that the best-qualified and light-duty assignments discussed above “are, by design, simply not covered by the seniority rules in the first place.” USPS Letter at 11-12. “Employees know and expect that such assignments will be made without regard to seniority because they are not covered by the seniority system.” *Id.* at 12. You have indicated that the rules governing treatment of these assignments are of long standing and have been consistently administered. See Bubb Email at 1. Regardless of whether best-qualified and light-duty assignments are best characterized as “covered by” the seniority system or as exceptions to the coverage of that system, we agree that the proper focus in any case-by-case analysis would be on the expectations that the CBA’s provisions create and the uniformity with which the provisions are applied. See *Barnett*, 535 U.S. at 405-06. We do not believe the existence of best-qualified and light-duty assignments, without more, undermines the consistent, uniform operation of USPS’s *bona fide* seniority system.

Our conclusion finds support in lower court decisions since *Barnett*. In *Adams v. Potter*, 193 F. App'x 440, 441 (6th Cir. 2006), for instance, a former mail handler sued the Postal Service for disability discrimination. The court noted that the plaintiff "requested a light-duty assignment or transfer to a mark-up clerk position." *Id.* at 445. But the court held that "[b]oth of these accommodations are unreasonable because the USPS would violate its CBA with the National Mail Handlers Union if it provided either of them to Adams." *Id.*; accord *Medrano v. City of San Antonio*, 179 F. App'x 897, 903 (5th Cir. 2006) ("The crucial and inescapable shortcoming of Medrano's attempt to establish 'special circumstances' is that the record is conspicuously devoid of a single instance in which an exception was made for an employee in the full-time parking attendant job classification in violation of the City's seniority policy."); *Stamos v. Glen Cove Sch. Dist.*, 78 F. App'x 776, 778 (2d Cir. 2003) (per curiam) (applying *Barnett* to deny accommodation claim because of seniority rule); cf. *Dilley v. SuperValu, Inc.*, 296 F.3d 958, 963-64 (10th Cir. 2002) (citing *Barnett* but concluding that jury reasonably could have found that plaintiff had sufficient seniority to be entitled to position).<sup>3</sup>

### C.

EEOC regulations, guidance, and decisions also support our view. Only months after the Supreme Court decided *Barnett*, the EEOC revised its Enforcement Guidance concerning reasonable accommodations.<sup>4</sup> The Guidance now explains that "[g]enerally, it will be 'unreasonable' to reassign an employee with a disability if doing so would violate the rules of a seniority system." *EEOC Enforcement Guidance* at 21 (Question 31) (footnote omitted) (citing *Barnett*). "However, if there are 'special circumstances' that 'undermine the employees' expectations of consistent, uniform treatment,' it may be a 'reasonable accommodation,' absent undue hardship, to reassign an employee despite the existence of a seniority system." *Id.* The Guidance provides illustrations that adhere closely to the language in *Barnett*:

For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee expectations in the seniority system. In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference. Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter. Another possibility is that a seniority system might contain procedures for

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<sup>3</sup> In his dissent in *Barnett*, Justice Souter argued that the legislative history of the ADA demonstrates that the existence of a seniority provision in a collective bargaining agreement "should not amount to more than 'a factor' when it comes to deciding whether some accommodation at odds with the seniority rules is 'reasonable' nevertheless." 535 U.S. at 421 (Souter, J., dissenting); see, e.g., S. Rep. No. 101-116, at 32 (1989). The *Barnett* majority, however, rejected this construction of the ADA and interpreted the statute to create a presumption that seniority provisions should be respected. See *Barnett*, 535 U.S. at 406 ("[A] showing that the assignment would violate the rules of a seniority system warrants summary judgment for the employer—unless . . . [t]he plaintiff . . . present[s] evidence of . . . special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable").

<sup>4</sup> "[T]he EEOC's interpretive guidelines do not receive *Chevron* deference"; rather, they "are entitled to respect under . . . *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the power to persuade." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (internal citations and quotation marks omitted).

making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

*Id.* at 21-22 (footnotes omitted).

The EEOC has issued a number of decisions that reinforce our conclusion. In *Southerland v. Potter*, for instance, USPS denied a complainant's request for a disability accommodation because it would have required deviation from the seniority policy. EEOC Decision No. 0120091983, 2010 WL 2547158, at \*1 (June 15, 2010). The EEOC cited *Barnett* and the Enforcement Guidance in finding that the complainant "did not prove that he had more seniority over the employee he identified. He also did not present evidence from which a reasonable fact finder could find that special circumstances operated to undermine Agency Clerks of uniform and consistent treatment in accordance with the collective bargaining agreement." *Id.* at \*3. The EEOC accordingly concluded that, "[t]o the extent that Complainant was requesting that he be given the senior employee's position, Complainant did not establish that his request for accommodation was reasonable" under the Rehabilitation Act. *Id.* Other EEOC decisions—many involving USPS—are to identical effect. See *White v. Donahoe*, EEOC Decision No. 0120113437, 2011 WL 5506236, at \*3 (Oct. 19, 2011) (USPS); *Jones v. Donahoe*, EEOC Decision No. 0120100859, 2010 WL 5136930, at \*2 (Dec. 8, 2010) (USPS); *Boozer v. Potter*, EEOC Decision No. 0120082990, 2009 WL 1117596, at \*3 (Apr. 14, 2009) (USPS); *Shires v. Potter*, EEOC Decision No. 0120055374, 2007 WL 506726, at \*4 (Feb. 6, 2007) (USPS); *Genton v. Paulson*, EEOC Decision No. 01A53115, 2006 WL 2332529, at \*3 (Aug. 2, 2006) (Treasury Department); *Gregory v. Potter*, EEOC Decision No. 01A52887, 2006 WL 1057824, at \*2 (Apr. 14, 2006) (USPS).

You have expressed concern that *Burnett v. Potter*, EEOC Decision No. 01981618, 2002 WL 31232312 (Sept. 26, 2002), casts doubt on the facial validity of USPS's seniority rules in light of the light-duty assignments available under Article 13 of the CBA. USPS Letter at 9-11. The complainant in *Burnett* was assigned to a different position because of her disability, but she later lost that position when it came open for seniority-based bidding as a result of a union grievance. 2002 WL 31232312, at \*3-\*4. In assessing the complainant's Rehabilitation Act claim, the EEOC cited the availability of light-duty assignments under Article 13 of the CBA as evidence that "the CBA provides for accommodations even where someone with a disability has less seniority." *Id.* at \*5. (Article 13, as explained above, provides—and provided at the time—that disabled employees may receive light-duty assignments without regard to seniority, but that the availability of those assignments is limited. See USPS Letter at 5.) The EEOC also cited the Supreme Court's then-recent decision in *Barnett* and its "special circumstances" requirement. *Burnett*, 2002 WL 31232312, at \*5. After closely examining the record, the EEOC concluded that "special circumstances" existed on "the particular facts of this case" to justify accommodating complainant's reassignment. *Id.* at \*6.

Although the EEOC's reasoning in *Burnett* is not perfectly clear, we believe it is best read as a case-specific finding of special circumstances on a close review of the particular facts before the EEOC. The decision noted various facts that weighed in the EEOC's analysis, including that the complainant had worked in a temporary position for two years and that agency witnesses testified to the availability of light-duty assignments at that time despite the seniority

system. *Id.* at \*3, \*6. We do not read *Burnett* as concluding that the potential availability of light-duty assignments under Article 13 undermines the consistent, uniform application of USPS's seniority system or gives rise to special circumstances whenever a disabled employee seeks reassignment. Such a reading would place *Burnett* in conflict not only with the Supreme Court's decision in *Burnett*, but also with the EEOC Enforcement Guidance and the long line of EEOC decisions cited above.<sup>5</sup>

### III.

We therefore conclude that the CBA between the Postal Service and the Union may provide that seniority rules trump disability accommodation requests in the run of cases. We do not address the special circumstances that may require exceptions to the seniority system as applied to particular cases.

Please let us know if we may be of further assistance.



H. Jefferson Powell  
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<sup>5</sup> The EEOC's USPS-related decision in *Jambora v. Potter*, EEOC Decision No. 07A40128, 2006 WL1464830, at \*10 (May 16, 2006), closely resembles that in *Burnett*. For similar reasons, we read *Jambora* as nothing more than a case-specific finding of special circumstances following a "careful review of the record." *Id.* at \*9.